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Reorienting Bowers v. Hardwick

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REORIENTING *BOWERS V. HARDWICK*

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This Article challenges the conventional thinking about the Supreme Court's decision in Bowers v. Hardwick. *It argues that one need not read* Hardwick *to have "held" that the Due Process Clause of the Fourteenth Amendment affords no protection to private, consensual "homosexual sodomy." Rather, through a fresh reading, the Article maintains that one can interpret* Hardwick *to have avoided a decision on the merits of the substantive due process claim presented in the case.*

This alternative reading permits Hardwick *to be regarded as having established a kind of prudential interpretive rule. If so, for reasons the Article discusses, lesbian and gay rights advocates*

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might choose to defend a reinterpreted Hardwick *as a matter of legal doctrine. Such a defense would provide courts with a basis for distinguishing between those constitutional claims that do, and those that do not, offend deeply held and widely shared social values. From pragmatic and strategic points of view, these are important distinctions that might otherwise be unavailable as a matter of constitutional principle alone.*

To guide the judicial application of Hardwick, *this Article proposes a modification to an increasingly popular way of thinking about lesbian and gay rights: the "like race" miscegenation (or* Loving*) analogy. Typically, the miscegenation analogy invokes* Loving v. Virginia *as a substantive reason for striking down laws that discriminate against lesbians and gay men. This Article argues that a reformulated, more historically accurate version of the analogy can provide courts with a source of judgment about how to apply* Hardwick *when understood as a prudential interpretive rule. It contends that rather than looking to* Loving *as the sole (or primary) source of judgment, courts could look for guidance to the process of constitutional evolution, as represented by some of the social and legal changes that took place in the time between the Court's decision in* Loving *and its pragmatic non-decisions in an earlier miscegenation case,* Naim v. Naim. *Those social and legal changes, which reflect what the Article calls "the conditions of prudence," can be abstracted and used, by analogy, to help a court to decide whether, in a particular case involving discrimination against lesbians and gay men,* Hardwick *counsels judicial action on the merits or, in contrast, judicial restraint.*

"Justice must always question itself, just as society can exist only by means of the work it does on itself and on its institutions."

Michel Foucault

"Only free men can negotiate. Prisoners cannot enter into contracts."

Nelson Mandela

INTRODUCTION

Anniversaries prompt reflection. In "a modern life ruled by haste,"[1] they give us reason to pause and search for meaning. These moments invite us to imagine: How our choices have shaped the course of our lives. What we have done and left undone. Who we have become and who we could be. In these ways and others, anniversaries remind us of our relationships with ourselves, with others, and with time.

This year marks the fifteenth anniversary of the Supreme Court's decision in *Bowers v. Hardwick*.[2] Some, no doubt, will greet the anniversary with anger or resentment—or both. Those who regard the event this way may recall that nearly an entire generation has come of age in moral and legal exile under *Hardwick*'s shadow, and that another generation, more or less, has died as outsiders while *Hardwick* ruled the land. Others, in contrast, will celebrate *Hardwick*'s longevity. For them, *Hardwick*'s anniversary may be a

1. Letter from Karl Jaspers to Hannah Arendt (Mar. 12, 1946), *reprinted in* HANNAH ARENDT KARL JASPERS CORRESPONDENCE 1926–1969, at 34 (Lotte Kohler & Hans Saner eds., 1992).

2. 478 U.S. 186 (1986).

time to rejoice over the endurance of a moral tradition that, as they see it, *Hardwick* righteously and magnificently affirmed. Still others will neither quite lament nor celebrate the occasion. They, like or unlike the others, may recognize that the decision, at its very best, has had a deeply checkered life and wonder whether the time has come for *Hardwick* to go.

Fifteen years is a long time for a decision like *Hardwick* to survive. Few Supreme Court opinions have weathered as many storms as it has. Neither tide nor time, however, has disturbed the common wisdom about what *Hardwick* means. Speaking for a closely divided Court, in an opinion said to have set five against four,[3] Justice Byron White announced *Hardwick*'s now famous holding that the Due Process Clause of the Fourteenth Amendment does not protect as a fundamental right consensual, same-sex sexual activity between adults, even when it takes place behind closed, private doors.

This is the *Hardwick* we have generally come to know. It is but another way of talking about the "homosexual sodomy" in which White is supposed to have said for the Court there was not a fundamental due process right to engage. And so, if we reflect on *Hardwick* at all this year, it seems likely that we will reflect on it defined in this particular way.

But anniversaries being moments to remember, we should not forget: What we say when we say what *Hardwick* means is not at all preordained. It is, instead, the product of an ongoing process of interpretation. It may be nothing (or not much) more than that. As we have it, *Hardwick* is—and has been—the result of the choices we make when reading the several opinions in the case.

Fifteen years after the Supreme Court wrote and published the full text of *Bowers v. Hardwick*, the project of interpreting it continues. Indeed, that project calls out to us for special attention on an occasion such as this, with interpretive questions such as these: What exactly did the Court tell us in *Hardwick*, and in deciding the case, what did the Court do? No sooner might we begin to formulate an answer than may other questions come into view: How does our interpretation of the choices the Justices made in *Hardwick* speak to, and define, us as readers, as people, or as citizens? And how does it define the Justices who wrote and decided *Hardwick*? What choices,

3. The 5–4 spread in *Hardwick* is conventionally rendered this way: Joining Justice White in the "majority" were Chief Justice Warren Burger, and Justices Lewis Powell, William Rehnquist, and Sandra Day O'Connor. The "minority"—or "dissenting"—Justices were Justices William Brennan, Thurgood Marshall, Harry Blackmun, and John Paul Stevens.

if any, have we made when orienting our thinking about the case? How has that thinking, wittingly or not, oriented us? Perhaps more basically, what is *Hardwick* anyway—and what could it be? Is it too late to re-orient our thinking about the case? How is *Hardwick*'s text related to time?

In the pages that follow, I set out to provide some thoughts on these, among other, questions. Prominently along the way, is a basic challenge to the standard interpretation of *Hardwick*, presented in the form of an extended argument that *Hardwick* can be read differently than, until now, it (mostly) has been. We can read *Hardwick*, I maintain, as having not decided what sex, constitutionally speaking, lesbians and gay men can rightfully have in the privacy of their homes. In slightly more technical terms, I contend that *Hardwick* can be interpreted as a prudential constitutional decision, in which the Court decided not to adjudicate whether the Due Process Clause of the Fourteenth Amendment protects a broad right to sexual privacy that would have shielded from state prohibition the same-sex sexual activity in which Michael Hardwick had engaged.

My efforts begin in Part I by putting the existing academic commentary on the Court's decision in *Hardwick* into perspective. In this Part, I examine and question the commonly held notion that the *Hardwick* Court "held" there is no substantive due process right to engage in private "homosexual sodomy."[4] To understand why that interpretation has become, and remains, so pervasive within the legal academic literature, I suggest that one cannot look simply at the text of Justice White's *Hardwick* opinion, but rather one must look beyond it.

Throughout Part I, I argue that *Hardwick*'s readers may do well to reconsider their individual and collective commitments to the idea that there is one and only one plausible reading of *Hardwick*—the standard one—that the text of the case will support. It is worth emphasizing at the outset that in making these observations, I will not insist that the standard reading of *Hardwick* necessarily was (or is) "wrong." Nor will I ask readers to give up their general commitments in any grand sense when I make my interpretive claim that the

4. There are various conceptual problems with the definition of "homosexual sodomy" that I will not deal with here. Is it, for example, redundant in the cultural imagination to speak of "homosexual sodomy"? What, exactly, makes the practice "homosexual": the sexual identity (or identities) of those who engage in the practice or the body parts and gendered bodies of those who ostensibly engage in the activity? What, if anything, does (or should) distinguish between "homosexual" and "heterosexual sodomy"? For some further discussion of my use of related terms, see *infra* note 15.

standard reading of *Hardwick* may have gained ascendancy, at least in part, because of prior or subsequent commitments *Hardwick* readers might have had when interpreting its text. I start with the commentary on *Hardwick* and locate it within a conceptual and historical context with a different purpose in mind: to attempt to make it easier for readers with diverse commitments to see and consider the possibility that the dominant interpretation of *Hardwick* is in some important sense distinguishable from the text of *Hardwick* itself. My hope is that pointing to that distinction will facilitate a fresh reading of *Hardwick* after all these many years.

I provide that fresh reading in Part II. Through a close examination of Chief Justice Burger's, Justice White's, and Justice Powell's *Hardwick* opinions,[5] I argue in this Part that one can read *Hardwick* to have decided not to decide the merits of the substantive due process claim Michael Hardwick raised. In Part II.A, I discuss Chief Justice Warren Burger's *Hardwick* opinion, which relied on historical disapproval of homosexuality as the sum and substance of its reasoning. That historical rationale, as I note in Part II.B, is not the same as the one found in Justice Byron White's *Hardwick* opinion, notwithstanding the suggestion sometimes found lurking in the academic commentary that it is. As I demonstrate in considerable detail in Part II.B, White's *Hardwick* opinion relied primarily, if not exclusively, on a controversial theory about the proper relationship

5. I have chosen throughout my text, particularly in my footnotes, to resist the standard, formalistic references to the various opinions the Justices filed in *Hardwick*. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 67 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) (requiring that "[w]hen a case is cited for a proposition that is not the single, clear holding of a majority of the court (e.g., . . . dissenting opinion; plurality opinion; . . .), indicate that fact parenthetically"). In an important sense, relying on the standard references (which I do not), and citing the various *Hardwick* opinions strictly in accordance with their "official" designations found in the pages of the U.S. REPORTS (or the opinions themselves), is to deny that there are a number of significant interpretive questions to ask about the meaning and authority of those opinions. Is it, for example, accurate to treat Justice White's *Hardwick* opinion as the "opinion of the Court" or Chief Justice Burger's opinion as a concurrence in that opinion? Is it appropriate to treat Justice Powell's *Hardwick* opinion as a concurrence in the—or "a"—holding of White's text? Perhaps. But, as I will argue, the matter may be more complicated than that. A formalistic interpretation of the relevant *Bluebook* rule begs, while simultaneously shutting down, questions I will try to open up to investigation through this Article. Thus, rather than using conventional designations, such as "concurring" or "dissenting," I refer to all opinions in *Hardwick* through a simple parenthetical reference to the "opinion of," followed by the name of the Justice who authored the opinion being cited. At a minimum, my designations, which are accurate but imperfect, leave room for questions like these: What exactly *is* this or that opinion in relation to our definition of *Hardwick*? Can we properly (and definitively) say it is only one thing? What should we make of any particular opinion in *Hardwick* and the authority we accord it? And, why?

between social and constitutional norms. Specifically, White's *Hardwick* opinion embraced a certain view of existing social norms about homosexuals and homosexuality as its central animating principle. Which, for good or for bad, leaves *Hardwick* more open to an alternative interpretation than Burger's opinion does, particularly as social mores about homosexuals and homosexuality change over time (a subject taken up, to look ahead, in Part IV.C).

The foundation for my re-reading of *Hardwick* comes in Part II.C, where I carefully parse the text of Justice Lewis Powell's separate *Hardwick* opinion. It is this opinion, representing as it does the thoughts of the "swing vote" in the case, on which my new interpretation *Hardwick* largely stands or falls.[6] In this Subpart, I explore a certain way of reading Powell's discussion of an Eighth Amendment theory of the case. For reasons that I elaborate, that Eighth Amendment theory can be understood as a placeholder for a non-decision on the merits of the substantive due process claim Michael Hardwick made.

Viewed from an introductory perspective, the novel reading of Powell's opinion that I provide in Part II.C chiefly revolves around Powell's failure adequately to justify a vital aspect of his reasoning. Powell's opinion, significantly, turned on a distinction between the Eighth Amendment theory he seemed prospectively to be endorsing and the due process theory Michael Hardwick advanced. Powell's opinion, however, contained no justification for that distinction. As readers familiar with certain basic constitutional norms and notions, we may overlook this feature of Powell's opinion. But if we do (as many apparently have), we may fail to see how it is we who inevitably must make the interpretive choice whether to fill in the (principled) reasoning Powell did not provide. We thus have choices, I argue, about how to read Powell's *Hardwick* opinion. But not only that. We also have reasons for interpreting it as I argue we can: these include what I refer to in the course of my discussion as the "intentionalist" and "consequentialist" equations between Powell's Eighth Amendment theory and Hardwick's interpretation of the Due Process Clause. Part II.C, then, details why *Hardwick* can be read as having avoided a substantive ruling on the merits of Hardwick's constitutional claim. Part II.D summarizes the first part of my argument, looking back and looking ahead.

6. There are alternative moves that (if further developed) could be marshaled to justify my reading of *Hardwick*. *See, e.g.*, *infra* notes 57, 161, 181, 189, 198, & 211.

With this, the first aspect of my argument—found in Parts I and II—is complete. If I am correct, *Hardwick* need not be read to have decided the substantive due process claim involved in the case. It can also (or instead) be read as having avoided passing on the merits of that claim. The second aspect of my argument—found in Parts III and IV—provides an example of how the alternative reading of *Hardwick* can actually be put to use. Building on that reading, I raise and discuss a possible compromise that may help advance efforts to secure federal constitutional rights for lesbians and gay men.

Before describing the structure and analysis of Parts III and IV, let me pause for a moment to underscore an important conceptual point. The argument, including the compromise I deal with in these Parts, relies as it is written on my prudential interpretation of *Hardwick*. But it does not do so as any strict matter of necessity. Though, perhaps obviously, I think it would be a mistake to reject my new reading of *Hardwick* out of hand, one could reject it completely and still be moved to accept many, if not all, of the points I make in Parts III and IV. The same, naturally, holds true in reverse. One's position regarding either aspect of my overall argument does not oblige one to take any particular position on the other.

Moving on, in Part III, I discuss the so-called miscegenation or *Loving v. Virginia*[7] analogy. I provide some background in Part III.A and rehearse the analogy (both at the level of theory and legal doctrine), as well as the arguments of some of the analogy's more prominent critics. Then, in Part III.B, I lay out how the alternative reading of *Hardwick* can be marshaled in an effort to respond to those critics and to sustain the equality project the analogy has been thought to entail. I provide the basic outline of a pragmatic compromise that might be forged by lesbians and gay men and their centrist allies.

The alternative reading of *Hardwick*, I propose in Part III.B, can be used and defended as a pragmatic interpretive rule in cases involving constitutional claims on behalf of lesbians and gay men. Were lesbian and gay rights advocates to endorse the alternative interpretation of *Hardwick*, the miscegenation analogy—revised in an important way to respond to its critics—could be invoked to inform a court's judgment in a case involving lesbian and gay rights about whether (and when) pragmatic considerations would tend to authorize a principled constitutional decision on the merits or instead counsel judicial restraint. Rather than looking to *Loving* as the sole

7. 388 U.S. 1 (1967).

(or primary) source of judgment, a court could look for guidance to the process of constitutional change, as represented by some of the social and legal changes that took place in the time between the Court's decision in *Loving* and its earlier pragmatic non-decisions in *Naim v. Naim*.[8]

I take up these social and legal changes—which I call the "conditions of prudence"—and analyze some of their implications for lesbian and gay rights cases in Part IV. In Part IV.A, I introduce *Naim* more fully and briefly review an old debate about the Court's action in the case. Then, picking up where Part III left off, I go on in Part IV.B to review some of the changes on social and legal fronts that took place in the years between *Naim* and *Loving*—changes that may have led the Court to finish in *Loving* the principled business it pragmatically postponed in *Naim*. Finally, building on the revised miscegenation analogy, I generalize my discussion of the conditions of prudence in the miscegenation context and, in Part IV.C, consider those conditions (as the miscegenation analogy suggests we can[9]) in the context of state prohibitions against private, consensual same-sex sodomy. I ask, and offer thoughts on the question: What action do the conditions of prudence today recommend to a court faced with a constitutional challenge to a state law against sodomy?

In my Conclusion, I specify some of the minimal commitments of the proposed compromise that may need to be considered, particularly by those within what we may think of as the lesbian and gay communities.[10] I end with a reading of my own text, which reveals its identity—like *Hardwick*'s—as something other (or more) than what, at first glance, it might appear to be.

I. ORIENTING *HARDWICK* (THE STANDARD WAY)

As Professor Donald Dripps has observed, "*Bowers v. Hardwick* has provoked more scholarly debate than any Supreme Court decision of the last two decades."[11] Within that debate, commentators have explored the Court's *Hardwick* opinions for a variety of purposes: to discuss and defend traditional conceptions of

8. 350 U.S. 891 (1955) (per curiam), *vacating and remanding* 87 S.E.2d 749 (Va. 1955), *aff'd*, 90 S.E.2d 849 (Va. 1956) (per curiam), *appeal dismissed*, 350 U.S. 985 (1956) (per curiam).

9. *See infra* note 302 and accompanying text.

10. Instead of the awkward (but perhaps more accurate) locution "what we think of as the lesbian and gay communities," throughout the remainder of the Article, I shall say, more simply, "the lesbian and gay communities." *See infra* note 15.

11. Donald A. Dripps, Bowers v. Hardwick *and the Law of Standing: Noncases Make Bad Law*, 44 EMORY L.J. 1417, 1417 (1995).

the "right to privacy;"[12] to illuminate the political and theoretical shortcoming of those conceptions;[13] to ask whether, for gays, privacy is the doorway out of "the closet" or the dim space within it;[14] to ask who gays "are;"[15] to demonstrate the potential for psychoanalytic readings of judicial texts;[16] to reveal the pervasiveness of irrational, homophobic, or heterosexist bias within our legal regime;[17] to

12. *See, e.g.*, RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 50–62 (1988). *See generally* David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986) (discussing the constitutional right to privacy).

13. *See, e.g.*, Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 799–802 (1989) (advancing an "anti-totalitarian" understanding of the constititutional right to privacy); *cf.* Poe v. Ullman, 367 U.S. 497, 521–22 (1961) (Douglas, J., dissenting) (grounding the constitutional right to privacy in "the totality of the constitutional scheme under which we live," and then suggesting that "the idea of allowing the State th[e] leeway [to investigate the intimacies of the marital relation] is congenial only to a totalitarian regime").

14. *See, e.g.*, EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 71 (1990) ("The legal couching . . . of *Bowers v. Hardwick* as an issue . . . of a Constitutional right to privacy, and the liberal focus in the aftermath of that decision on the image of the *bedroom invaded by policemen* . . . are among other things extensions of, and testimony to the power of, the image of the closet."); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1455 (1992) [hereinafter Thomas, *Beyond the Privacy Principle*] (proposing that "[t]he problem with the reliance on privacy . . . is that 'the closet' is less a refuge than a prisonhouse," and going on to note that Justice White's *Hardwick* opinion was "governed by the same logic" as the "privacy paradigm"); Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217, 262 n.141 (1988) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987)) ("Privacy" as it was involved in *Hardwick* is "a shorthand expression for the liberty interest contained in substantive due process doctrine. It is not an argument for the right to 'stay in the closet' . . . . It is an argument for the right to realize ourselves fully as persons which would include stepping out of the closet.").

15. *See, e.g.*, Janet E. Halley, *Reasoning About Sodomy: Acts and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1723–24 (1993) [hereinafter Halley, *Reasoning About Sodomy*] (questioning, inter alia, the coherence and meaning of gay identity). It is worth specifying the way in which I will be using the terms "lesbian," "gay," "homosexual," and so on. I do *not* mean them in any "essentialized" sense, and I will not even venture to define the words in terms of sexual proclivities, attractions, desires, or any of the other standard ways. I use the terms roughly to describe the identities of sexual orientation or sexual preference (or sexuality) that some people take themselves, or others, to have. This is not to suggest, as will become clear much later on, *see infra* Conclusion, that I think the terms are purely fictive. They are real in some very experiential sense, especially when backed with the force of law or the force of fists. But it is worth being clear that if there is such a thing as a "real" "homosexual," I would not know why or what that means. I generally avoid using the word "queer" because I do not much care for it.

16. *See, e.g.*, Kendall Thomas, *Corpus Juris (Hetero)Sexualis: Doctrine, Discourse, and Desire in* Bowers v. Hardwick, *in* A QUEER WORLD: THE CENTER FOR LESBIAN AND GAY STUDIES READER 438, 446 (Martin Duberman ed., 1997) (bringing psychoanalytic insights to bear in reading the text of *Hardwick*).

17. *See, e.g.*, Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's*

highlight facets of the relationship between sexual orientation discrimination and discrimination based on sex and race;[18] to articulate the virtues of dignity[19] and civic republicanism;[20] to laud the much-maligned notion of "neutrality;"[21] to evaluate the role of text,

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USA: The Continuing Toll of Bowers v. Hardwick, 24 GOLDEN GATE U. L. REV. 1, 10 (1994) ("The inescapable conclusion is that the result in *Hardwick* is about homophobia, and, given that cause of the result, playing with the facts will not change the outcome; only a frontal address of the homophobia will do so."); Halley, *Reasoning About Sodomy*, *supra* note 15, at 1770 (describing *Hardwick* as an "exercise of homophobic power"); Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655 (1987) (reading *Hardwick* "strongly [to] suggest[] that the explanation [of White's opinion] lies in the emotional response of five justices to the subject matter underlying the case as they perceived it, or rather, as they reconstituted it: the subject of homosexuality"); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1806 (1993) [hereinafter Thomas, *The Eclipse of Reason*] (suggesting that *Hardwick* reflects "homophobic ideology"); Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 42 (1998) ("The homophobia of [White's] *Hardwick*... opinion... and the [opinion] of Chief Justice Burger is evident in their focus on homosexual sodomy."); Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 540 (1988) (cautiously proposing that "[i]n *Hardwick*, the Court upheld the group value of family, *and arguably the group prejudice of homophobia*, while rejecting a liberal and libertarian vision of the self and of sexual freedom" (emphasis added)). *See generally* Mark F. Kohler, Comment, *History, Homosexuals, and Homophobia: The Judicial Intolerance of* Bowers v. Hardwick, 19 CONN. L. REV. 129 (1986) (suggesting that *Hardwick* was the product of homophobia and intolerance of homosexuality); Yvonne L. Tharpes, Comment, Bowers v. Hardwick *and the Legitimization of Homophobia in America*, 30 HOW. L.J. 829 (1987) (discussing *Hardwick* and its relationship to homophobia).

18. *See generally, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 209–20 (1994) [hereinafter Koppelman, *Why Discrimination*] (discussing the relationship among discriminations based on sexual orientation, sex, and race); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188–96 (examining sex and sexual orientation discrimination); Cass Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994) [hereinafter Sunstein, *Homosexuality and the Constitution*] (same); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1579–81 (1989) [hereinafter *Sexual Orientation and the Law*] (dealing with the relationship between sex and sexual orientation discrimination).

19. *See, e.g.*, MOHR, *supra* note 12, at 49–62 (dealing with *Hardwick* and laws against sodomy in relation to the concept of dignity).

20. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1494–99 (1988) (criticizing *Hardwick* from a civic republican or a republican-inspired perspective). *But see* Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 921 (1990) (observing that "a republican argument against the ruling in *Bowers v. Hardwick*—that it sanctions laws which deny the political process authentic and independent voices—seems to miss the point" (footnotes omitted)).

21. *See, e.g.*, Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1873 (1997) ("To a large extent, the liberal conceptual framework of neutrality, equality, and toleration is well-suited to efforts to repeal sodomy statutes as well as to efforts to deter and remedy employment and housing discrimination against gays and lesbians."); Michael J. Sandel,

history, tradition, and precedent in constitutional adjudication;[22] and as well as to speak jurisprudentially about "the law."[23] As long as this list may seem to some, it is only an abbreviated one. But if it does nothing else, I think it amply shows a few of the many directions—sometimes divergent, sometimes not—in which commentators have pulled and stretched the *Hardwick* opinions.

In light of all that has been written about *Hardwick*, it is not insignificant to identify a thread that is woven extensively throughout the expansive scholarly literature on the case. But there is at least this one: with few notable exceptions, the literature on *Hardwick*

Political Liberalism, 107 HARV. L. REV. 1765, 1788 n.52 (1994) (reviewing JOHN RAWLS, POLITICAL LIBERALISM (1993)) ("It is possible to argue for certain gay rights on grounds that neither affirm nor deny the morality of homosexuality."); *id.* at 1790–91 ("Those who oppose anti-sodomy laws of the kind at issue in *Bowers v. Hardwick* cannot argue that the moral judgments embodied in those laws are wrong, only that the law is wrong to embody any moral judgments at all." (footnotes omitted)).

22. *See generally, e.g.*, CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 81–84 (1991) (criticizing White's *Hardwick* opinion for its treatment of judicial precedent). *But see* Peter Mancusi, *Administration Met Many Rebuffs in High Court*, BOSTON GLOBE, July 13, 1986, at 9 (quoting former Solicitor General Charles Fried as approving Justice White's *Hardwick* opinion for employing the "exact constitutional methodology" Fried had previously urged on the Court). For whatever it is (or may be) worth, Fried was one of Justice Harlan's clerks the year that the Justice penned his famous dissent in *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). *See generally* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991) (considering the impact of constitutional text on the constitutional adjudication involved in *Hardwick*); William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 643–49 (1999) (considering the role of history within discussion of constitutional adjudication and *Hardwick*); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1081–89 (1988) (same); Halley, *Reasoning About Sodomy*, *supra* note 15, at 1756–68 (dealing with the relationship between postmodern concepts of "text," including *Hardwick*, and constitutional interpretation); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 669 (1997) (mentioning *Hardwick* in light of history and tradition).

23. *See, e.g.*, Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 282–98 (1996) (dealing with *Hardwick* in the context of a broader discussion of sexual orientation, morality, and the law); Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. BOOKS, Aug. 8, 1996, at 44 (discussing *Hardwick* and morality); *cf.* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1070–76 (1994) (expounding on the relationship between morality and the legal treatment of homosexuality); Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1516–17, 1601 (1994) (referring to *Hardwick* in the context of a larger discussion dealing with both ancient Greek and contemporary American standards of public morality). For an interesting report on the exchanges between Finnis and Nussbaum on these questions, see Daniel Mendelsohn, *The Stand: Expert Witnesses and Ancient Mysteries in a Colorado Courtroom*, LINGUA FRANCA, Sept. 1996, *available at* http://www.linguafranca.com/9609/stand.html (on file with the North Carolina Law Review).

reflects basic and widespread agreement about what the *Hardwick* Court held. Professor Cass Sunstein captures with elegant simplicity the conventional thinking about *Hardwick* when he writes that, "[i]n *Bowers v. Hardwick*, the Supreme Court held that the Due Process Clause does not protect the right to engage in homosexual sodomy."[24]

To many, the understanding of *Hardwick* that Sunstein's remark underscores will seem obvious. Perhaps it will even seem warranted. The text of Justice Byron White's opinion, styled as the "opinion of the Court," certainly buoys such a reading.[25] But one cannot properly attribute the incredibly warm and widespread reception that this standard reading has received—and more significantly, continues to receive—within academic circles solely to its plausibility as an interpretation of the *Hardwick* opinions.[26] For, as I will explain in some considerable detail, one can also read those opinions to have established a different proposition altogether—a proposition that (so

24. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1161 (1988) [hereinafter Sunstein, *Sexual Orientation and the Constitution*]; *see also* Eskridge, *supra* note 22, at 632; Courtney G. Joslin, Recent Development, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick, 32 HARV. C.R.-C.L. L. REV. 225, 226 (1997); Mark John Kappelhoff, Note, Bowers v. Hardwick: *Is There a Right to Privacy?*, 37 AM. U. L. REV. 487, 504 (1988); Tharpes, *supra* note 17, at 833.

25. *See infra* Part II.B.

26. The academic commentary on the Supreme Court's recent assisted suicide decisions provides an illuminating parallel. A number of commentators have emphasized that, in those cases, a majority of the Court, arguably a unanimous Court, "held" that neither the terminally ill nor anyone else has a due process or equal protection right or liberty to engage in physician-assisted suicide. *See, e.g.*, Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1978 n.17 (1999) ("On physician-assisted suicide, ... lower courts (or the Supreme Court in a subsequent decision) may be more attuned to the fact that five members of the Court signed onto the Rehnquist opinion."). One cannot understand the cases without understanding this agreement. But, as other commentators have maintained, one cannot understand the cases if one looks *only* to the Court's agreement. There were important differences in the Justices' thinking, expressed in the numerous separate opinions in the case, about what rights at the end of life the Due Process and Equal Protection Clauses do and do not protect. *See, e.g.*, Robert Burt, *Disorder in the Court: Physician-Assisted Suicide and the Constitution*, 82 MINN. L. REV. 965, 968–73 (1998) (considering the various opinions in the assisted suicide cases, along with their similarities and differences); Yale Kamisar, *On the Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895, 904–10 (1998) (same); Martha Minow, *Which Question? Which Lie? Reflections on the Physician-Assisted Suicide Cases*, 1997 SUP. CT. REV. 1, 4–18 (same). Perhaps one can view the lack of consensus about the meaning of the assisted suicide cases, in part, as a reaction to the interpretive hegemony that has surrounded *Hardwick*. For an interesting collection of essays on the Court's assisted suicide opinions, see generally LAW AT THE END OF LIFE: THE SUPREME COURT AND ASSISTED SUICIDE (Carl E. Schneider ed., 2000).

far as I am aware) has received no attention in the *Hardwick* literature.[27]

How else, though, if not on the "plain meaning" of the text of *Hardwick*, might one account for the general acceptance of the idea that the *Hardwick* Court "held that the Due Process Clause does not protect the right to engage in homosexual sodomy"?[28] Part of the answer may be found in the earliest commentary on the case.[29] The

27. Nor, accordingly, can one say that the standard interpretation of *Hardwick*'s holding is the better or the best one, because until now few, if any, alternative readings of its holding have been proposed. To be sure, there have been various attempts to "limit" the reach of *Hardwick*. Sunstein, for example, proposes that it should be understood as only a "due process" case. Sunstein, *Sexual Orientation and the Constitution*, *supra* note 24, at 1168. For their part, the editors of the *Harvard Law Review* maintain that "[g]iven its reliance on history, *Hardwick* should not extend beyond its facts to apply to other types of same-sex sexual activity that have not been the subject of historic prohibitions." *Sexual Orientation and the Law*, *supra* note 18, at 1525.

28. Sunstein, *Sexual Orientation and the Constitution*, *supra* note 24, at 1161; *see infra* note 161.

29. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1422 (2d ed. 1988) [hereinafter TRIBE, AMERICAN CONSTITUTIONAL LAW] (describing *Hardwick* as a case in which "a five-member majority held that it is 'facetious' even to suggest that two adult homosexuals engaging in consensual sex in the privacy of their home are carrying on an intimate association entitled to constitutional protection" (footnotes omitted)); Michelman, *supra* note 20, at 1495 (describing his "task" as explaining "how an examination of our constitutionalism from a republican-inspired standpoint might help invigorate a constitutional discourse that would steel judges against the desertion of claims like Hardwick's"); Richards, *supra* note 12, at 807–08 ("In *Bowers v. Hardwick*, Justice White, writing for a 5–4 majority, ruled that the privacy protections of the due process clause do not extend to homosexual activity between consenting adults in the privacy of their homes." (footnote omitted)); Sunstein, *Sexual Orientation and the Constitution*, *supra* note 24, at 1161 ("In *Bowers v. Hardwick*, the Supreme Court held that the due process clause does not protect the right to engage in homosexual sodomy." (footnote omitted)); *see also, e.g.*, Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74 (1989) ("[I]n *Bowers v. Hardwick*, the Court concluded that private consensual adult homosexual activity was not a fundamental right because it was unsupported by the Constitution's text or a tradition of legal protection."); Harlon L. Dalton, *"Disgust" and Punishment*, 96 YALE L.J. 881, 906 n.106 (1987) (reviewing JOEL FEINBERG, 2 OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1985)) (describing *Hardwick* parenthetically as "holding Georgia sodomy statute constitutional"); Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 579 n.101 (1988) ("The [Court's] cavalier attitude in *Griswold* may well have led to the result in *Bowers v. Hardwick*, . . . which held that the state can forbid consensual, private sodomy." (citation omitted)); Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 873 n.4 (1987) (describing *Hardwick* as a case "where the Court rejected a claim that a state prohibition of sodomy among consenting adults violated the due process clause"); Mark Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777, 782 (1987) (referring to "the Court's decision holding that the Constitution does not bar states from prohibiting consensual homosexual sodomy" (footnote omitted)); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1066 (1990) ("The majority pigeonholed the [Court's earlier privacy cases] to ensure that

most well-respected legal academics who weighed in on *Hardwick* shortly after it was handed down seemed quite certain about what the Court concluded on the "bottom line." Who else, thinking *Hardwick* might have meant something different, would have failed to be humbled by the roster of commentators who did—and would—disagree? And who, seeing all that there was wrong with *Hardwick* if these eminent commentators were right, would shag what looked to be a home run when there were more pressing and convenient balls to field?

There are, of course, no home runs without rules and no rules without authority.[30] Although it may not have been their intention, the prominent commentators who came to consensus about *Hardwick*'s holding early on may have effectively established the acceptable patterns for academic, as well as popular, thinking about the *Hardwick* Court's decision. In discussing *Hardwick*, these commentators were engaged in a process of producing, shaping, and defining *Hardwick*'s meaning. If, as it did, their understanding turned out to be "the" understanding of *Hardwick*'s holding, it may have done so (at least to a degree) precisely because it was theirs. One need not quote Professor Stanley Fish to explain the theory behind the observation—though one could.[31] Justice Anthony Kennedy made the important theoretical point perfectly well when pressed to divulge the "meaning" of his decision for the Court in *Romer v. Evans*. "It will be interesting," Kennedy replied, "to see how [*Evans*] is understood."[32]

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no right to privacy broad enough to encompass Hardwick's behavior would emerge." (footnote omitted)).

30. *See* JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 23 (1986) (discussing the construction of authority).

31. As Fish has observed in the course of rejecting arguments made by Professor Owen Fiss about the distinction between literary and legal practice: "In literary studies, for example, one possible reason for hearkening to an interpretation is the institutional position occupied by the man or woman who proposes it." STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 135 (1989) [hereinafter FISH, DOING WHAT COMES NATURALLY]. Speaking in a decidedly more legal voice, Dean Terrance Sandalow has made similar observations about the relationship between authority and interpretation: "It is of course true, as [Professor Ronald] Dworkin argues, that when Hercules decides he will not claim that his choice is best because he has chosen it, but that he has chosen it because it is best." Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1169–70 (1977) [hereinafter Sandalow, *Judicial Protection of Minorities*] (footnote omitted). As Sandalow continued: "In the absence of a controlling external standard, however, Hercules' claim that his choice is best has no apparent meaning other than that he thinks it is best." *Id.*

32. Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82, 90 (quoting Justice Kennedy) (citations omitted).

Various other concerns, reactive and strategic, may also help explain how the standard interpretation of *Hardwick* became so standardized. Some undoubtedly—and earnestly—read *Hardwick* as though it were as firm a repudiation of Michael Hardwick's constitutional claims as the Court could muster. Keying into Justice White's use of the word "facetious" to describe the merits of Hardwick's argument,[33] for example, or Chief Justice Burger's approval of the age-old, masculinist notion that sodomy was "an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named,' "[34] some observers understandably might have thought that any but the most "conservative" reading of *Hardwick* could not capture what, to them, looked and felt like a mean-spirited, backhanded dismissal of an eminently colorable constitutional position. Professor William Rubenstein's candid reflection about *Hardwick* captures the sentiment that many lesbians and gay men assuredly felt (and feel) when reading the case: " 'I don't think about sex when I read *Hardwick* and I don't think about what sex acts are at issue. *I think how they hate me.*' "[35]

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33. *Hardwick*, 478 U.S. at 194 (opinion of White, J.).

34. *Id.* at 196 (opinion of Burger, C.J.) (footnote omitted). For commentary relevant to the description of Burger's notion as masculinist or male supremacist, see Catharine A. MacKinnon, Brief of Amici Curiae, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (No. 96–568), *reprinted in* 8 UCLA WOMEN'S L.J. 9, 20–22 (1997) (explaining that the denial of sex and gender in the context of male-on-male sexual abuse services to maintain male dominance); *id.* at 32–34 (highlighting the relationship of harassment because of homosexuality to harassment because of sex); Marc S. Spindelman & John Stoltenberg, Oncale: *Exposing "Manhood,"* 8 UCLA WOMEN'S L.J. 3, 4–5 (1997) (discussing ways male victims of same-sex sexual harassment, including gay men, confront cultural norms of male supremacy).

35. Janet E. Halley, Romer v. Hardwick, 68 U. COLO. L. REV. 429, 435 (1997) [hereinafter Halley, Romer v. Hardwick] (quoting a letter from William Rubenstein) (footnote and internal quotation omitted). Rubenstein's remark likewise supports Halley's interesting idea that lesbians and gay men, along with non-gay readers, may read *Hardwick* through the lens of their social identities as persons with sexual orientations. As Halley puts it: "If we are readers of *Hardwick* at all, we are sexually identified readers .... Readers of *Hardwick* cannot, I think, negotiate the text without making some reference, however fleeting, to these bodies, investments, and identifications." *Id.*

I think it makes (some) sense to suppose that one's social identity would have some bearing on one's thinking and one's experience of reading a text, and that a text like Justice White's (which is what Halley has in mind in the context of the passage just quoted), does, indeed, seem to divide its "audience by personhood and only *as such* [does it] invite [its audience] to contemplate acts taxonomized by personhoods: 'homosexuals' were invited to read differently from 'heterosexuals.' " *Id.* at 434. If I understand her work correctly, however, it would be a mistake to think that Halley is suggesting that there "is" a "gay" or a "straight" reading of *Hardwick*, although that might seem to be one way to interpret what she is saying. Such a reading of Halley would fundamentally conflict

Other commentators for their part may have adopted the standard reading of *Hardwick* as their own less because they thought it was the "best" possible reading of the case than because it was the "worst." Steeped in adversarial modes of legal argumentation,[36] some commentators may have chosen to emphasize a conservative reading of *Hardwick* in order flesh out the best possible arguments on the other side.[37]

Still others may have followed the standard interpretation of *Hardwick* because they understood, and worried about, the threat *Hardwick* potentially posed to their deepest held principles and commitments.[38] Reliance on the standard interpretation of *Hardwick* may have made it easier for some academics to show how *Hardwick* seemed to threaten the values they held dear. To those, for example, who prized liberal notions of privacy, the Court's refusal to accept Hardwick's privacy claim held out the possibility that the Court would roll back the constitutional protection that it had, in earlier cases, afforded heterosexual sexual activity.[39] For those interested in

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with her basic critical commitments, which may properly be described as among the most challenging within the legal academic literature dealing with social identities based on sexuality and sexual orientation. She spells out these commitments in greater detail elsewhere in her work. *See generally, e.g.*, JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999) [hereinafter HALLEY, DON'T] (offering post-identarian reading of military policy dealing with lesbians and gay men). I mention all this to make it clear that I do not think one needs to "be" a "lesbian" or a "gay man" in order to share Rubenstein's general sentiment ("I think how they hate me"), although perhaps the "non-homosexual" reader of *Hardwick* might conceive of the sentiment in somewhat different terms (e.g., "I think how we hate them," or "I think how they hate him").

36. JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS 125 (1994) ("Lawyers naturally work by disagreement, as they argue for contrary results; but in doing this they work by agreement, as well, reaffirming the terms in which their conversation can proceed at all. Everything that is not arguable is for the moment affirmed.").

37. Some commentators might simply have thought this was the best reading of *Hardwick* because they approved of the Court's conclusion in the case. *See, e.g.*, Lino A. Graglia, Romer v. Evans*: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409, 418 n.43 (1997) (citing *Hardwick* approvingly and observing that "Justice White explicitly declared that homosexuals do not have a 'liberty interest' in freedom of sexual conduct that can prevent states from declaring homosexual sex a crime"); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA 120–26 (1990) (discussing *Hardwick* with approval).

38. *See, e.g.*, David B. Cruz, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 305 (2000) (suggesting that "the political or jurisprudential commitments of . . . commentators, which could lead [them] to distort their descriptions of extant case law to favor what they view as the desirable approach," may help explain flaws in scholarly accounts of sexual freedom cases).

39. *See, e.g.*, TRIBE & DORF, *supra* note 22, at 56 (arguing that White's *Hardwick*

defending a robust notion of privacy, emphasis on the conventional reading of *Hardwick* would thus help cast in stark relief the doctrinal tension *Hardwick* could be understood to have produced and to generate pressure on the Court to continue the temporarily stalled, forward march of its constitutional privacy doctrine. Even feminist critics of conventional, liberal notions of privacy could find something in the popular understanding of *Hardwick*'s holding: additional proof of the sexism they saw latent in the purportedly gender-neutral privacy ideal.[40] In a certain way, the principal reading of *Hardwick*, with the sexual orientation- and sex-based divisions it implied, readied the tools for attacking *Hardwick* that might have been less accessible, if at all, on other readings of the case.

Perhaps, and for present purposes finally, the standard reading of *Hardwick* recommended itself to some scholars because they recognized, paradoxically, the salutary effects such a reading could have for the lesbian and gay communities. Judicial decisions, as we know from the effects of *Roe v. Wade*,[41] for example, can galvanize groups that perceive themselves (or their values) as having been defeated in a case, especially when members of the groups regard the defeat as momentous.[42] The perception, perpetuated by the popular

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opinion "could herald the overruling of the entire line of privacy decisions, going back to the 1920s"); *see also* Rubenfeld, *supra* note 13, at 746–47 (*Hardwick* "may foretoken a considerable narrowing of the privacy doctrine."); *id.* at 749 ("By identifying three disparate applications ungrounded by any unifying principle, [Justice White's *Hardwick* opinion] effectively severed the roots of the privacy doctrine, leaving only the branches, which will presumably in short order dry up and wither away.").

40. For a classic statement of the view that privacy under prevailing conditions of male supremacy is anything *but* gender neutral, see, for example, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 184, 190–91 (1989) (maintaining that because men dominate women within the "private" sphere, the privacy doctrine guarantees women "no more than ... what they can extract through their intimate associations with men"). For critiques of privacy specifically within the context of *Hardwick* from a decidedly feminist perspective, see, for example, RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 63–70 (1992) (discussing "sexual privacy" from a lesbian feminist perspective); and John Stoltenberg, *You Can't Fight Homophobia and Protect the Pornographers at the Same Time—An Analysis of What Went Wrong in* Hardwick, *in* THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 184 (Dorchen Leidholdt & Janice G. Raymond eds., 1990) (discussing privacy from a radical feminist perspective). *See also* Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 154–62 (1988) [hereinafter Koppelman, *The Miscegenation Analogy*] (making feminist arguments against sodomy laws as a form of sex discrimination).

41. 410 U.S. 113 (1973).

42. *See, e.g.*, Robert A. Burt, *The Burger Court and the Family*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 92, 108 (Vincent Blasi ed., 1983) ("*Roe* has not ended controversy regarding abortion. It was indeed the impetus for new forces of opposition to identity themselves and to mobilize political effort that has had

understanding of *Hardwick*, that the Court had attacked the lesbian gay communities in its decision, both could and did mobilize those communities in ways that other interpretations of the case simply might not have done.[43]

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considerable legislative success."); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 379 (1985) ("*Roe v. Wade* ... has occasioned searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun[,] annual proposals for overruling *Roe* by constitutional amendment, and a variety of measures in Congress and state legislatures to contain or curtail the decision." (citations omitted)); *id.* at 380 ("The decision in *Roe* appeared to be a stunning victory for the plaintiffs."); *id.* at 381 ("The sweep and detail of the opinion stimulated the mobilization of a right-to-life moment and an attendant reaction in Congress and state legislatures."). *But see* David Garrow, *A Look at ... Roe v. Wade v. Ginsburg: History Lesson for the Judge; What Clinton's Supreme Court Nominee Doesn't Know About Roe*, WASH. POST, June 20, 1993, at C3 ("[B]y suggesting that the *Roe* decision 'stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures,' Ginsburg has misconstrued the political context of the Court's landmark decision.").

43. For a summary report of the immediate responses to *Hardwick* by the lesbian and gay communities, see DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 538 (1999). To ask what accounts for the widespread acceptance of the idea that *Hardwick* held that the Due Process Clause does not protect a right to engage in homosexual sodomy might be thought to risk revising history. To investigate how *Hardwick* has come to mean what it does might seem to some to hint that those who protested *Hardwick*, either in the streets or academic journals, were protesting a chimera. I myself would not draw or abide such a conclusion. The standard reading of *Hardwick* has been used in various ways to justify a broad range of unjust discriminations against lesbians and gay men that, indeed, warrant protest. *Hardwick* and its material effects have not been chimerical.

There are, then, undoubtedly risks associated with studying the academic commentary on *Hardwick*. But they are, in the end, only risks. A study of that commentary could well proceed without ever endorsing the notion that the standard reading, particularly in its early days, was "wrong." It could keep the goal of respect for lesbians' and gay men's equal citizenship keenly in mind, and treat (even praise) the early protest of the case as fully justified.

All the same, the history of the commentary on *Hardwick* remains unwritten. What I have written in my text, so far, about that commentary is, from one perspective, an invitation to imagine the outlines of that history. If and when it is finally written, such a history may well turn out to show that there are reasons—maybe like the ones already mentioned, maybe not—that commentators came to accept the standard reading of *Hardwick* and that those reasons are more complex than the easy idea that the standard reading of the case—and only that reading—ineluctably flows from the text of the *Hardwick* opinions.

The history of the commentary on *Hardwick*, if (and when) written, may not only illuminate some of the more subtle reasons that the standard reading of *Hardwick* became so widely accepted, but also how more basic tendencies (or modes) of thinking about legal doctrine may have helped preserve that reading even when it might have begun to yield to alternative ones. Even assuming for argument's sake that the standard reading of *Hardwick* was once "the best" reading of the Court's decision, over time one might have imagined that other readings would have emerged to claim some prominence, particularly in light of the significant improvements in the social status of lesbians and gay men in the years since the Court decided the case. Alternative readings (such as they are), however,

It goes nearly without saying: The common wisdom about *Hardwick*'s holding, which continues to reign supreme, is not only interesting intellectually; it also has significant doctrinal, and hence practical, implications. Should the conclusion of *Hardwick* be, as many have said it is,[44] that there is no substantive due process right to engage in consensual, same-sex sexual activity in private, lower courts are bound to follow it as the "law in the books."[45] Now, some commentators have argued that the Court's decision in *Romer v. Evans*[46]—striking down, on equal protection grounds, an amendment to the Colorado Constitution that precluded the state from protecting lesbians, gay men (and bisexuals) from sexual orientation discrimination—implicitly overrules *Hardwick*.[47] But there is an important difference between a High Court decision implicitly and explicitly overruling an earlier case. For doctrinal purposes, as we know, only the latter technically counts.[48] All the same, this difference need not be cause for despair—particularly if we recall Justice Holmes's insight that "[a] word is not a crystal, transparent and unchanged," but "the skin of a living thought [which] may vary greatly in color and content according to the circumstances and the time in which it is used"[49]—and if we reconsider how we choose to define *Hardwick*, which, after all, is only a word.[50]

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remain overshadowed by the standard interpretation of the case.

44. *See supra* note 29.

45. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 35 (1910); *cf.* Thomas C. Grey, Bowers v. Hardwick *Diminished*, 68 U. COLO. L. REV. 373, 385–86 (1997) (describing the limited sense in which *Hardwick* is "still good law").

46. 517 U.S. 620 (1996).

47. Grey, *supra* note 45, at 385–86; *cf.* Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 82–83.

48. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). As Judge Politz explained in his dissent from the denial of rehearing en banc in the Fifth Circuit's earlier decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996): " '[A]bsent clear indications from the Supreme Court itself, lower courts should not lightly assume that a prior decision has been overruled sub silentio merely because its reasoning and result appear inconsistent with later cases.' " *Id.* at 723 (Politz, J., dissenting from the denial of rehearing en banc) (quoting Williams v. Whitley, 994 F.2d 226, 235 (5th Cir. 1993)).

49. Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

50. Again, I do not mean to suggest that as a word, with a particular meaning, *Hardwick* has had no effects. Words can—and do—cause harm. *See generally, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS (1993) [hereinafter, MACKINNON, ONLY WORDS] (exploring the relationship between speech and speech harms). I mean only that since it is only a word, one can understand the project of offering another interpretation of *Hardwick* as the re-definition of a word. And yet I do not think that one can define

Let me illuminate generally what I have in mind by contrasting the way commentators have gone about their discussions of *Evans* and *Hardwick* with how they might have proceeded had they modified one of their basic assumptions. A familiar approach within the literature on the two cases is to posit that they have fixed and discernible holdings, to compare those holdings, and then, finally, to determine whether, by reason, the two can be reconciled.[51] The move is notable to no small degree because Justice Kennedy's *Evans* opinion, as anyone who has read it closely will know, thwarts a confident declaration of a single, simple proposition for which it stands.[52] Thus, I share Professor Janet Halley's concern with the familiar move just described. As she cautions, it "may render a

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Hardwick in any which way. Not *any* reading of *Hardwick* will do. In this sense, I will be relying to a considerable degree, albeit implicitly, on Fish's rich theory of "interpretive community." *See* FISH, DOING WHAT COMES NATURALLY, *supra* note 31, at 141, 580 n.3; STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14–15 (1980) [hereinafter FISH, IS THERE A TEXT IN THIS CLASS?]. The attempt in this Article to offer an alternative reading of *Hardwick* proceeds from a basic acceptance of, respect for, and deference to, one of the most basic legal "rules" important to the continuity and plausibility of "the rule of law": that lower courts are bound to follow the "law" laid down by the Supreme Court. *See supra* note 45 and accompanying text. In some sense, though, the argument in this Article shows that Fish must be right that "rules *are* texts. [Therefore,] [t]hey are in need of interpretation and cannot themselves serve as constraints on interpretation." FISH, DOING WHAT COMES NATURALLY, *supra* note 31, at 121.

51. *See, e.g.*, WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 141 (1999) [hereinafter ESKRIDGE, GAYLAW] ("Because the [Colorado] initiative [at issue in *Romer v. Evans*] was bizarrely drafted and the Court's opinion more broadly reasoned than needed to decide the case, *Evans* raises more questions than it answers. Can *Hardwick* stand?"); *id.* at 143 ("Stripped of its antihomosexual rhetoric, *Hardwick* can no longer be applied to deny other rights to gay people and should be narrowed or overruled outright."); *id.* at 151 ("Although *Evans* does not overrule—or even mention—*Hardwick*, the two decisions do not rest easily together in the same logic set."); *see also, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 453–73 (2000) (arguing that *Hardwick* and *Evans* cannot be reconciled); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 152–57 (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME] (attempting to reconcile *Hardwick* and *Evans*); Grey, *supra* note 45, at 373 (asking "[h]ow much constitutional authority does *Bowers v. Hardwick* still have after *Romer v. Evans*?" (footnotes omitted)). Notice how the inquiry arises in the related context of the effects of stare decisis on overruling *Hardwick*. *See* ESKRIDGE, GAYLAW, *supra*, at 166 (discussing the impact of stare decisis on the decision whether to "overrule" *Hardwick*).

52. *See, e.g.*, Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 364 (1997) ("[T]he *Romer* opinion is strikingly enigmatic in ways that make it perilous to venture strong claims about what the case means."); Jeffrey Rosen, *A Matter of Interpretation: Federal Courts and the Law*, NEW REPUBLIC, May 5, 1997, at 32 (describing, as part of a larger point, that "Justice Anthony Kennedy's constitutional theory [in *Evans*] . . . was expressed a little obscurely").

deceptively clear picture of [*Evans*], of *Hardwick*, and of the relationship between the two cases."[53]

Halley is certainly not alone. But particularly in light of the concern she expresses, it is significant that, at moments, she herself falls back on the "rigid and determinate"[54] standard reading of *Hardwick*. In the same article in which Halley sounds her post-modern, post-identity note of caution, for example, she writes:

> *Hardwick*, after all, held that popular majorities were entitled to express their disapproval of homosexuality by criminalizing homosexual sodomy: when the [*Evans*] majority says that the people of Colorado have manifested constitutionally irrational animus, it cuts deeply through the rational fabric of doctrine and logic and into the very body of the *Hardwick* holding.[55]

Halley's lapse (if it is fair to call it that) testifies volumes to the profound grip that the standard reading of *Hardwick* has and has had on legal thinking and writing about the case. I think—certainly, hope—it does not speak definitively, saying it is impossible to avoid the trap that Halley has quite rightly warned us to avoid.

And so, for a moment let us imagine what the *Evans* and *Hardwick* debate might have looked like if commentators regularly followed Halley's exhortation "to read less cooperatively" as one way to avoid the "deceptively clear picture of [*Evans*], of *Hardwick*, and of the relationship between the two cases."[56] What would happen to the conceptual structure of the debate, for example, if one were to indulge the idea that the holdings of cases, including those of *Evans* and *Hardwick*, are not fixed, but rather (like the Constitution) change over time in light of background changes in law and society?[57] Would

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53. Halley, Romer v. Hardwick, *supra* note 35, at 434.

54. *Id.* at 433.

55. *Id.* at 438.

56. *Id.* at 434.

57. A complete theoretical defense of this assumption will not be provided here. Nevertheless, it raises a set of interesting questions about the interpretive project as it relates to judicial opinions. For those of us, for example, who do not believe that the meaning of the Constitution is fixed, but that it changes over time, a defense of the assumption might well open up investigation into the relationship between our views about proper methods of constitutional interpretation and our methods of interpreting the Court's interpretations of the Constitution. The Court's sex equality cases could provide occasion for an elaboration and critique of the assumption. There are various moments within the Court's sex equality jurisprudence, for instance, in which the Court, in developing the doctrine, might be thought of as "cheating," by knowingly "misinterpreting" or "over-reading" an earlier decision. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Frontiero v. Richardson, 411 U.S. 677 (1973). Of course, whether one thinks it is or is not any of those things will depend, in part, on one's views of

it not be possible to read *Evans* as reflecting changes in legal and social norms that should prompt us to reconsider what the holding of *Hardwick* "is"? That, on such a reading of *Hardwick*, it might not need to be "overturned" in the way many commentators have been assuming? That, on such a reading, *Hardwick* could be squared with *Evans* because *Evans* itself reflects legal and social changes that significantly affect *Hardwick*'s holding as well? Might those social changes, incidentally but not accidentally, be traceable to the very same standard reading of *Hardwick* that they potentially modify?[58] That the highest tribute to the success of the standard reading of *Hardwick* might be paid by recognizing that it may have brought about its own undoing—that it may no longer be (if it ever was) the only "plausible" reading of what *Hardwick* "holds"?

Even without answers, these various questions, like Halley's call, beckon us to engage in some creative, even uncooperative, thinking about *Hardwick*. But, to put the question sharply, is there room in *Hardwick* for such thinking? Will the text of the *Hardwick* opinions support an alternative interpretation? I believe so. And in the next Part, through a careful re-reading of Burger's, White's and Powell's *Hardwick* opinions, I explain why.

II. REORIENTING *HARDWICK*

In the main, majority opinions are written to mediate disagreement as best they can, to highlight points of convergence and consensus, and not to beg unnecessary mapping of the terrain of dissent.[59] When a Justice joins a majority opinion but nevertheless

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the proper methods of interpreting judicial opinions, and, also in part, on one's view about "the law." To be sure, what "cheats" there are, are produced to a measurable degree by judges' perceived need not to seem to be "making" law, and to guard themselves against the potential charge that they are. *Cf.* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 180 (1997) (explaining that judges "and their informed audience, 'deny' in the psychological sense of the word, the influence of ideology" in judicial decision making). For Kennedy's further elaboration of the point, see *id.* at 180–212.

58. Thanks to Martha Ertman for reminding me of this last question.

59. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 59 (1964) ("While it is probably true that accommodation within the Court more often prevents a majority from splintering into concurring factions, compromise can also serve to mute dissent."); *id.* at 60 ("[A] minority Justice might reason that it would be more prudent to suppress his disagreement if he can win concessions from the majority."); *id.* at 63–64 ("[T]here are factors which push the majority Justices, especially the opinion writer, to accept accommodation.... The majority may thus find it profitable to mute criticism from within the Court by giving in on some issues."); *id.* at 67 (elaborating reasons why a Justice who wished to write for or strengthen a majority might appeal to a fellow Justice "who had expressed some uncertainty during or after conference or whose voting record indicated

files a separate opinion to explain the "join," the explanation can invite us to discern fractures in the views of the Justices in majority that might otherwise remain hidden from sight.

Chief Justice Burger's and Justice Powell's separate opinions in *Hardwick*, which begin by noting their respective author's official agreement with Justice White's opinion, both issue this kind of invitation. By writing separately to express their views, Burger and Powell told us not only what they themselves thought about *Hardwick*, but also, by implication, what they thought about White's thinking in the case. Separately and together, their opinions raise a basic question about whether White's "majority opinion" in *Hardwick* was the "opinion of the Court" more in name than in fact. Powell's separate opinion, in particular, helps lay the groundwork for a transformative redefinition—a reorientation—of *Hardwick*.

A. *Chief Justice Burger's* Hardwick *Opinion*

Analytically, Chief Justice Burger's separate *Hardwick* opinion really has nothing to offer aside from its reliance on history (including age-old, anti-gay morality), defined at a very narrow (or low) level of generality:

> "[T]he proscriptions against sodomy have very 'ancient roots.' "[60]
>
> "Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards."[61]
>
> "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."[62]
>
> "Homosexual sodomy was a capital crime under Roman law."[63]
>
> "During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed."[64]
>
> "Blackstone described 'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape, a heinous act 'the

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ambiguous commitment to the side with which he had actually voted").

60. *Hardwick*, 478 U.S. at 196 (opinion of Burger, C.J.) (citing *Hardwick*, 478 U.S. at 192 (opinion of White, J.)).

61. *Id.* (opinion of Burger, C.J.).

62. *Id.* (opinion of Burger, C.J.).

63. *Id.* at 196 (opinion of Burger, C.J.) (citations omitted).

64. *Id.* at 197 (opinion of Burger, C.J.) (citation omitted).

> very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.' "[65]
>
> "The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies."[66]
>
> "In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time."[67]
>
> "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[68]

These observations, which Burger believed provided him an adequate reason for repudiating Hardwick's constitutional claim, are, practically speaking, the sum and substance of his opinion. If our goal here were to search for a reply, Justice Holmes might give us all the answer we could either want or need:

> It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[69]

What is interesting about Burger's *Hardwick* opinion, however, is neither so much its questionable (not to mention, thin) reasoning nor how we could respond to it. Rather, it is how his opinion can direct our attention to the possibility that Justice White's was not the most flat-footed rejection of Michael Hardwick's claim the Court could have mustered. As Burger took pains to explain: "I join the Court's opinion, but write separately" in order to "underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy."[70]

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65. *Id.* (opinion of Burger, C.J.) (citation omitted).
66. *Id.* (opinion of Burger, C.J.) (citation omitted).
67. *Id.* (opinion of Burger, C.J.).
68. *Id.* (opinion of Burger, C.J.).
69. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (quoted in *Hardwick*, 478 U.S. at 199 (opinion of Blackmun, J.)); *see also* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 29, at 1427 n.50 ("Lest the deployment of Holmesian rhetoric appear a bit hyperbolic, it should be noted that Chief Justice Burger relied in his [separate] opinion on the first English statute criminalizing sodomy, which was enacted during the reign of Henry VIII."); *cf.* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523–90 (1995) (lamenting contemporary legal scholars' often superficial use of history and recommending the perspective of early Amercian constitutional thinkers to modern theorists).
70. *Hardwick*, 478 U.S. at 196 (opinion of Burger, C.J.).

He called it "my view." But is the view Burger expressed not the same view that we tend to ascribe to "them"—the Justices who joined Justice White's *Hardwick* opinion—and not just to "him"? When we say that *Hardwick* "held" that the Due Process Clause does not protect a right to engage in consensual, same-sex sexual activity in private, do we not ordinarily mean that the Justices who joined White's *Hardwick* opinion were expressing the "view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy"?[71]

Possibly Burger meant nothing by his "my," believing that his opinion was but a reiteration of the gist of White's opinion.[72] Possibly his "my" was a mistake. But if it was not, and one might well believe it was not, through his use of an otherwise insignificant possessive, Burger may have effectively begun to tell us something very significant—about his way of thinking about the case and White's, as well.

Based on history, including a history of anti-homosexual morality, Burger was seemingly prepared to hold, once and for all, that there was no fundamental, constitutional right to engage in homosexual sodomy. Had White's opinion, in the Chief Justice's estimation, fully embraced this position, Burger would have had no reason to write separately, and no reason to set off his view with that "my." That Burger did both suggests that, in his mind at least, White's opinion had not gone as far as he himself would have gone in rejecting, more or less permanently, the merits of the claim Hardwick raised. Burger was right to entertain such thoughts if he did. It is one of the precious few virtues of White's largely infelicitous *Hardwick* opinion that it neither methodologically nor substantively simply followed the Chief Justice's lead.

B. Justice White's Hardwick *Opinion*

Not infrequently the differences between Chief Justice Burger's and Justice White's opinions in *Hardwick* are glossed over in the academic commentary on the case.[73] By isolating some notion of

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71. *Id.* (opinion of Burger, C.J.).

72. Burger did tell us he wrote separately "to underscore ... that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy." *Id.* (opinion of Burger, C.J.). And he did lift his remark about "proscriptions against sodomy hav[ing] very 'ancient roots' " directly from Justice White's opinion. *Id.* (opinion of Burger, C.J.) (citing *Hardwick*, 478 U.S. at 192 (opinion of White, J.)). *See infra* note 84 and accompanying text.

73. *See, e.g.*, Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for*

history as the defining pillar on which White built his *Hardwick* opinion, students of the case commonly divert attention away from a more basic element of the opinion's architectural design.

If history mattered in White's opinion, it was not because it was history, as such. Rather, it was because it was living history embodied in the then-prevailing social norms about homosexuals and homosexuality.[74] Those norms, as their historical pedigree helped to demonstrate, were not merely an episodic expression of majoritarian, anti-gay sentiment sprung suddenly, full-blown from Zeus's head. Widely shared and deeply felt at the time of *Hardwick*,[75] with deep historical roots, social norms about homosexuals and homosexuality, and not history standing alone, carried White a good distance toward—if not all the way to—his constitutional conclusion.[76]

I will return to these points in a moment, elaborating and demonstrating that they are supported by the text of White's opinion. But for now they should suffice to explain why I respectfully disagree with Professor William Eskridge and those he joins by saying that "[t]he [*Hardwick*] Court's response, and *ultimately* [*White's*] *entire opinion*, rested upon a principle of history: only activities unregulated in 1868 could be considered liberties protected by the due process clause."[77] This *might* be a fit description of Burger's *Hardwick* opinion,[78] but not of White's "opinion of the Court."[79]

Gay, Lesbian, and Bisexual Identity, 36 UCLA L. REV. 915, 915 (1989) (treating the opinions together to launch a broader theoretical discussion of identity and the law).

74. Some, along with Justice John Harlan, might call this "living tradition," *see* Poe v. Ullman, 367 U.S. 497, 542 (Harlan, J., dissenting), or with Professor Daniel Conkle, "the pattern of American moral development." Daniel O. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 642 (1985). There are, undoubtedly, differences between the conceptions, but the lines conjoining and separating them will not be specified here.

75. Contempt for, or disgust with, male-male sex was nothing new, as Burger's opinion shows. But the virulence of the emotional response to that kind of sex, particularly in 1986 (when *Hardwick* was decided), assuredly drew power and form from the conservative successes of the so-called Reagan Revolution and the close association between gay sex and death spurred by the national, moral panic occasioned by the emergence of AIDS in those years. As discussed below, *see infra* text accompanying notes 345–73, one should not forget these factors when seeking to understand *Hardwick*. *Cf.* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 677 (1990) (considering "socio-economic and political" factors in legal treatment of homosexuality).

76. *See Hardwick*, 478 U.S. at 199 (opinion of Blackmun, J.) ("The Court concludes that [Georgia's sodomy law] is valid essentially because '*the laws of*... *many States*... *still make such conduct illegal and have done so for a very long time.*' " (citing *Hardwick*, 478 U.S. at 190 (opinion of White, J.) (emphasis added))).

77. ESKRIDGE, GAYLAW, *supra* note 51, at 156 (emphasis added); *see id.* at 151 ("The Supreme Court in *Hardwick* sought to avoid the gay rights implications of this [anti-

commandeering] principle by invoking the historical pedigree of laws against 'homosexual sodomy' at the time of the framing of the fourteenth amendment (1868)."). *But see id.* at 166 (summarizing "*Hardwick*'s reasoning [as] faulty in (1) characterizing the precedents, (2) setting the terms of the inquiry, and (3) representing the history of state regulation of oral sex").

78. I am not even sure if this is an apt description of Burger's position. Although much of the historical evidence he invoked predated the enactment of the Bill of Rights, he did, for instance, mention that "[i]n 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time." *Hardwick*, 478 U.S. at 197 (opinion of Burger, C.J.). The dating of the sources in Burger's *Hardwick* opinion makes it somewhat difficult to say with much confidence that either 1791 or 1868 was a date of any particular significance within the framework of what he wrote.

79. History, it might be said, is one of "the essentially contested concepts" Gallie taught us about. W.B. Gallie, *Essentially Contested Concepts*, 56 ARISTOTELIAN SOCIETY PROCEEDINGS 167 (1955–1956). In some sense, White's *Hardwick* opinion was, *of course*, based on history. But mostly or only in the unexceptionable sense that the legal endeavor is often conceptualized as inevitably relying on history, that one cannot know "the law" without casting one's eye, in part, to the past. The legal force of precedents and statutes reflect the force of history in judicial decision-making. There is, however, an important way in which the legal endeavor is related to the future, as well, and cannot be said to be "simply" or "merely" historical. The future is often implicitly posited in the *reductio*, of which more anon, in which certain paths—future paths—are foreclosed in the present because of the vestigial authority of historical norms. Nevertheless, I still think that what I suggest in the text will make sense to most readers, especially in view of Eskridge's specification of a particular history, linked to a particular moment in time past. I am not, in other words, attempting to invoke any grand theory about "the nature" of "history," or to score any philosophical point dealing with "the nature" of time.

This all, I think, suggests that there is not only a history to the commentary on *Hardwick*, *see supra* note 43, but also a history of the use of history within the commentary on *Hardwick* that is worth considering. Indeed, in reading Eskridge's remark about the centrality of history within White's *Hardwick* opinion, I cannot help but detect a little conscious overstatement. *See supra* note 77 and accompanying text. I would agree with Eskridge, however, that if *Hardwick* had defined the scope of the Due Process Clause as frozen in 1868, it would have been difficult on that score to square *Hardwick* with *Roe v. Wade*, 410 U.S. 113 (1973). *See* ESKRIDGE, GAYLAW, *supra* note 51, at 156 ("In *Roe*, the Court protected a woman's right to control her pregnancy through an abortion, even though states prohibited women from obtaining abortions in the nineteenth century; in 1868 thirty-six states or territories made this a crime, twenty-one of which statutes were still in effect in 1970." (footnote omitted)). And it also would have been difficult to square *Hardwick* with *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), neither of which, as Eskridge observes, "had considered nineteenth-century regulation of contraception relevant." ESKRIDGE, GAYLAW, *supra* note 51, at 156. My own sense of it is that the identification of history as the touchstone of White's *Hardwick* opinion underscores the significance of the endeavor Eskridge goes on to undertake, challenging the "history of homosexual sodomy" found in White's opinion. Efforts, like Eskridge's, to challenge White's understanding of history remain an important endeavor *even if* one believes history played a more modest role, if any, as a justification for White's ultimate judgment in the case, leaving to one side (for a moment) what that "ultimate judgment" was. Thus, I find much more appealing (though still I do not agree with), then Professor, now-Dean, Kathleen Sullivan's careful observation that White and those Justices who substantively joined his *Hardwick* opinion "drew the line" they did, "*in large part*, because they could not identify [homosexual sodomy] with the

The argument that White's *Hardwick* opinion ultimately rests on a principle of history, as with the standard statement of the proposition for which *Hardwick* stands, seem likely driven by something other than text alone. Nevertheless, it is not without textual foundation. The most directly relevant passage for a historical account of White's *Hardwick* opinion appears in his discussion of the process of identifying unenumerated constitutional rights.[80] After laying out the familiar formulations from *Palko v. Connecticut*[81] and *Moore v. East Cleveland*,[82] White declared that "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[83] Sketching the details, White told us that "[p]roscriptions against [consensual sodomy] have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights,"[84] adding significantly that, "*[i]n 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.*"[85]

Had this been White's only proffered justification for his "obvious" conclusion (which is not at all "obvious" to many of us), the notion that his opinion (like or unlike Burger's) turned on history

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tradition of our country, the values underlying our people at the time of the framing of the Bill of Rights." 3 NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY, 100TH CONG. 3099 (1987) [hereinafter BORK HEARINGS] (remarks of Kathleen Sullivan (emphasis added)). White's case-by-case approach to constitutional adjudication, *see, e.g.*, Rhesa H. Barksdale, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 3, 6 (1993) (noting that, jurisprudentially, White kept the issues "as narrow as possible, so that there could be reasoned, and reasonable, predictability to the law for the American people"); Charles Fried, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 20, 22–23 (1993) (observing that "[d]octrinal consistency just did not weigh very heavily with [White] if it led to a conclusion that did not make sense." (footnote omitted)); *id.* at 22 n.35 (noting criticism of White's jurisprudence for this very reason), may help explain the seeming inconsistency, to some, between his definition of the Due Process Clause in *Hardwick*, and his positions in cases like *Eisenstadt*, 405 U.S. at 461 (White, J., concurring in the result); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (White, J., joining the unanimous opinion of the Court written by Warren, C.J.); and *Griswold*, 381 U.S. at 502 (1965) (White, J., concurring in the judgment).

80. *See Hardwick*, 478 U.S. at 191 (opinion of White, J.).

81. 302 U.S. 319, 325 (1937) (opinion of Cardozo, J.) (announcing that rights are fundamental in the constitutionl sense which are "implicit in the concept of ordered liberty" or basic in our system of jurisprudence).

82. 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.) (treating as fundamental those rights that are "deeply rooted in this Nation's history and tradition").

83. *Hardwick*, 478 U.S. at 192 (opinion of White, J.).

84. *Id.* at 192 (opinion of White, J.) (internal citation omitted).

85. *Id.* at 192–93 (opinion of White, J.) (emphasis added) (footnotes omitted).

might have followed.[86] But this was not all that White—or the text of his *Hardwick* opinion—had to say.

1. Unenumerated Rights and Social Norms

Justice White introduced historical disapproval of the act of sodomy in order to buttress what was, on a more basic level, an argument from contemporaneous social norms. White wrote that then-current prohibitions of consensual sodomy had "ancient roots," as he began to explain that those proscriptions did not violate any fundamental right of "homosexuals to engage in acts of consensual sodomy."[87] Two sentences on history, quoted above, followed: "Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws."[88] Then, White closed the circle at its source, with then-existing proscriptions against consensual sodomy. "In fact, until 1961, all 50 States outlawed sodomy, and *today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.*"[89]

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86. I say "might" quite intentionally. That White was not relying exclusively on a conception of the scope of the Fourteenth Amendment (or more specifically, its Due Process Clause) fixed in 1868 is suggested, albeit weakly, by his reference to the common law and the "laws of the original thirteen States when they ratified the Bill of Rights." *See id.* at 192 (opinion of White, J.); *cf.* BORK HEARINGS, *supra* note 79, at 3099 (remarks of Professor Kathleen Sullivan). Perhaps, as David Cruz has thoughtfully suggested to me, the references to the Bill of Rights can be explained in terms of the congruence between Fifth and Fourteenth Amendment notions of "due process." Either way, I will have occasion shortly to provide much stronger evidence for the proposition that White's opinion did not ultimately rest on a principle of history, whether or not fixed in 1868. *See infra* Part II.B.1 (discussing unenumerated rights and social norms).

87. *Hardwick*, 478 U.S. at 192 (opinion of White, J.).

88. *Id.* at 192–93 (opinion of White, J.) (footnotes omitted).

89. *Id.* at 193–94 (opinion of White, J.) (footnote and citations omitted) (emphasis added). Although some have suggested that the evidence about homosexuality that the Court considered was historically inaccurate, *see, e.g.*, Michelman, *supra* note 20, at 1497 & n.12, the considerable strides that had been made to achieve equality for lesbians and gay men—to erase or modify social norms disapproving of homosexuality—were woefully incomplete by 1986 (as they continue to be today). Part of the problem, of course, was the use of sodomy laws, such as the one at issue in *Hardwick*, to perpetuate the subordination of lesbians and gay men. *See* Nan D. Hunter, *Banned in the U.S.A.: What the* Hardwick *Ruling Will Mean*, *in* LISA DUGGAN & NAN D. HUNTER, SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 80, 80 (1995). As Professor Hunter explains: "Sodomy laws have functioned as the linchpin for denial of employment, housing and custody or visitation rights; even when . . . there was no nexus between homosexuality and job skills or parenting ability, we have had the courts throw the 'habitual criminal' label at us as a reason to deny relief." *Id.* at 80–81.

Were the structure of White's reasoning not clear enough from the structure of the passage just reviewed, one would need only look back a few pages in his opinion—to his statement of the "issue presented" in the case—to find the same rationale, prefiguring what was to come, expressed more succinctly. "The issue presented," White announced, "is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and *hence invalidates the laws of many states that still make such conduct illegal* and *have done so for a very long time.*"[90] Prevailing social norms, reflected in the glance White cast toward "the laws of the many States that still make such conduct illegal," are primary; the history of such laws, implicated by the subordinate conjunctive phrase "*and* have done so for a very long time," functions to steel the main point.[91] It may be worth noting that Justice Blackmun, in his own *Hardwick* opinion disagreeing, read White's opinion just this way. For Blackmun, White's opinion had concluded that Georgia's sodomy law was "[v]alid[,] essentially because '*the laws of . . . many States . . . still ma[d]e such conduct illegal and ha[d] done so for a very long time.*' "[92]

So far, in a loose sense, we have largely stayed within the four corners of *Hardwick*, reading White's opinion as relying in some basic way on social norms disapproving of homosexuals and homosexuality.[93] But it will be helpful to lay White's *Hardwick* opinion beside remarks Professor Laurence Tribe made in a brief he filed with the Court on the eve of the decision in *Hardwick*, written on Michael Hardwick's behalf. Comparing the texts should help dispel any lingering doubt whether, in the passage under consideration, White was or was not reasoning his way to his "obvious conclusion" through a particular view of the social norms he thought implicated by the case.[94]

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90. *Hardwick*, 478 U.S. at 190 (opinion of White, J.) (emphasis added).

91. *Id.* (opinion of White, J.).

92. *Id.* at 199 (opinion of Blackmun, J.,) (emphasis added) (internal citation omitted).

93. *Cf.* PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 105–06 (John B. Thompson ed., 1991) (explaining that text or language must be understood in socio-historical context).

94. As Dean Terrance Sandalow has pointed out, Judge J. Skelly Wright was correct to disagree with Justice Roberts's comment, *see* United States v. Butler, 297 U.S. 1 (1936), that "[a]nswers to constitutional questions" are to "be determined simply by laying 'the article of the Constitution which is invoked beside the statute which is challenged.' " Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1038 (1981) [hereinafter Sandalow, *Constitutional Interpretation*] (footnote omitted) (quoting J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 784 (1971)). Still, there is often much to be learned about the interpretive choices judges make in their texts by comparing them to alternative choices highlighted in

Here is Tribe commenting on what *he* saw as the clear and unmistakable trend toward tolerating, if not embracing, homosexual sodomy, signified by a widespread trend to decriminalize the conduct: "Our tradition of liberty under the Due Process Clause has never 'been reduced to any formula' nor 'determined by reference to any code,' but rather has been a 'living thing,' that must grow and change over time within careful limits sketched by 'solid recognition of the basic values [of] our society.' "[95] He continued:

> It is for just this reason that Justice Harlan, in *Poe* [*v. Ullman*] wrote that the "general public opinion ... of a bygone day" condemning contraceptives could not justify the criminalization of their use. Likewise, the general public opinion of an earlier day that led Justice Harlan to take for granted the condemnation of homosexual practices cannot justify their criminalization of those practices today. In the quarter-century that has passed since Justice Harlan wrote, more than half the states in the Union have decriminalized private homosexual acts between consenting adults, and our nation's professional societies have taken the position that such acts should not be condemned either by medicine or by law.[96]

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other texts, such as Tribe's brief in *Hardwick*.

95. Laurence H. Tribe, Brief for Respondent at 8, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) [hereinafter Tribe, *Hardwick* Brief] (citations and footnote omitted).

96. *Id.* at 8–9 n.14 (citations omitted). Elsewhere in the brief, Tribe repeated this theme. "Nor can consensual homosexual contact in private any longer be deemed so transparently evil that a government need not explain its criminalization to any judicial authority." *Id.* at 13 (footnotes omitted). Tribe then went on to cite *Loving v. Virginia*, 388 U.S. 1, 6 & n.5 (1967), for the proposition that "no activity may be deemed self-evidently injurious in a nation where ... more than half the states have decriminalized it." Tribe, *Hardwick* Brief, *supra* note 95, at 13. And in a footnote, Tribe drove the point home:

> The vast majority of the American population lives in the 26 states that have decriminalized private, consensual, adult homosexual acts, either by legislative ... or judicial means. Petitioner claims that 25 states still outlaw oral and anal sexual contacts, but its list of such jurisdictions erroneously includes the Commonwealth of Massachusetts, which has long since held its sodomy law unconstitutional as applied to the acts of consenting adults in private ....
>
> Nor can the remaining division among the states on the issue be viewed simply as a benign patchwork of legislative experiments. For a state's prerogative to "serve as a laboratory, and try novel social and economic experiments," *New State Ice. Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), in its public sphere entails no comparable perogative to conduct " 'experiments at the expense of the dignity and personality' of the individual." *Poe v. Ullman*, 367 U.S. at 555 (Harlan, J., dissenting) (quoting Skinner v. Oklahoma, 316 U.S. at 546 (Jackson, J., concurring)).

Id. at 13–14 n.23.

Although White did not cite it in his discussion of the process of identifying unenumerated constitutional rights, he was, in part, responding there to Tribe's reliance on language from Harlan's famous dissent in *Poe*. It seems clear that White and Tribe disagreed on a good many things in *Hardwick*, but not on any grand theory of constitutional interpretation.[97] Each articulated a method of adducing unenumerated constitutional rights that was commensurable with the other's. Each agreed that the pattern of state laws, as evidence of "general public opinion" (what I have been calling "social norms"), was relevant to the determination of whether acceptance of homosexual sodomy should or should not already be counted within the country's evolving social and constitutional mores.[98]

White and Tribe, however, disagreed with each other about what to make of the evidence of public opinion to which Tribe, in his brief, had pointed. Tribe saw the de-criminalization of homosexual practices in more than half of the states as powerful evidence that social norms about gays and gay sex had recently changed—so powerful, in fact, he maintained that "the general public opinion of an earlier day that led Justice Harlan to take for granted the condemnation of homosexual practices [could not] justify criminalization of those practices today."[99] For his part, though, White saw the other half of the glass: the laws of twenty-four states and the District of Columbia that continued to criminalize homosexual sodomy. White was unwilling to extrapolate from the (seeming) trend to de-criminalize sodomy a constitutional warrant to strike down the numerous remaining prohibitions, particularly in light of their vitality and correspondence to the "the general public opinion

97. White's agreement with the Court in *Eisenstadt v. Baird*, 405 U.S. 438, 460 (1972) (White, J., concurring in the result); *Loving*, 388 U.S. at 2 (White, J., joining the unanimous opinion of the Court written by Warren, C.J.); and *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment), may go some distance toward illuminating the methodological similarities between the approach he and Tribe took in *Hardwick*. *See also* Barksdale, *supra* note 79 (discussing White's interpretive methodology); Fried, *supra* note 79 (same).

98. As Justice Scalia would explain several years later in *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989), " '[F]irst' among the ' "objective indicia that reflect the public attitude toward a given sanction" ' are statutes passed by society's elected representatives." *Id.* (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976))). That the indicia are "objective" in any pure sense is rather doubtful. Nevertheless, it might be agreed that they are less subjective in some meaningful way than the Justices' own raw value preferences.

99. Tribe, *Hardwick* Brief, *supra* note 95, at 8 n.14 (citation omitted).

. . . of . . . a bygone day."[100] For White, we might say, the day was not entirely "bygone."

It is, of course, a prerogative of authority to reserve the last word, and White took full advantage of that prerogative to belittle Tribe's interpretation of public opinion. Against the background of existing sodomy bans with their "ancient roots" and "the laws of the many States that still make such conduct illegal and have done so for a very long time,"[101] White snapped, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[102] White's damning description of Tribe's interpretation of public opinion is equaled in its pitch perhaps only by the intensity of the reactions it has precipitated.[103] But far from demonstrating simply (or only) an inappropriate judicial expression of irrational dislike or hatred of homosexuals, White's clever *reductio* of Tribe's argument to

100. *Id.* (quoting Poe v. Ullman, 376 U.S. 497, 546–47 & n.12. (1961)).

101. *Hardwick*, 478 U.S. at 190 (opinion of White, J.).

102. *Id.* at 194 (opinion of White, J.).

103. Some critics of White's *Hardwick* opinion have been quite a good deal less charitable towards his interpretation of the evidence of cultural opposition to homosexual sodomy. As they see it, White's interpretation of the evidence, so different from Tribe's, can be attributed to a defect in White's psyche that distorted his judgment in deciding *Hardwick*. This, of course, is the familiar, sometimes whispered, sometimes published, suggestion that White's "homophobia" rendered him incapable of viewing the evidence (or the issues) before the Court in *Hardwick* "objectively," or that it improperly tilted him against Tribe's otherwise powerful constitutional argument. *See, e.g.*, supra note 17 (collecting sources sympathetic with this view).

White has often been the target of such charges, but he certainly was not the only Justice in *Hardwick* whose personal relationship (or lack thereof) with homosexuals (or homosexuality) shaped his view of the case. (Powell, who reported during deliberations over *Hardwick* that he never knew a homosexual, comes to mind in this regard. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521, 528–29 (1994).) Even if White was a "homophobe" (I, myself, might hesitate before calling him that), that fact alone might not, without more, explain why he decided the case as he did. Indeed, if hatred (or dislike) of homosexuals were the determining factor in one's decision in a case like *Hardwick*, one might have expected White's opinion to have attracted at least one other vote. According to Professor David Garrow, Justice Stevens is reported to have confessed to at least one of his colleagues during deliberations in *Hardwick*, "I hate homos." DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 659–60 (1994) ("John Stevens said that morality was not enough, and that while he disliked homosexuals—'I hate homos,' one colleague quoted Stevens as saying—'we have to live with it,' for it was a basic question of liberty."). And yet, Stevens, as we know, did not join White's *Hardwick* opinion. *Hardwick*, 478 U.S. at 218, 220 (opinion of Stevens, J.).

If we are going to take account of White's psychology or biography, any theory of defect must account for White's record of steady support for the Court's sex equality jurisprudence and his experience on the Court as a clerk for Justice Vinson (giving White some personal relationship both to the repudiation of *Lochner* and later as a Justice involved in deciding *Roe*).

an absurdity—a familiar judicial move[104]—in an odd way may have been a tacit acknowledgment of the seriousness and legitimacy of what Tribe had claimed. For, if White had had a persuasive, substantive justification for his rejection of the argument he declared "facetious," he surely would not have failed to tell us what it was.

2. Precedent and Social Norms

The *reductio* plays an important role at vital junctures in Justice White's *Hardwick* opinion, distracting the reader from the difficulties of his positions and the reasons they are so unsatisfying. Summarizing the relationship of the Court's privacy precedents to Hardwick's due process claim, for example, White wrote:

> [W]e think it evident that none of the rights announced in [the Court's earlier privacy] cases bears *any* resemblance to the claimed constitutional right of homosexuals in acts of sodomy that is asserted in this case. *No* connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . .[105]

While White neatly reconciled much of the Court's privacy jurisprudence in the efficient rule that the Due Process Clause protects "family, marriage, and procreation," he neglected to mention the most obvious principle that, however roughly, might have explained it. But it is there, in his opinion, in the passage we have been examining. As that discussion suggests, White may have been thinking that the Court's privacy precedents could be reconciled on some principle of public opinion.[106]

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104. *See* People v. Roberts, 178 N.W. 690, 693–94 (Mich. 1920); Queen v. Dudley & Stephens, 14 Q.B.D. 273, 273–74 (1884). In both *Roberts* and *Dudley & Stephens*, the courts passionately express their views about the reprehensibility of the conduct under consideration. The tone of the respective opinions, however, can (well) be understood as masking the real legal and moral dilemmas presented by each case. The same might be said about White's *Hardwick* opinion. White's retreat to overstatement or *reductio* (not necessarily in its formal meaning) may thus partake of a time-honored judicial tradition. Whether one believes White's opinion was a reflection of his, or a, "homophobic ideology," *see* Thomas, *The Eclipse of Reason*, *supra* note 17, at 1806, one might nevertheless appreciate that there may be more to the opinion than that.

105. *Hardwick*, 478 U.S. at 190–91 (opinion of White, J.).

106. *Sexual Orientation and the Law*, *supra* note 18, at 1524 ("The only distinction between the activity protected in the Court's previous privacy cases and the behavior found unprotected in *Hardwick* is an unpersuasive one—a majoritarian consensus against homosexual sodomy."); *cf.* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 923–24 (1973) (discussing consensus in the context of the lawfulness of abortion and sodomy regulations).

Naturally, had White attempted to elaborate such a principle, he quickly would have discovered it lacking. At least two of the cases White included within his rule—*Loving v. Virginia*[107] and *Roe v. Wade*[108]—were, to a greater or lesser degree, decided against a background of social norms that frowned on the conduct that the Court ultimately found in those cases to be constitutionally guaranteed as of right.

We will come to *Loving* later on.[109] For present purposes, however, it will somewhat blunt the challenge *Loving* would have presented White (if not completely meet it) to recall that by the time that *Hardwick* was decided, there were no serious public calls to revisit or reverse *Loving*. It might not have been outlandish for White to have supposed that, at least by 1986, *Loving* could be read to conform with the principle, which he did not specify, animating the rule, which he did.

Roe, though, was a different matter. Neither at the time it was decided nor at the time of *Hardwick* was *Roe* easily aligned with social norms or public opinion. Under attack since its inception, *Roe* had not been accepted by a vocal and powerful segment of the American public. Moreover, at the time of *Hardwick*, the voice and power of that segment of the public had been amplified through the connections it had with the leaders of the so-called "Reagan Revolution," not least among them Reagan Attorney General Edwin Meese, who had repeatedly called for the Court to overturn *Roe*.[110]

It thus would have been exceedingly difficult for White to try to account for *Roe* on a principle requiring correspondence between constitutional rules and social norms. But, in a strange way, it may partly have been the lessons *Roe* had taught the Court, and the *Roe* Court's refusal to abide by social norms opposing abortion, that inspired White's mean reading of the Court's privacy precedents.[111] Professor Michael McConnell nicely makes the point I intend when he reminds us that "[t]ouching a hot stove can [itself] be a kind of precedent."[112]

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107. 388 U.S. 1 (1967).

108. 410 U.S. 113 (1973).

109. *See infra* Part III and Part IV.B; *see also* notes 158, 222–23.

110. Hence, I can appreciate why Professor Nan Hunter would write that "*Hardwick* was the case the Court picked to quiet its Meesian critics." Hunter, *supra* note 89, at 82.

111. White's discussion of the Court's institutional legitimacy demonstrated that he had not forgotten the lessons of *Roe*. *See infra* Part II.B.3.

112. McConnell, *supra* note 22, at 701. At times, it is difficult to separate the attacks on *Hardwick* from *Hardwick* itself. It may be that the Court's message in *Hardwick* was, as Jed Rubenfeld has characterized it, "We in the majority barely understand why even

White's reliance on the *reductio* reappears later in his opinion—at precisely the place where it earlier left off. If the defining feature of the right of privacy was that it protected those activities in the sanctity of the home that were socially approved of outside it, what could White possibly say about *Stanley v. Georgia*,[113] which protected in private what in public was—at least in theory[114]—socially forbidden?

Stanley, one could say, threatened White's efficient rule about the scope of the Due Process Clause.[115] His analysis of *Stanley* thus began not a little defensively, almost as if responding to a critic who had challenged his interpretation of the Court's privacy cases by pointing out that *Stanley* had protected private possession of obscenity despite its ostensibly widespread social disapproval: "*Stanley* did protect conduct that would not have been protected

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these three areas [marriage, procreation, and family relationships] are constitutionally protected; we simply acknowledge them and note that they are not involved here." Rubenfeld, *supra* note 13, at 748. As suggested in the text, I am not sure that White had "barely [any] understand[ing] why even [those] three areas [were] constitutionally protected." *Id.* My own view is that he may well have understood why, but may still have declined to elaborate that understanding because of the difficulties the elaboration would have presented.

113. 394 U.S. 557 (1969).

114. Specifically, I have in mind the theory of the Court's obscenity doctrine that ties its regulation directly to community—as in social—standards. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) (rejecting obscenity as material utterly lacking "redeeming social importance" and treating obscenity as appropriately community-defined). For the view, however, that obscenity, or pornography, is more often condemned in principle than in practice, see generally CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 127–205 (1987); MACKINNON, ONLY WORDS, *supra* note 50, *passim*; *id.* at 87 (noting, not a little ironically, that the Court's "obscenity test" in Miller v. California, 413 U.S. 15, 39 (1973), "is so effective that, under it, the pornography industry has quadrupled in size," and asking parenthetically, "*they're* being hurt?"); Catharine A. MacKinnon, *The Roar on the Other Side of Silence*, *in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 3 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997). For a fascinating, if often overlooked, feminist discussion of pornography, see generally SUSANNE KAPPELER, THE PORNOGRAPHY OF REPRESENTATION (1986). For more particularized discussions of gay male pornography in a small, but growing legal academic literature, see Christopher N. Kendall, *Gay Male Pornography After* Little Sisters Book and Art Emporium*: A Call for Gay Male Cooperation in the Struggle for Sex Equality*, 12 WIS. WOMEN'S L.J. 21, 23 (1997) [hereinafter Kendall, *Gay Male Cooperation*] (arguing that gay male pornography predicated on sexual hierarchy conflicts with sex equality principles); Christopher N. Kendall, *Real Dominant, Real Fun!: Gay Male Pornography and the Pursuit of Masculinity*, 57 SASK. L. REV. 21, 22–23 (1993) (same). For a response to Kendall's arguments, see CARL F. STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 82–84 (1995); see also Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 662 (1995) (praising gay male pornography on various grounds), to whom Kendall, *Gay Male Cooperation*, *supra*, at 50–51, responds.

115. That it did may shed light on White's decision to treat *Stanley* independent of the Court's privacy cases involving "family, marriage, and procreation."

outside the home, and it partially prevented the enforcement of state obscenity laws . . . ."[116]

This, of course, was exactly the point of arguing Hardwick's case from *Stanley*. Because *Stanley* had protected in private what was unaccepted in public, even assuming for argument's sake that White would take the position he did about social disapproval of homosexuals and homosexuality, he would nevertheless have to concede that Hardwick's conduct was protected—at least so long as it took place behind closed, private doors.[117] After all, as White himself noticed (and explained), "*Stanley did* protect conduct that would not have been protected outside of the home."[118]

But, White continued, quickly deflating the power of such reasoning by turning to different sets of social (and constitutional)

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116. *Hardwick*, 478 U.S. at 195 (opinion of White, J.).

117. As Professor William Eskridge has recently argued, the Supreme Court should "overrule *Hardwick* for it violates the central lessons of the Court's privacy jurisprudence: the state has no business in the bedrooms of consenting adults, and in a Freudian culture we are permitted to do disgusting things with other consenting adults behind closed doors without incurring legal disabilities." ESKRIDGE, GAYLAW, *supra* note 51, at 173. There is here a bridge to be built between Eskridge's observation and Professor William Ian Miller's fascinating (and stomach-turning) work on disgust. *See* WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997). Professor Martha Nussbaum's review of Miller's *Anatomy of Disgust*, *Foul Play*, THE NEW REPUBLIC, Nov. 17, 1997, at 36 ("There is certainly a lot to be said about the role played by appeals to disgust in the oppression of homosexuality."), and another, more recent review she has written speak of the bridge. *See* Martha C. Nussbaum, *Experiments in Living*, NEW REPUBLIC, Jan. 3, 2000, at 31 (reviewing MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999)) ("Having a lot of shame about our own bodies—and disgust, too . . .—we seek to render our bodies less disturbing; . . . frequently [we project] our own emotions outward, onto vulnerable people and groups who come to embody a shamefulness and a disgustingness that we then conveniently deny in our[selves]."). *See generally* Martha C. Nussbaum, *"Secret Sewers of Vice:" Disgust, Bodies, and the Law*, *in* THE PASSIONS OF LAW 19 (Susan A. Bandes ed., 1999) (analyzing the relationship between disgust and male perceptions of homosexuality, especially the identification of penetrability with a fear of mortality). Miller's *Anatomy of Disgust*, as Nussbaum's recent work shows, offers ample material for someone who is interested in aspects of why many undoubtedly do, as a descriptive matter, find homosexuality disgusting. *See* MILLER, *supra*, at 19–20 ("Semen has the capacity to feminize and humiliate that which it touches. And it just may be that the durability of misogyny owes much to *male* disgust for semen."); 103–04 (discussing semen); 101–05 (penises); 17 (Sambian fellatio practices); 126–27 (decay of orgasmic pleasure); 126–27 (orgasm as excessive) 99–101 (anuses); 209 (butt cracks); 100–01 (dignity and control of the anus); 100 (contamination of anus); 15 (feces); 147–48 (defecation); 70, 101 (confusion of anus with vagina); 128–32 (sex and degradation); 124–32 (sexual desire); 113–19 (desire's relation to disgust); 120 (prohibitions against desire); 34–36, 198–204 (shame and social/moral order); 114 (shame and violating prohibitions); 199–200 (stigma); 179–86 (vice); *see also* Sigmund Freud, *The Most Prevalent Form of Degredation in Erotic Life*, *in* COLLECTED PAPERS 203–16 (Joan Riviere & J. Strachey eds., 1912) (cited and discussed in MILLER, *supra*, at 128–32).

118. *Hardwick*, 478 U.S. at 195 (opinion of White, J.) (emphasis added).

norms, "the [*Stanley*] decision was firmly grounded in the First Amendment."[119] *Stanley*, he announced, jarring many who had actually read Justice Marshall's opinion in the case,[120] was not about privacy after all.[121] The proposition having thus been established by its mere proclamation, White followed with *reductio*:

> The right pressed upon us here has no similar support in the text of the Constitution.... Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home.... [I]f respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.[122]

Social norms disapproving of homosexuals and homosexuality, White taught us (just in case we did not already know), did not stop at, but pushed beyond the threshold of the bedroom door.

Drawing and defending lines can be tricky business. But so can erasing them or deciding not to draw them.[123] If, as I have argued,

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119. *Id.* at 195 (opinion of White, J.). *See* Stanley v. Georgia, 394 U.S. 557, 569 (1969) (Stewart, J., concurring) (joined by Brennan and White, JJ.) (treating *Stanley* as presenting a Fourth Amendment problem); Al Katz, *Privacy and Pornography:* Stanley v. Georgia, 1969 SUP. CT. REV. 203, 215 ("The concurring opinion of Mr. Justice Stewart, joined by Justices Brennan and White, characterized *Stanley* as a search and seizure problem of the first aspect.").

120. For a fairly standard reading of Justice Marshall's opinion for the *Stanley* Court, see Katz, *supra* note 119, at 215. *See also* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 29, at 1426 ("Justice White's reading of *Stanley* ignores the *Stanley* opinion itself ... and flies in the face of the Court's prior treatment of *Stanley* as having been decided on substantive grounds derived largely from the Fourth Amendment." (footnote omitted)).

121. Of course, if *Stanley* was not about privacy, but rather about the First Amendment, it is hard to understand White's evident endorsement of *Stanley*'s protection of "conduct that would not have been protected outside the home." *Hardwick*, 478 U.S. at 195 (opinion of White, J.). If *Stanley* was "firmly grounded in the First Amendment," *id.*, and not the right to privacy (as well), why would *Stanley* be limited to the home? Why would it not directly call into question the existence of the Court's obscenity doctrine? Why would White's reading of *Stanley* not overturn that doctrine altogether? If White's understanding of *Stanley* was correct, what is there to be said for the distinction between public and private that the Court relied on in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973), to distinguish *Stanley*?

122. *Hardwick*, 478 U.S. at 195–96 (opinion of White, J.).

123. *See generally* Louis Henkin, *On Drawing Lines*, 82 HARV. L. REV. 63, 63–65

White believed social norms provided a reason for distinguishing between those activities that were protected by the right of privacy and those that were not, surely *he* could not have been altogether serious when he suggested it would have amounted to an exercise of judicial fiat to place a line between homosexual sodomy and the other practices (including drug possession and use, adultery, and incest) he so blithely lumped together. Such a line, after all, was no different in kind from the line between what constitutional privacy did and did not entail—the very line that White himself drew even as he purported to refuse to draw lines.[124] Perhaps it is somewhat easier to see as judgment a line (based on social norms) between social approval and social disapproval. But how the same line becomes fiat when placed between varying degrees of social disapproval, White

(1968) (discussing the practice and techniques of judicial line drawing); Yale Kamisar, *The "Right to Die:" On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481, 489 (1996) (same, in the context of the "right to die").

124. Even on White's understanding of the evidence of social norms about homosexual sexual activity, one might propose that disapproval of (some of) such activity was significantly less severe than the corresponding social disapproval of the other activities he mentioned. The "disapproval distinction," in other words, which White seemed to recognize as a legitimate basis for distinguishing between what was and what was not protected by the right to privacy, could have offered White a justification for recognizing that private, consensual same-sex sexual activity was constitutionally protected without necessarily holding that all the other activities (drug possession and use, adultery, incest, and other sexual crimes committed in the home) were similarly protected. White's failure to acknowledge the similarities between the line he drew between the Court's earlier privacy cases, *Stanley*, and private, consensual sodomy, on the one hand, and the line he refused to draw between private consensual sodomy and possession and drug use, adultery, incest, and other sexual crimes in the home, on the other, is not without consequence. As Professor Louis Henkin explained:

> The lines and distinctions of doctrine tell why cases on either side should be decided differently, and promise that future cases will be decided accordingly. The line drawn, then, is the symbol of rationality in the judicial process. The line also guides. It guides the Supreme Court itself, which will often apply it without reconsideration. It guides the hundreds of courts that take care that the Court's law is faithfully executed. It guides governmental agencies and citizens and their lawyers. If the line which the Court draws is not rational, the law and the legal process become less rational and lose the confidence of those they serve; if a line is not rational it is less likely to survive; it fails to predict accurately what the Court's law will be, thereby breeding uncertainty and undermining respect for Court and law.

Henkin, *supra* note 123, at 64. One might respond to my suggestion about where White might have drawn the privacy line, arguing that social disapproval of adultery, for instance, was (and is) less virulent, perhaps by far, than social disapproval of sodomy or homosexual sodomy. It may well be that, for men, generally, adultery is not physically punished and is even sometimes socially prized. For women, however, adultery may be met with quite different social consequences. But much more, however, would need to be said about gender and sexual norms and their relationship to social disapproval of adultery to provide an adequate answer to this objection than seems prudent to go into here.

never explained.[125] His silence here, on a matter so crucial to the structural integrity of his reasoning, lends weight to the late Tom Stoddard's blistering criticism of White's *Hardwick* opinion that it is an *ipse dixit* defined.[126]

3. Institutional Legitimacy, Caution, Morality and Social Norms

Without more, the argument I have already offered, at least, strongly suggests that Justice White's *Hardwick* opinion chiefly relied on social norms about homosexuals and homosexuality as its basis of justification.[127] But there are two final passages from that opinion against which the thesis must be tested.

The first passage comes on the heels of White's discussion of the appropriate method for elaborating unenumerated constitutional rights and his conclusion that the Constitution extends no "fundamental right to homosexuals to engage in acts of consensual sodomy."[128] In it, White spelled out his "judgment about the limits of the Court's role in carrying out its constitutional mandate":[129]

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which 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. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.[130]

125. Perhaps there is a meaningful distinction to be drawn along the lines suggested by Powell's *Hardwick* opinion, between "moribund" laws and "vital" ones. For discussion of this aspect of Powell's opinion, see *infra* Part II.C.2.

126. *See* Stoddard, *supra* note 17, at 653 ("*Ipse dixit* can never suffice for a decision by the Supreme Court of the United States and, at bottom, *Bowers v. Hardwick* is just that.").

127. Indeed, one might regard White's discussions of "homosexuals" and "homosexuality" throughtout his opinion as further evidence of White's reliance on social norms. *See Hardwick*, 478 U.S. at 187–96 (opinion of White, J.).

128. *Id.* at 192 (opinion of White, J.).

129. *Id.* at 190 (opinion of White, J.).

130. *Id.* at 194–95 (opinion of White, J.). White's biographer, his former clerk,

White's expressed concern highlights in unequivocal terms his deep-seated preoccupation with the potential repercussions *for the Court* and its precious institutional legitimacy which might have attended a decision in *Hardwick* disregarding or overriding unfavorable social norms about homosexuals and homosexual sodomy.[131] There will yet be time to assess White's reliance on such pragmatic considerations in reaching his judgment on the merits of the case.[132] At present, I need only note that those considerations are tightly bound up with White's focus on social norms as a basic justificatory theme of his *Hardwick* opinion.

Much the same can be said of the final passage of that opinion. In it, White observed that Georgia's sodomy law survived rational basis review because it was supported by widespread moral judgment disapproving of homosexual sodomy. White started out with "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable," but dismissed the

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Professor Dennis Hutchinson, calls this passage "the heart of the [*Hardwick*] opinion." After quoting it, Hutchinson goes on to observe:

> Unlike so many modern Supreme Court opinions, the words are absolutely authentic to the author—down to the ice hockey metaphor awkwardly employed to evoke the constitutional and political conflict between [President] Franklin D. Roosevelt and the Supreme Court over the constitutionality of the New Deal in 1937. The diction should not distract from two points. First, the legitimacy of judicial review—which White worried about in the abortion cases, the death penalty cases, the campaign financing cases, the legislative veto case, and so on—was central to the "claimed right," and no deft manipulation of precedent could gloss over the fact. Second, White added without elaborating a point that some political scientists and lawyers had argued for years: when the Supreme Court tests the tensile strength of its legitimacy, it not only threatens principle but jeopardizes its own political authority. A Court that weakens itself by overreaching its power invites retaliation by Congress, not only by reversing statutory decisions legislatively but by restricting the Court's power to hear issues or cases. Even worse, the Court's capacity to persuade—its only real power, as Paul Freund liked to emphasize—is likely to be diminished. The loss is likely to be across the board, at both the center and periphery of its power. The point was important, not expressly acknowledged before by any opinion for the Court, and central to the growing debate over the role of the Court and proper basis for construing the Constitution. White contented himself with making the point with a single word—"vulnerable."

DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 453–54 (1998).

131. *See* PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT 4–5 (1995) ("Whether the concern about legitimacy is valid or not, the fact is that many members of the Court have regarded it as a fragile institution and have adopted its preservation as a central part of their obligation.").

132. *See infra* note 300; Koppelman, *The Miscegenation Analogy*, *supra* note 40, at 162–64 (discussing "prudence"—or "pragmatic considerations"—in the context of White's *Hardwick* opinion).

claim that this "presumed belief" was reason enough to invalidate the law (under rational basis review) by relying—will one be surprised?—on *reductio*: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[133] He then went on to invoke what he saw as the broad moral disapproval of homosexual sodomy, concluding that Georgia's law could stand: "[Hardwick] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that"—note the move—"the sodomy laws of some 25 [sic] States should be invalidated on this basis."[134] *Q.E.D.*

At the outset of this discussion, it might have seemed easy to confuse White's and Chief Justice Burger's *Hardwick* opinions. Perhaps now, the notion that White's opinion, like Burger's, depended exclusively or primarily on history, including a history of anti-homosexual morality, may be laid to rest. Quite unlike Burger's opinion, White's depended on social norms as "the"—or "a"—primary source of constitutional judgment. It was social norms—and not history, much less history by itself—that provided the analytic foundation for White's conclusion. And what *was* that conclusion? To repeat, borrowing Sunstein's formulation: given existing social norms, as evidenced in the pattern of state laws barring this practice, which had lengthy historical roots, White's *Hardwick* opinion "held that the due process clause does not protect the right to engage in homosexual sodomy."[135]

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133. *Hardwick*, 478 U.S. at 196 (opinion of White, J.).

134. *Id.* (opinion of White, J.). It was not Georgia's majority's morality alone, White's opinion can be read to say ("the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable," *Hardwick*, 478 U.S. at 196 (opinion of White, J.)), that supported his decision to uphold the state's sodomy ban. *But see* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 29, at 1426 ("The only justification offered to, or considered by, the *Hardwick* [Court] was that a majority of the Georgia legislature had decreed that private acts of oral and anal sex offend public morality. [White's *Hardwick* opinion] deemed this sufficient, since '[p]roscriptions against that conduct have ancient roots.' "). That might have been the simple tautological reasoning Tribe argued it was. Rather, it was "majority sentiment about the morality of homosexuality," *Hardwick*, 478 U.S. at 196 (opinion of White, J.), that supported White's conclusion, and not just the majoritarian sentiment *in* Georgia, as the very next sentence of White's opinion makes clear: "We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis." *Id.* (opinion of White, J.). White's discussion of morality was thus tied into the same majoritarian norms—what I have been calling social norms—that fueled the rest of his opinion.

135. Sunstein, *Sexual Orientation and the Constitution*, *supra* note 24, at 1161. One could put White's holding differently, as Professor Donald Dripps has. *See* Dripps, *supra*

But wait. Have I not just effectively given up on the possibility of creatively reinterpreting *Hardwick*? If White's opinion "held that the due process clause does not protect the right to engage in homosexual sodomy," and that opinion was, as it purported to be, the "opinion of the Court," is the attempt to reinterpret *Hardwick* not already at an end? No—far from it. Through a close reading of Justice Powell's *Hardwick* opinion, I will show why.

C. *Justice Powell's Fifth Vote: Deciding Not to Decide*

Justice Powell provided Justice White with that crucial fifth vote White needed to write formally in the Court's name. Like Chief Justice Burger, Powell began his separate opinion by indicating his agreement. "I join the opinion of the Court," Powell wrote, continuing: "I agree with the Court that there is no fundamental right—*i.e.*, no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals."[136]

Perhaps it goes without saying. But not all joins are created equal. Because Powell's initial remarks read like a basic endorsement of White's reasoning, one can begin to appreciate why relatively so few commentators have noticed that Powell's opinion can be read another way.[137]

To understand, one must recall the nature of the right that Hardwick claimed and that the court of appeals found. Professor

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note 11, at 1440–41 ("If, as I have argued, all the *Hardwick* Court held is that an unenforced, 'moribund' sodomy statute is constitutional, then the Court's decision leaves utterly open the question of what civil law liabilities the Constitution allows the government to impose on account of sexual orientation."). Indeed, Dripps goes so far as to argue that had the Court been presented with something other than a "moribund" law, as represented by an actual challenge to a conviction by a lesbian or gay man for engaging in private, consensual sodomy, White might have voted differently. *See id.* at 1436–39. I somehow doubt it. But to the extent that Dripps intimates that now-Chief Justice Rehnquist might also have switched his vote in such a case, I doubt *that* even more. Still, stranger things have happened. Compare the Rehnquist's position in *Dickerson v. United States*, 530 U.S. 428 (2000) (upholding *Miranda v. Arizona*, 384 U.S. 486 (1966), as having laid down a rule of constitutional law), with his position in *Michigan v. Tucker*, 417 U.S. 433 (1974) (describing *Miranda*'s rule as prophylactic, not itself constitutionally commanded). For commentary on Rehnquist's position on the Court's ruling in *Miranda*, see Yale Kamisar, Reflections on Dickerson v. United States, Remarks at the Annual Meeting of the Oregon State Bar Association (Sept. 15, 2000) (on file with the North Carolina Law Review).

136. *Hardwick*, 478 U.S. at 197 (opinion of Powell, J.).

137. Some have simply overlooked Powell's *Hardwick* opinion, while others have thought it enough to stop after remarking that he sounded his agreement with White's privacy analysis. *See, e.g.*, Hunter, *supra* note 89, at 83.

Laurence Tribe (for Hardwick) advocated and the court of appeals announced a fundamental right to engage in private, non-commercial intimate association between consenting adults—a right that itself would include a right to engage in private same-sex sexual activity.[138] This is the right that Powell, joining White, said was not protected as fundamental under the Due Process Clause. His opening agreement with White thus did not itself analytically preclude recognition of either a narrower right to engage in same-sex sexual activity or an alternative grounding for such a right. We will come back to this point in a moment.

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138. As Tribe remarked at oral arguments in *Hardwick*, on Hardwick's behalf: "I think ... it is misleading to say that we are championing a fundamental right to commit a particular sexual act. We are saying that there is a fundamental right to restrict government's intimate regulation of the privacies of association like [this] in the home." Oral Argument for Respondents, Bowers v. Hardwick, 478 U.S. 186 (1986), *reprinted in* 164 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 653–54 (Philip B. Kurland & Gerhard Casper eds., 1987) [hereinafter *Hardwick* Oral Arguments]. Or, as Tribe explained in his *Hardwick* brief, there is a fundamental right to engage in "wholly consensual, noncommercial sexual relations between willing adults." Tribe, *Hardwick* Brief, *supra* note 95, at 4. Or, as he put it a few pages later: "This case involves a claim of constitutional protection for the associational intimacies of private life in the sanctuary of the home." *Id.* at 7 (footnote omitted). The omitted footnote specified that "[n]o claim of special protection is made here for all activities that may be deemed 'intimate,' nor for all activities that may seek shelter inside the four walls of a private home." *Id.* at n.8 (internal reference omitted). The internal reference is to "Section II" of the Tribe brief, which he captioned, "CLOSE SCRUTINY OF A LAW THAT CRIMINALIZES THE MOST PRIVATE OF RELATIONSHIPS WILL IN NO WAY ENDANGER LAWS THAT REGULATE THE PUBLIC SPHERE." *Id.* at 19. In that section of his brief, Tribe dealt not only with the public/private distinction, but also explained that all private sexual relations, e.g., adultery or polygamy, were not immune from regulation under his theory of the case. *Id.* at 23. As Tribe additionally went on to explain: "Marriage ... is a contract controlled by the state .... Thus close scrutiny of state intrusion upon private, consensual, noncommercial sexual acts ... does not suggest similar scrutiny of laws that would restrain those who have entered marriage contracts from violating those agreements." *Id.* (footnotes and citations omitted); *see also* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 29, at 1427–29 (arguing that the *Hardwick* Court used the wrong level of generality to conceptualize Michael Hardwick's consitutional claim); TRIBE & DORF, *supra* note 22, at 73–76 (discussing what level of generality should be used to describe a fundamental right). The court of appeals spoke of the broad right involved in *Hardwick* in terms that lent weight to Tribe's point. *See* Bowers v. Hardwick, 760 F.2d 1202, 1212 (11th Cir. 1985) ("[T]he ... Court's analysis of the right to privacy ... leads us to conclude ... Georgia['s] 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.* ("This is not a case involving sexual activity with children or with persons who are coerced either through physical force or commercial inducement. The absence of any such public ramifications in this case plays a prominent part in our consideration of Hardwick's legal claim.").

To be sure, White was not impervious to Hardwick's claim about a generalized right to private sexual intimacies. He expressly mentioned it in several places in his opinion in order, of course, to dismiss it.[139] Throughout the remainder of his opinion, however, White demonstrated far, far greater interest in evaluating and rejecting the basis for constitutionally recognizing the considerably narrower "fundamental right [of] homosexuals to engage in sodomy."[140] Had White not said so expressly, it would nevertheless have followed logically from his rejection of a narrow right to engage in homosexual sodomy that he did not believe there was a generalized right of privacy or sexual privacy. No lesser, hence no greater.[141]

Powell, in contrast, began his opinion by speaking only of the broad right of sexual privacy. In doing so, he left open the possibility that the narrower right might yet be found to exist.[142] What Professor Yale Kamisar has written elsewhere seems equally applicable here:

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139. *Hardwick*, 478 U.S. at 189 (opinion of White, J.) (noting that the circuit court held "that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment," and then going on to state "[w]e agree with the petitioner that the Court of Appeals erred, and hence reverse its judgment"); *id.* at 191 (opinion of White, J.) ("[A]ny claim that [the Court's privacy cases] stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* [*v. Population Services International*, 431 U.S. 678 (1977),] twice asserted that the privacy right . . . did not reach so far.") (citation omitted); *id.* at 195 (opinion of White, J.) ("[I]f respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.").

140. *Hardwick*, 478 U.S. at 190 (opinion of White, J.) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."); *see also, e.g.*, *id.* at 190–91 (opinion of White, J.) ("[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."); *id.* at 191 (opinion of White, J.) ("Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy."); *id.* at 192 (opinion of White, J.) ("[N]either of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."); *id.* at 195 (opinion of White, J.) ("Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home.").

141. *But see* Cruz, *supra* note 38, at 326 ("The Constitution might include a more broadly formulated right while not including a more narrowly formulated one if the abstract specification names a constitutionaly protected value while the more concrete specification does not.").

142. Perhaps Justice Powell's opinion can be read to have left open the possibility that the broader right might yet be found to exist. *See infra* Part II.C.2.

Powell's focus on the broad right may well have been a result of his "reluctance to rule out the possibility of a right to [engage in private, consensual gay sex between adults] in every set of circumstances and a desire to 'proceed with special caution' in this area."[143] Perhaps the best evidence that this is so is found in that language of Powell's opinion, in which he proposed that a successful challenge under the Eighth Amendment might lie for an adult who had been punished by prosecution, conviction, and sentence for engaging in consensual and non-commercial private sodomy with another adult of the same sex (what, for the sake of ease, I will call either "private same-sex sex" or "private gay sex").

I will continue explaining how Powell's opinion can be read to have left the door open for a future challenge to a law banning homosexual sodomy. But before I do, let me flag one sentence from his opinion, in which he appeared to be embracing a much larger portion of White's reasoning than I have and will suggest. "But the constitutional validity of the Georgia statute was put in issue by respondents," Powell wrote, "*and for the reasons stated by the Court*, I cannot say that conduct condemned for hundreds of years has now become a fundamental right."[144] I will return to this remark once its surrounding context has been illuminated. For the time being let me simply say that, properly set in context, the meaning of this sentence—with its significant but much missed "now"—is different than what, taken in isolation, it might appear to be.

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143. Kamisar, *supra* note 26, at 915. In the passage from which I quote, Professor Kamisar is dealing with the meaning of Justice O'Connor's separate opinion in the Court's recent assisted suicide cases, *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997).

Be that as it may, by focusing on the broad—as opposed to the narrow—right involved in *Hardwick*, Powell may have shown that his concern with what Dean John C. Jeffries, Jr. has called the " 'human dimensions' of laws against homosexuals." JEFFRIES, *supra* note 103, at 527. Certainly, the emphasis is some indication of the "gulf that separated [Powell] from Burger and White." *Id.* As Jeffries has explained more fully:

> [Powell's opinion] said merely that imprisonment for consensual sodomy would create a serious Eighth Amendment issue, which he would not get into as it had not been raised below. The point seemed almost an aside. It did not convey the strength of Powell's commitment to the Eighth Amendment theory or suggest how far he was prepared to go. It did not reveal the gulf that separated him from Burger and White. It said nothing about the doubts and concerns that had led Powell first to vote against the Georgia sodomy statute and only later to change his mind. It gave no hint that anyone in the Court's majority was the least concerned about the "human dimensions" of laws against homosexuals.

Id.

144. *Hardwick*, 478 U.S. at 198 n.2 (opinion of Powell, J.) (emphasis added).

1. Powell's Eighth Amendment Theory

After telling us he joined Justice White's opinion, Justice Powell went on to elaborate an Eighth Amendment theory of the case, presumed by many commentators to be a major motivation for writing separately:

> This is not to suggest, however, that [Hardwick] may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed [for] serious felonies such as aggravated battery, first-degree arson, and robbery . . . .[145]

Professor Kendall Thomas has offered one interpretation of this aspect of Powell's opinion. According to Thomas:

> The implication is clear enough. Justice Powell in effect proposes what might be called a constitutional "systems analysis," whose task would be to compare the sanctions provided for under Georgia's sodomy law with those criminal statutes that carry similar punishments. If this comparative inquiry shows that the substantive conduct criminalized under [those] other statutes is more "serious" than the consensual sexual acts proscribed by the sodomy law, then the sanction provided under the sodomy statute may be deemed disproportionately excessive, thus rendering the law itself constitutionally suspect.[146]

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145. *Id.* at 197–98 (opinion of Powell, J.) (footnote and citations omitted). As Powell then concluded, "In this case, however, respondent has not been tried, much less convicted and sentenced. Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us." *Id.* at 198 (opinion of Powell, J.) (footnote omitted).

146. Thomas, *Beyond the Privacy Principle*, *supra* note 14, at 1471. Expanding on his interpretation, Thomas observed:

> [I]n a strict sense, the disproportionality argument by no means logically forecloses retention of "sodomy" statutes as part of the substantive criminal law. For example, one cannot tell from Justice Powell's opinion whether, and if so why, a statute imposing ten months in prison would pass constitutional muster and one imposing ten years would not. At this level, Powell's position arguably relies more on intuition than objective analysis.

Id. at 1471 n.152. To foreshadow, one way of understanding Powell's Eighth Amendment theory is to read it as suggesting that *any* criminal punishment for homosexual sodomy

Thomas's reading is certainly plausible. After all, Powell did note that the Georgia law under consideration in *Hardwick* authorized a prison sentence for as long as twenty years for engaging in a single act of consensual sodomy.[147] And he did observe that "[u]nder the Georgia statute[,] a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed [for] serious felonies such as aggravated battery, first-degree arson, and robbery."[148] And so, it may well sound as if Powell had in mind precisely the kind of "systems analysis" Thomas has described.

One plausible reading alone, however, does not define a text. In the case of Powell's opinion, an equally—if not more—plausible reading than Thomas's calls out for attention. Powell, it should be remembered, did not ultimately take aim at "a [prison] sentence of long duration" for private same-sex sex. Rather, it was *any* prison sentence for such conduct, Powell said, that would face a serious constitutional obstacle. In the Justice's own words, "In my view, *a prison sentence for such conduct—certainly a sentence of long duration*—would create a serious Eighth Amendment issue."[149]

One need not agree entirely with Thomas's reading of Powell's opinion (and I do not) in order to share his view that "Powell's argument regarding an Eighth Amendment-based challenge to anti-

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would be unconstitutional. That reading and Thomas's raise different sets of questions. Thomas's reading, on the one hand, might lead one to wonder: Why would "a statute imposing ten months in prison . . . pass constitutional muster and one imposing ten years . . . not[?]" *Id.* On the other hand, the reading I am presently proposing might lead one to ask: Should a criminal sanction for private gay sex be treated differently, for constitutional purposes, than a non-criminal one? If so, why? I myself think it doubtful that the Court would have long maintained, had it ever accepted, a distinction between criminal and non-criminal sanctions for private gay sex. Still, had it wished to maintain such a distinction, the Court would have had ample doctrinal resources at its disposal. Thus, on reading reading of it, Powell's Eighth Amendment theory does not decide the case in which a criminal conviction under state law for private, gay sex carried only a punishment of a fine; it might or might not be unconstitutional. An interesting theory that one might fruitfully develop is that a civil sanction for consensual gay sex could be treated as an unconstitutional "taking" under the Fifth or Fourteenth Amendment. (No puns intended.) Finally, I am inclined to think—for reasons I explain later, *see infra* Part II.C.2—that Powell was not really so particularly interested in a distinction between criminal and non-criminal sanctions as his Eighth Amendment theory might, at first glance, seem to imply.

147. *Hardwick*, 478 U.S. at 197–98 (opinion of Powell, J.) (citations omitted).

148. *Id.* at 197–98 (opinion of Powell, J.) (citations omitted).

149. *Id.* at 197 (opinion of Powell, J.) (emphasis added); *see also* JEFFRIES, *supra* note 103, at 527 ("Powell was prepared to rule that a lengthy prison sentence—*indeed, any prison sentence*—would be grossly excessive for private sexual activity between consenting adults." (emphasis added)).

sodomy statutes clearly rests on a view that the meaning of the amendment is an evolving one."[150] As Powell undoubtedly knew, the Court had expressly tied the meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause to the notion of "evolving standards of decency" in cases pre-dating *Hardwick*.[151]

So what did those "evolving standards of decency" as they pertained to criminal punishment for engaging in private gay sex look like at the time of the decision in *Hardwick*? One finds an answer at that moment in Powell's opinion when he turned a spotlight on the representation made to the Court during oral arguments by Georgia's

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150. Thomas, *Beyond the Privacy Principle*, *supra* note 14, at 1471 n.150.

151. *See* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (Powell, J., for the Court). All nine Justices (even the Justices in dissent) agreed on one point in *Furman v. Georgia*, 408 U.S. 238 (1972): the meaning of the Cruel and Unusual Punishments Clause is an evolving one. The Court had also used the expression "contemporary standards of decency." *Rhodes*, 452 U.S. at 343. As Donald Dripps has observed, "Powell played a leading role in moving the Court to scrutinize prison terms, as well as death sentences, under the Eighth Amendment's 'cruel and unusual punishments' language." Dripps, *supra* note 11, at 1434. The "evolving standards of decency" test that Thomas identified within Powell's opinion is a reflection of Powell's reliance on social norms in reaching his conclusion. But more must be said before I elaborate my thoughts about that conclusion.

The two readings of Powell's opinion—the one offered here and the one Thomas has proposed—can thus be expressed in terms of which the Court's Eighth Amendment precedents most closely correspond to Powell's Eighth Amendment theory. Thomas's reading would (and did) rely on the Court's decision in *Solem v. Helm*, 463 U.S. 277, 290–92 (1983), whereas the reading in the text might draw on *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962); or *Trop v. Dulles*, 356 U.S. 86 (1958). *See* Thomas, *Beyond the Privacy Principle*, *supra* note 14, at 1470–72, 1471 n.151

For additional discussions of the merits of relying on *Robinson* to understand the reasoning of Powell's *Hardwick* opinion, see GARROW, *supra* note 103, at 659 (noting that Powell relied on *Robinson* at the Conference discussion of *Hardwick*); JEFFRIES, *supra* note 103, at 520 ("The [Powell] clerks . . . invoked a different aspect of Eight Amendment law, the 1962 decision in *Robinson v. California*. . . . [T]he clerks felt that the act of sodomy was so closely linked to the status of homosexuality that perhaps *Robinson* could be stretched to protect both from criminal prosecution."); *id.* at 520 (noting that Powell accepted the clerk's recommendation of the *Robinson* theory). *But see* GARROW, *supra* note 103, at 660 (quoting memorandum from Powell to the Conference backing away from his reliance on *Robinson* but reserving decision on whether he would "join an opinion finding no substantive due process right or simply join the judgment"); JEFFRIES, *supra* note 103, at 526 (observing that after the Conference discussion of *Hardwick*, Powell "abandoned" the *Robinson* approach to the case in favor of a "disproportionality" theory of the case); *id.* at 527 ("Powell was prepared to rule that a lengthy prison sentence—indeed any prison sentence—would be grossly excessive for private sexual activity between consenting adults. . . . [T]his reasoning allowed Powell . . . to forbid criminal punishment for homosexual sodomy without getting into the more difficult issues . . . he did not want to face."). One could think of *Robinson* as a kind of "disproportionality" case in that any prison sentence, given the nature of the offense, was out of proportion to any reasonable governmental end. But this is a different and broader conception of "disproportionality" than that at issue in a case like *Solem*, or in the kind of constitutional "systems analysis" Thomas has described.

Attorney General, that private same-sex sex was not ordinarily (and had not, for years, been) an offense that led to criminal prosecution, conviction, or sentence.[152] Extrapolating from the state of affairs in Georgia, Powell can be read to have expressed the "evolving standard" quite capaciously (and in a way that White's opinion, evidently, disregarded): "The history of nonenforcement [in Georgia] suggests the moribund character today of laws criminalizing this type of private, consensual conduct."[153] As if to reinforce the point, there

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152. *Hardwick* Oral Arguments, *supra* note 138, at 634. As Powell explained:

> It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades. Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute. The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right."

Hardwick, 478 U.S. at 198 n.2 (opinion of Powell, J.) (citation omitted). Hereafter, when I speak about "sentencing" or "punishment" in the context of Powell's opinion, I will generally do so with prosecution, conviction, *and* sentence in mind, unless otherwise specified or clear from context.

153. *Id.* (opinion of Powell, J.). The standard reply to a suggestion like Powell's, that sodomy laws go unenforced, at least insofar as private gay sex is concerned, is that it is simply not true. Tribe, for instance, assails the argument from desuetude at its source:

> Michael Hardwick actually spent that day in jail following his arrest by the Atlanta police. [*See* Robinson v. California, 370 U.S. at 667 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").] He was incarcerated despite the fact that a bondsman was present at the processing desk almost immediately upon his arrival at the jail.... To defer resolution of the eighth amendment issue until ... a [formal] jail sentence—something that may never occur hereafter—is to give state officials a license to inflict cruelty without legal accountability, since the laws criminalizing consensual adult intimacies are most typically used "only" to stigmatize, to justify discriminatory treatment, and to victimize individuals in the very way Michael Hardwick was victimized—without trial or sentence. Thus jailers and prosecutors could forever insulate statutes such as Georgia's from judicial review by the simple expedient of arresting and temporarily jailing offenders but declining to complete prosecution. In a strange inversion of the civil contempt context, where prisoners hold the keys to their own jail cells, jailers in Atlanta and elsewhere would hold the keys to the federal courthouse.

TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 29, at 1425 n.32 (citation omitted).

"Cruelty without accountability" is strong language, as is the language in the remainder of Tribe's argument. I concur in Tribe's observation that sodomy laws, even though they go unenforced, are used to "punish" gays in a number of direct and indirect ways. But the observation may, for some, be no answer to Powell's point that sodomy laws are not used to "punish" gays for private, consensual sodomy in the ordinary sense of what "criminal punishment" means (under the Eighth Amendment). One could say that if Tribe does give us an answer, it is because he has changed the question to one about what

is Powell's additional remark that "[s]ome 26 States ha[d] repealed similar statutes."[154] One might say that, from aught Powell surveyed, "evolving standards of decency" seemed harmoniously aligned:[155] punishment, certainly criminal sentence, for engaging in private gay sex was beyond the constitutional pale.

Still, Powell may be thought to have reasoned, there had been no deviation from the straight and narrow of those "decent" standards in *Hardwick*. "In this case," Powell wrote, ending his short opinion, "respondent has not been tried, much less convicted and sentenced. Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us."[156]

As Hardwick's counsel before the Court, Tribe did not forget—nor did he fail to mention—that his client had been subject to the processes of the criminal law. In order to keep the Court from veering away from a judgment on the merits, Tribe repeatedly went out of his way to emphasize that Hardwick had been arrested and, under the relevant statute of limitations, "remain[ed] subject to prosecution for the charged offenses."[157] Perhaps as a strategy for

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(un)constitutional "punishment" is or should be. For the argument that, however harrowing and humiliating Hardwick's day in jail, *id.* ("While putting him behind bars . . . jail officers made it clear to the other inmates that Hardwick was gay and had been charged with sodomy, saying, 'Wait until we put [him] into the bullpen. Well, fags shouldn't mind—after all, that's why they are here.' "), it was not the same thing as serving a prison sentence after being convicted of a felony, see Dripps, *supra* note 11, at 1424 n.27 ("Note how artfully Tribe equivocates between Hardwick's particular injury—the arrest, of which Hardwick did *not* complain—and the common grievance against official insult, of which he did complain.").

154. *Hardwick*, 478 U.S. at 198 n.2 (opinion of Powell, J.).

155. *Cf.* WHITE, *supra* note 36, at 170 ("It is a deep part of our understanding of the law that the results in particular cases should not only be legal but just, and this naturally leads judges and lawyers alike to see harmony in the various sources of authority that bear on a case.").

156. *Hardwick*, 478 U.S. at 198 (opinion of Powell, J.) (footnote omitted).

157. Tribe, *Hardwick* Brief, *supra* note 95, at 2 (citation and footnote omitted). During the oral arguments in *Hardwick*, Tribe explained that:

> I want to make some comment about the suggestion implicit in some of the questions, that the absence of frequent prosecution in cases like this, apart from how strongly it suggests the State of Georgia hardly has a compelling or important interest in vindicating this law, might also provide an avenue for avoiding a decision much as the Court found one in Poe versus Ullman.
>
> It does not seem to me that that avenue is a plausible one here for several reasons. After all, Mr. Hardwick was arrested. Under this very arrest, he could still be prosecuted. Under this arrest, he is subject to considerable restraint. And, the state's undisputed resolve to enforce this law, at least in some instances, according to their own catalogue of where they think it is appropriate to enforce it if evidence comes to their attention. That resolve is undiminished, especially

keeping the Court on course towards a judgment on the merits, Tribe's maneuver worked (although, as I will presently explain, I have my doubts). But all the same, by highlighting for the Court that Hardwick had not been subject to actual prosecution, conviction, or sentence, Tribe reminded Powell that he had all the wiggle room he might have wanted or needed to avoid handing Hardwick the relief he sought, even under an Eighth Amendment theory.[158]

As I have suggested, one can read Powell to say, perhaps a little coldly,[159] that Hardwick had to bear the risk of punishment, including sentence, for private same-sex sex (tiny though the risk appeared), discounted by the likely success of a subsequent Eighth Amendment challenge. If one were to read Powell's opinion this way, one would probably understand Powell's talk about the history of non-prosecution for private gay sex in Georgia and the inference it helped raise about the "moribund character ... of laws criminalizing" private, consensual sodomy[160] as nothing much more or less than a set

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since this is a facial attack on the law.

It seems to us that the nature of the harm that Mr. Hardwick suffers from having been arrested and being told he is a criminal and might be arrested again makes it very difficult to avoid decisions.

Hardwick Oral Arguments, *supra* note 138, at 650. Thanks to my colleague Joan Larsen for helping me see the point clearly.

158. It is interesting to note that *Loving* involved a formal conviction for Virginia's prohibition against miscegenation. The Lovings were convicted and sentenced for miscegenating, but their one-year prison sentence was suspended on the condition that they leave Virginia for a period of years. Loving v. Virginia, 388 U.S. 1, 3 (1967). (The facts of *Loving* thus look remarkably like the facts of a sodomy case that, as I will explain, Powell may have been awaiting.) One might think that prosecution and punishment for violating state law was a significant difference between *Loving* and *Hardwick*. It is hard to say, however, whether that difference makes *Loving* an easier case or a harder case than *Hardwick*. From one perspective, *Loving* (which involved both formal prosecution and punishment) may seem an easier case than *Hardwick* (which did not). But from another perspective, the fact that the Lovings were criminally punished might be regarded as evidence that the cultural norms disapproving miscegenation were still electric at the time *Loving* was decided in a way cultural norms disapproving homosexual sodomy at the time of *Hardwick* were not. *Cf.* Note, *Constitutionality of Anti-Miscegenation Statutes*, 58 YALE L.J. 472, 479 & n.41 (1949) (discussing several prosecutions under miscegenation state laws from the late 1940s). Accordingly, *Loving* may be a harder case than *Hardwick*; or it may be more accurate to say, *Loving* is both easier and harder than *Hardwick* (and vice versa). Either way, laws against miscegenation were not *always* only used to punish individuals for miscegenating. In *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va. 1956) (per curiam), *appeal dismissed*, 350 U.S. 985 (1956) (per curiam), they were, for example, used as the basis for annulling a marriage. For additional discussion of *Naim*, see *infra* Part IV.A.

159. *See* JEFFRIES, *supra* note 103, at 527 (proposing that Powell's opinion "gave no hint that anyone in the Court's majority was the least concerned about the 'human dimensions' of laws against homosexuals").

160. *Hardwick*, 478 U.S. at 198 n.2 (opinion of Powell, J.).

of "talking points" for an Eighth Amendment opinion Powell might have written (or joined) in some future sodomy case. But before stopping with this reading, we should sharpen our interpretive tools and dig more deeply into Powell's *Hardwick* opinion to see what else it can be interpreted to say.

2. Powell's Opinion (Re-)Defined

We often speak of a text's "plain meaning," but as a general, if not categorical, rule, meaning is not found on the surface of a text.[161] Justice Powell's *Hardwick* opinion is no exception, and it is a mistake to treat it as if it were. Reading Powell's opinion as simply having set forth an Eighth Amendment proscription against sodomy laws does not explain the entirety of this very short text. Nor, for that matter, does such a reading capture the notable gap in Powell's reasoning, nor yet, as we will see, the text's notable internal conflict. Although Powell himself did not put it this way, his reference to an Eighth Amendment theory of the case, along with his refusal to pass judgment on it, can be understood as a stand-in for a refusal to decide Hardwick's due process claim.[162]

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161. *See* FISH, DOING WHAT COMES NATURALLY, *supra* note 31, at 87 ("Just as there are those in the legal community who have insisted on construing statutes and decisions 'strictly,' ... so there are those in the literary community who have insisted that interpretation is, or should be, constrained by what is 'in the text.' "). *See generally* FISH, IS THERE A TEXT IN THIS CLASS?, *supra* note 50 (articulating assumptions that can underlie the interpretation of written text). My argument here may be *in part* an appeal to the text. But as should become clear, it is at most *only in part* an appeal to the text. *See id.* at 340 ("One cannot appeal to the text, because the text has become an extension of the interpretive disagreement that divides[;] and, in fact, the text as it is variously characterized is a consequence of the interpretation for which it is supposedly evidence."). The reading of Powell's opinion and the redefinition of *Hardwick* I am trying to enable will be preferable to the standard interpretation of *Hardwick*, or not, for reasons other than what Powell's text "plainly says." Social context, for example, is one source of judgment that may provide an additional reason for reading Powell's text the way I am about to do. *See infra* Part IV.C. The specification of that context and the relevant facts within it are not, I recognize, simply interpretive causes, but interpretive consequences, as well. *See* FISH, DOING WHAT COMES NATURALLY, *supra* note 31, at 108. ("But while it is certainly true that context constrains interpretation, it is also true ... that context is a product of interpretation and as such is itself variable as a constraint.").

162. Of course, it is not self-evident that the argument from desuetude need be an argument for judicial hand staying. To the contrary, should laws banning sodomy go unenforced, one might reasonably argue that the Court should have stepped in to pronounce last rites on a dead law. *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 51, at 108–15 (discussing the argument from desuetude generally and in the particular context of laws banning physician-assisted suicide); *id.* at 110 (proposing that White's opinion in *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment), "can be understood to point to concerns" of desuetude). One version of an argument from desuetude calls for courts to strike down laws that show no continued signs of

Let us begin by considering the striking parallels between Powell's Eighth Amendment reasoning and the legal theory Justice Felix Frankfurter utilized to avoid a judgment on the merits in *Poe v. Ullman*.[163] Impressed by the history of nonenforcement of Connecticut's anti-contraceptive law, Frankfurter maintained that "[d]eeply embedded traditional ways of carrying out state policy—*or not carrying it out*—are often tougher and truer law than the dead words of the written text."[164] From this, it was but a small step for Frankfurter to conclude that *Poe* did not present the Court with the kind of real controversy that warranted judgment on the merits of the substantive constitutional issue ostensibly implicated by the case:

> It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting. If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here. Eighty years of Connecticut history demonstrate a similar, albeit tacit agreement. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality.[165]

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vitality, but leaves room for legislatures to resuscitate them. *See* Quill v. Vacco, 80 F.3d 716, 731–43 (2d Cir. 1996) (Calabresi, J., concurring) (applying such an argument from desuetude to strike down a state law banning physician-assisted suicide). For other commentary on the arguments from desuetude, see, for example, Corey Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449, 489–90. For recent commentary on desuetude in the realm of substantive due process, see Cruz, *supra* note 38, at 333–39.

163. 367 U.S. 497 (1961) (plurality opinion). Powell was reminded of Frankfurter's *Poe* theory during oral arguments in *Hardwick*. *See supra* note 157 (setting forth remarks by Tribe in the oral arguments in *Hardwick* about Frankfurter's decision in *Poe*).

164. *Poe*, 367 U.S. at 502 (plurality opinion) (internal quotation marks and citation omitted) (emphasis added).

165. *Id.* at 507–08 (plurality opinion) (citations omitted). Frankfurter's views seem to have dripped from Judge Learned Hand's pen when he wrote that since the power of judicial review "is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer." LEARNED HAND, THE BILL

There are unmistakable echoes of Frankfurter's reasoning in Powell's elaboration of his Eighth Amendment rationale in *Hardwick*. The "concession" at oral argument "that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades,"[166] and the state's choice not "to present the criminal charge against Hardwick to a grand jury"[167] were strong indications of what "the law" of sodomy in Georgia (and elsewhere) was at the time *Hardwick* was decided. As Frankfurter expressed the idea: "[d]eeply embedded traditional ways of carrying out state policy—*or not carrying it out*—are often tougher and truer law than the dead words of the written act."[168] Powell captured the gestalt of Frankfurter's *Poe* plurality with his own remark that "[t]he

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OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 15 (1958). It is no coincidence that Hand's famous Holmes Lecture (later published as *The Bill of Rights*) should sound so much like Frankfurter. Frankfurter's influence on Hand in putting the lectures together has been well documented by Hand's biographer and former clerk, Professor Gerald Gunther. *See* GERALD GUNTHER, LEARNED HAND, THE MAN AND THE JUDGE 664–72 (1994) (noting the influence of Frankfurter in the development of Hand's Holmes Lectures). Gently casting doubt on Hand's views in *The Bill of Rights*, Professor Herbert Wechsler explained in his well-known article on "neutral principles":

> If [Hand's view] means that a court, in a case properly before it, is free—or should be free on any fresh view of its duty—either to adjudicate a constitutional objection to an otherwise determinative action of the legislature or executive, national or state, or to decline to do so, depending on "how importunately" it considers the occasion to demand an answer, could anything have more enormous import for the theory and the practice of review? What showing would be needed to elicit a decision? Would anything suffice short of a demonstration that judicial intervention is essential to prevent the government from foundering—the reason, you recall, for the interpolation of the power to decide? For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way.

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959). Even the great devotee and proponent of the "passive virtues" of judicial review (and the former Frankfurter clerk) Professor Alexander Bickel thought that Hand had gone too far and called Hand's argument "a radical doctrine of judicial restraint." *See* Alexander M. Bickel, *Judicial Restraint and the Bill of Rights*, NEW REPUBLIC, May 12, 1958, at 16 (quoted in GUNTHER, *supra*, at 782 n.104). To some, like Gunther, Bickel's advocacy of the passive virtues in his book, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d. ed. 1986) [hereinafter BICKEL, THE LEAST DANGEROUS BRANCH], teetered on the edge of radicalness themselves. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 24–25 (1964) [hereinafter Gunther, *Subtle Vices*].

166. *Hardwick*, 478 U.S. at 198 (opinion of Powell, J.) (citation omitted).

167. *Id.* (opinion of Powell, J.).

168. *Poe*, 367 U.S. at 502 (plurality opinion) (internal quotation marks and citation omitted) (emphasis added).

history of nonenforcement [of Georgia's sodomy ban] suggests the moribund character today of laws criminalizing this type of private consensual conduct"—particularly given that "[s]ome 26 States ha[d] repealed similar statutes."[169]

This was all Powell needed to say in order to establish the predicate for his Eighth Amendment theory. He had adequately set forth what the "evolving standards of decency" were and pointed out that nothing indecent in the relevant constitutional sense had happened to Hardwick. Was Powell, then, simply embellishing the point a little too gaudily when he went out of his way to mention that *Hardwick* was "a suit for declaratory judgment brought by respondents challenging the validity of the statute,"[170] and when, just a few short sentences later, he wrote to similar effect that "the constitutional validity of the Georgia statute was put in issue by respondents,"[171] and *again* at the end of his opinion, that "respondent has not been tried, much less convicted and sentenced"?[172] Perhaps so.

Powell's additional remarks make a good deal *more* sense, however, and may well have been worth making, if his Eighth Amendment rationale served as a stand-in for a non-justiciability ruling on the substantive due process claim at issue in *Hardwick*. Unlike Frankfurther, Powell may not himself have gone on expressly to mold the argument from desuetude that he was suggesting into such a ruling (or should I say, "non-ruling").[173] But it equally would

169. *Hardwick*, 478 U.S. at 198 n.2 (opinion of Powell, J.).

170. *Id.* (opinion of Powell, J.).

171. *Id.* (opinion of Powell, J.).

172. *Id.* at 198 (opinion of Powell, J.) (footnote omitted).

173. On my reading of Powell's opinion, one might ask: What kind of non-justiciability ruling is reflected in Powell's opinion? Based on the analogy to *Poe*, one might fairly say (in response) that it is a ruling that Hardwick's case was not "ripe." *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 122–23 (2d ed. 1994) (calling *Poe* "a classic example of a case dismissed for lack of ripeness"). Alternatively, one might say it is a ruling on "standing" grounds. *See* Dripps, *supra* note 11, at 1422–34 (arguing that Hardwick lacked standing because he could not establish "injury in fact"). Indeed, some commentators regard *Poe* as a "standing" and not a "ripeness" case. *Id.* at 1433 ("[I]t seems clear from *Poe v. Ullman* that the injury-in-fact hurdle is not lowered in sexual privacy cases"). Although the court of appeals had ruled that Hardwick had standing to challenge Georgia's law, *see* Hardwick v. Bowers, 760 F.2d 1202, 1204–07 (11th Cir. 1985), the State did not appeal that aspect of the lower court's decision. Thus, Tribe may not have been strictly obligated at the time of *Hardwick* to articulate any theory why a ruling on justiciability grounds was inapposite in the case. He did, however, argue the point during oral arguments, *see supra* note 157, and obviously, write about it later. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 29, at 1425 n.32. Finally, one might even say that *Poe* was a case that involved the general warrant against issuing advisory opinions. *See id.* at 74–75 (discussing *Poe* as an example of a "[n]onjusticiable declaratory

have suited what, based on the structure of Powell's decision, appears to have been his intention and, perhaps more importantly, its consequence: *to leave room in a future case for a decision announcing that the state lacks constitutional authority to punish consensual, private same-sex sexual activity.* The significance of these intentionalist and consequentialist equations will become clear (or clearer) shortly.[174]

One potential ambiguity already calls out for attention. Which of the constitutional rights involved in *Hardwick* can we understand Powell to have deferred adjudicating? Is it the narrow substantive due process right to engage in private gay sex or the broad due process right to engage in private, non-commercial intimate associations? It would be relatively easier to maintain that Powell (meant to) put off for a later date a ruling on the existence of the narrower substantive due process right. For, as I have already explained, the opening passage of Powell's opinion neither mentioned nor disparaged the constitutional *bona fides* of that right.[175] Although it will pose an additional challenge and require further explanation, the reading I am offering is relatively more comprehensive. What I mean to propose is that one can treat Powell's opinion as having

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judgment action" in the context of a discussion of the relationship between declaratory actions and the prohibition against federal courts' issuance of advisory opinions); *see also* CHEMERINSKY, *supra*, at 47–53 (discussing advisory opinions). I do not seek to defend the inchoate theory of justiciability in Powell's text or to classify it in any one of the ways in which it could arguably be classified. As some commentators have observed, there is considerable overlap, or redundancy, between and among the concepts of ripeness, injury and advisory opinion doctrines; accordingly, one need not choose one categorization. *Cf., e.g.*, CHEMERINSKY, *supra*, at 47–53 (noting multiple ways to articulate non-justiciability rulings). My point, then, is that such a ruling, however defined, can be found in, or can legitimately be read into, Powell's opinion. *See infra* notes 174–205 and accompanying text. Doing so may help give life to Professor Donald Dripps's general observation that: "If the Court had dismissed, for want of [a justiciable claim], the claim Hardwick actually brought, cases of . . . discrimination against gays would still be litigated, but without the complications posed by a homophobic precedent." Dripps, *supra* note 11, at 1444.

174. To some, these intentionalist and consequentialist equations will seem unpersuasive. But if so, it cannot be because such equations are unfamiliar to those of us in the law. I do not mean to embrace these forms of reasoning across the board; indeed, at times, I find them deeply problematic and unpersuasive. The distinction between acts and omissions, or feasance and nonfeasance, springs most quickly to mind. Still, it would seem to me that if those forms of reasoning ever have any validity, it is here, in an interpretation of Powell's *Hardwick* opinion. *Cf.* Rubenfeld, *supra* note 13, at 751 & n.89 (1989) (asking, "How else can one explain the Court's astonishing introduction of its pivotal holding in *Eisenstadt v. Baird* with the phrase, '*If the right to privacy means anything*, it means . . .'?" (footnotes omitted)).

175. *See supra* notes 136–43 and accompanying text. Moreover, Powell's Eighth Amendment theory itself seemed to suggest that, consistent with the Constitution, private same-sex sexual activity could not be criminally punished.

avoided an adjudication of the merits of both the narrow *and* the broad substantive due process rights *Hardwick* involved.

This reading of Powell's opinion quickly runs up against a significant (but not, in the end, insurmountable) obstacle. Powell told us he shared White's view that a broad substantive due process right did not exist. It would thus seem that he passed on the merits of that right. As Powell wrote: "I agree with the Court that there is no fundamental right—i.e., no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals."[176] Nevertheless, I think we might properly resist the urge to read this remark "with the literalness of a country parson interpreting the first chapter of Genesis."[177]

Powell, as we know, was deeply conflicted during the deliberations over *Hardwick*,[178] and after the Court handed down its decision in the case, he publicly revealed that he believed the *Hardwick* "dissenters" had the better argument. He even went so far at one point as to say that he had "probably made a mistake" in the case.[179] The prevailing academic (or should I just say, "popular"?)

176. *Hardwick*, 478 U.S. at 197 (opinion of Powell, J.).

177. ALBERT R. BEISEL, JR., CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 32 (1955), *cited in* Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983). Without agreeing with it, one can read the Court's recent Eleventh Amendment jurisprudence as standing for the proposition that, at least with some consitutional texts, "plain language" does not preclude an interpretation that such texts might seem plainly to preclude. For recent Supreme Court decisions embracing such a reading of the Eleventh Amendment, see *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). If the Eleventh Amendment, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. CONST. amend. XI, can be read to stand for the proposition that a citizen of a state cannot bring suit against that state, *see* Hans v. Louisiana, 134 U.S. 1, 18 (1890), surely language in Powell's *Hardwick* opinion, which might appear to block a reading of it as a justiciability decision, is not necessarily dispositive of what the "proper" reading of the opinion "is."

178. For a general discussion of *Hardwick* and Powell's deliberations in the case, see JEFFRIES, *supra* note 103, at 513–30. *See id.* at 514 ("From the beginning, Powell found the case deeply troubling."); *id.* at 522–24 (detailing Powell's vote-reversal before *Hardwick* was handed down); *see also supra* note 151 (discussing, inter alia, Powell's vacillation in his reliance on *Robinson*).

179. CLENDINEN & NAGOURNEY, *supra* note 43, at 539 ("Four years later, Justice Lewis F. Powell, Jr., told a group of New York University students, 'I think I probably made a mistake' voting with the majority."). David Garrow and John Jeffries tell similar stories. GARROW, *supra* note 103, at 667; JEFFRIES, *supra* note 103, at 530; *see also infra* note 182 (relating Powell's considered opinion that the Court should not have granted certiorari in *Hardwick*.).

account of Powell's "confession" would have him wishing he had joined with the *Hardwick* "dissenters," associating his "mistake" in the case with not doing so.[180] Crediting this account, one could say that Powell actually, or ultimately, believed the exact opposite of what his opinion is often understood to have said. Reading Powell's *Hardwick* opinion with his subsequent remarks in mind, one might argue (though I would not) that *Hardwick* was not a five–four decision against Hardwick, but yes, startling though it may sound, a five–four decision in his favor.[181]

I wish it were otherwise, but I believe Powell may have had a different "mistake" in mind: the "mistake" of signaling his opposition to a broad right of privacy, or having said or written anything in the case at all. So much, I think, may fairly be gathered from the considered position Powell finally reached after having had years to soul-search about the case. In a letter for posterity to Tribe,[182] which

180. *See* David Cole, *Playing By Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 163 n.200 (1994) ("Indeed, Justice Powell, one of the five Justices in the [*Hardwick*] majority, essentially changed his vote after stepping down from the Court."); Evan Wolfson & Robert S. Mower, *When the Police Are in our Bedrooms, Should the Courts go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 FORDHAM URB. L.J. 997, 1000 (1994) ("Although Former Justice Lewis F. Powell has since repudiated his 'mistake[n]' 'swing vote' that made up the five-to-four majority, *Hardwick* casts a looming shadow, an excuse for judges who do not wish to protect gay people against official discrimination.").

181. Is it legitimate to interpret Powell's *Hardwick* opinion in light of his subsequent remarks about the case? If not, why not? What is the source of, and justification for, an interpretive rule many will posit, suggesting the illegitimacy of the move? Where else, if anywhere, has it been applied? Is it a special rule for Powell? For *Hardwick*, given its subject matter? How often do we ordinarily use an author's subsequent remarks in interpreting or understanding prior statements? How often do judges do so in the project of interpreting precedent? *Cf.* Compassion in Dying v. Washington, 79 F.3d 790, 803 n.16 (9th Cir. 1996) (en banc) (majority opinion written by Reinhardt, J.) (citing media reports indicating Powell said publicly he felt he made a mistake in *Hardwick*)]"), *rev'd on other grounds sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997). *But see* Compassion in Dying v. Washington, 85 F.3d 1440, 1449 (1996) (Trott, J., dissenting from denial of rehearing en banc) (rejecting as "irrelevant [Judge Reinhardt's] observation that a retired Justice Powell said he probably made a mistake in *Bowers v. Hardwick*"). What might we say "fidelity" to *Hardwick* means? What are its conditions? Does *Hardwick* (on the standard reading of the case, or the one I am proposing here) deserve fidelity? *Cf.* Catharine A. MacKinnon, *"Freedom from Unreal Loyalties": On Fidelity in Constitutional Interpretation*, 65 FORDHAM L. REV. 1773, 1773–75 (1997) (questioning why those who are excluded from full and equal protection of the Constituiton owe it fidelity). For an insightful discussion of some of these matters, see Louis Michael Seidman & Mark Tushnet, *When Judges Tell Us What They Mean*, GRAVEN IMAGES (forthcoming 2001) (on file with the North Carolina Law Review).

182. According to Powell's biographer, John Jeffries, after Powell made his remarks to those New York University students, *see supra* note 179, Tribe "wrote Powell a personal letter recalling his oral argument ... and praising Powell's 'courage and candor' in acknowledging error." JEFFRIES, *supra* note 103, at 530. As part of Powell's reply, came

does not often enough make its way into the stories about Powell's change of heart, Powell flatly declared, "The Court should not have granted certiorari" in *Hardwick*.[183]

Powell's qualification may suggest that a relatively more modest construction (or re-construction) of his *Hardwick* opinion is in order. If Powell was willing to countenance the court of appeals's judgment recognizing a broad right to sexual privacy (as his note to Tribe suggests he was),[184] he could hardly have placed much stock in his own earlier words rejecting such a right. Thus, in contrast to thinking about *Hardwick* as either a five–four decision for or against Hardwick, one might view the decision (as I am inclined to do) as something more akin to "a vote of four and a half to four and a half," or a vote of four to four, with Powell, on behalf of the Court, reserving judgment on the question that, at first glance, he may have seemed to resolve.[185] Precisely how one describes *Hardwick* in terms

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this: "The Court should not have granted certiorari" in *Hardwick*. *Id.*

183. *Id.* Recall that had that been the course the Court had followed, the right the court of appeals found would have been left in place, in that circuit, to stand. It is scarcely a circumstance that would recommend itself to a Justice who believed the circuit court's ruling was wrong as a matter of constitutional principle.

184. Powell's willingness to countenance the court of appeals's judgment did not suddenly arise only after the Court ruled in *Hardwick*. Powell was not one of the Justices who had earlier voted to grant certiorari in *Hardwick*. *See* JEFFRIES, *supra* note 103, at 514 ("On October 11, 1985, [Powell] joined the majority of his colleagues (White and Rehnquist dissenting) in refusing to grant review" in *Hardwick*.). *Compare id.* ("[T]he decisive votes came from Brennan and Marshall, who joined White and Rehnquist in granting review ...."), *with* GARROW, *supra* note 103, at 656–57 (explaining that Brennan, who had at one point voted to grant certiorari in *Hardwick*, changed his mind, withdrawing his vote, leaving White, Rehnquist, and Marshall voting to grant review in the case, with whom Burger eventually joined, making up the required four).

185. Commenting on *Branzburg v. Hayes*, 408 U.S. 665 (1972), Justice Potter Stewart pointed out that, while purporting to join the opinion of the *Branzburg* Court, Powell wrote a separate opinion in the case that was half way between the majority and the dissents. Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 635 (1975) (describing *Branzburg* as "perhaps a vote of four and a half to four and a half"). Interestingly, in a gay rights case that came to the Court the year before *Hardwick*, *National Gay Task Force v. Board of Education*, 470 U.S. 903 (1985) (per curiam), the Court agreed to review a decision by the Tenth Circuit striking down, on First Amendment grounds, an Oklahoma law "which gave public schools broad authority to fire homosexual teachers, and even their supporters." CLENDINEN & NAGOURNEY, *supra* note 43, at 533. "On appeal, the Supreme Court split 4–4, with Justice Lewis F. Powell Jr. abstaining," thus affirming the lower court decision. *Id.*; *see also* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1607 n.309 (1993) (discussing the Supreme Court's decision to grant certiorari in *Hardwick* and the Court's action in *National Gay Task Force*). *Compare Nat'l Gay Task Force*, 470 U.S. at 903, *with* Stewart, *supra*, at 635, *and* Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 631 (1949) (Fuller sets forth the fictional "Justice Tatting's" opinion, which concluded that: "Since I have been wholly unable to resolve the doubts that beset me about the law of this case, I am with regret announcing a step that is, I believe, unprecedented in the history of this

that bring us to nine matters less than does a basic interpretive point about Powell's opinion in the case. Powell having (later) indicated he would not have abided by the (earlier) "plain" words he wrote in *Hardwick*, it is anything but self-evident that—or why—*we* now should.[186]

In any event, we need not rely on Powell's conscientious choice to distance himself from his *Hardwick* opinion, such as it was, in order to read that opinion as I am proposing we can, as something other than a categorical rejection of Hardwick's due process claim, including a broad right to sexual privacy. To appreciate why, imagine that Hardwick had been convicted and sentenced and that Powell's Eighth Amendment theory had carried the day: Powell, J., delivering the opinion of the Court, holding that a state cannot constitutionally punish a person for having engaged in private same-sex sex. Had the Court concluded that a state lacked the authority to punish consensual same-sex sodomy in private—which is the conclusion to which Powell's Eighth Amendment theory might have led him had he followed it—it would, perforce, have given Hardwick the relief he had asked for through his Fourteenth Amendment rationale.[187] To put the point somewhat differently, had Hardwick been convicted and sentenced for private, consensual sodomy, the "existing doctrine[] . . .

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tribunal. I declare my withdrawal from the decision of this case.").

186. One might say that my interpretation of *Hardwick* is incompatible with (or as some have less delicately put it, "flies in the face of") the doctrine of stare decisis. I fail to see how this argument works. Among other things, it begs all the interpretive questions it (confidently) purports already to have answered: What does fidelity to a judicial text or precedent mean when there are interpretive choices available on many, if not most or all, judicial texts? How can one say whether one is following or violating the norms underlying stare decisis without making strong claims, which may or may not be supportable, about (for example) what a judicial text that is to be treated as binding precedent "means" or what legitimate modes (or rules) of legal interpretation "are"? Indeed, it is tempting to suggest that my reading of *Hardwick* fully accords with, or more, that it promotes, the principles of stare decisis. After all, unlike the standard interpretation of *Hardwick*, which typically forms the basis for calls to "overturn" the case, *see, e.g.*, ESKRIDGE, GAYLAW, *supra* note 51, at 166 (calling for Hardwick to be overruled), the alternative reading I have offered eases the pressure on courts to make a sharp (or clean) break with the decisional past. Which, in turn, I believe, shows that "overruling" an earlier decision may sometimes be more important normatively and symbolically than it is required as any matter of strict interpretive necessity.

187. For that matter, the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), is as much a due process (or equal protection) case as a cruel and unusual punishments case. *See* Daniel Polsby, *The Death of Capital Punishment*, 1972 SUP. CT. REV. 1, 25 ("Why [Justices Douglas, Stewart, and White, in *Furman*] should have [used "the Eighth Amendment as a tool for testing whether the penalty of death is evenhandedly applied"] is obscure in view of the fact that existing doctrines of equal protection . . . or due process of law should have furnished more than adequate ground for striking down the death penalty, once the factual premises which these three Justice proffer . . . are accepted.").

of due process of law should have furnished more than adequate ground for striking down" the state's sodomy law as a punishment that violated Hardwick's liberty.[188] Resort to the Eighth Amendment in such a case would have been unnecessary, even redundant. A criminal law that cannot punish, whether under the Eighth or Fourteenth Amendment, is (so far as I can tell) no law at all.[189]

If I am correct, the Eighth and Fourteenth Amendment theories in play in Powell's *Hardwick* opinion converge there to become interchangeable with one another. It could not have been otherwise: any "punishment," including (but not limited to) sentence and imprisonment, in violation of the Eighth Amendment is itself a violation of the Due Process Clause.[190] Accordingly, we can

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188. Polsby, *supra* note 187, at 25.

189. Severity of sentence is not the only basis for declaring a law in violation of the Eighth Amendment. *Compare* Solem v. Helm, 463 U.S. 277, 290–92 (1983), *with* Robinson v. California, 370 U.S. 660, 664–65 (1962). Given the language of Powell's *Hardwick* opinion, one cannot entirely discount the possibility of interpreting it as suggesting that any punishment for private, consensual same-sex sexual activity would be unconstitutional. *But cf.* Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964) (upholding a twenty to thirty year sentence for fellatio as well within the statutory limit of punishment) (*cited in* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 179 & n.106 (2d ed., 1986). This, even though it is not a reading I ultimately embrace. That said, let me go on to mention another reason the reading may recommend itself. If Powell's *Hardwick* opinion is to be interpreted against the backdrop of doctrine as it presently stands, such a reading may be preferable to one (like Professor Kendall Thomas's) that is grounded in a notion of (*Solem*-like) Eighth Amendment disproportionality. *Solem*, after all, has been all but completely erased from the doctrinal backdrop against which Powell's opinion can be read. Harmelin v. Michigan, 501 U.S. 957, 965 (1991). The same cannot be said about *Robinson*, which, at least technically, remains (even today) "good law." To be sure, *Harmelin* did not do away with proportionality review in every set of circumstances. *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (indicating that the Eighth Amendment "does not require strict proportionality between crime and sentence," but protects against only punishments that are "grossly disproportionate"); *id.* ("successful challenges to the proportionality of particular sentences are exceedingly rare" (citation omitted)). But proportionality review (as doctrine now stands) will generally not bear fruit, except perhaps in a somewhat limited range of cases. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597–600 (1977). So long as a law prohibiting sodomy does not make the act an offense punishable by death, it will likely fall outside of that limited range. Thanks especially to Terry Sandalow and Nancy King for helpful thoughts on this aspect of my argument.

190. Professor Laurence Tribe might not strongly (or very strongly) disagree with the point I am making about convergence between the Eighth and Fourteenth Amendments in Powell's *Hardwick* opinion. For, as Tribe has written, Powell's "consideration of whether criminalizing homosexual conduct constitutes cruel and unusual punishment cannot [properly] be thought to require actual imprisonment." TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 29, at 1424 n.32. "[I]t is the very criminalization of an involuntary condition, not the terms of any specific sentence imposed, that violates the Constitution." *Id.* Then, citing the Court's decisions in *Ingraham v. Wright*, 430 U.S. 651, 667 (1977), and *Robinson v. California*, 370 U.S. 660, 666–67 (1962), as well as Justice

justifiably talk about Powell's decision to delay ruling for Hardwick on Eighth Amendment grounds as the equivalent of a decision to postpone adjudication of Hardwick's due process claim.

To be sure, Powell may have attempted to foreclose the equivalence between the Eighth and Fourteenth Amendments, or believed he did, by alluding to a distinction between these constitutional provisions. Indeed, it may be tempting to urge as an objection to the equivalence between the amendments, that I have failed to give due regard to the relevant *doctrinal* differences between the Due Process and Cruel and Unusual Punishments Clauses. One could, for instance, consistently maintain that, while Hardwick had no due process right to engage in private gay sex, he nevertheless may have had an Eighth Amendment right not to serve time in prison if he did. One could likewise contend that there are similar doctrinal distinctions between a broad due process right, such as the one for which Hardwick argued, and the kind of Eighth Amendment right Powell's opinion seemed to envision.

However valid these (or other) distinctions may be (and I do not wish to disparage them in the abstract), I must say that I think it is Powell's opinion that does not give them their "due regard." Powell's opinion no more than alludes to those distinctions—and at best that implicitly—in the context of an opinion that in its way appeared sharply to draw them into question.[191] At the risk of repetition,

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White's opinion in *Powell v. Texas*, 392 U.S. 514, 548 (1968) (White, J., concurring in the result), Tribe continued: "The eighth amendment 'imposes substantive limits on what can be made criminal.' . . . [E]ven a day in jail for engaging in sexual intimacies inherent in a homosexual orientation might violate the eighth *and* fourteen amendments." *Id.* (quoting Robinson v. California, 370 U.S. 660, 667 (1962) (emphasis added)). Tribe went on to hint that governmental harassment of lesbians and gay men or, under certain circumstances, governmental indifference to such harassment, may likewise violate the Eighth Amendment. *Id.* at 1425 n.32. For a similar argument that would call into question, under the Eighth Amendment, laws, such as sodomy bans, that legitimize violence against lesbians and gay men, see generally Thomas, *Beyond the Privacy Principle*, *supra* note 14 (treating the relationship between the Eighth Amendment and anti-gay violence). For questions about the tenability of arguing against the convergence of the Eighth and Fourteenth Amendments in Powell's opinion, see *infra* note 191; see also LAFAVE & SCOTT, *supra* note 189, at 182 (noting that "*Robinson* supports the proposition that crimes of status and personal condition are unconstitutional—a result which has been reached in other cases as a matter of substantive due process"). This, of course, is not to propose that, as a general matter, constitutional protections against "cruel and unusual punishments" are always coextensive with denials of due process, either substantive or procedural.

191. Before arguing that these distinctions are really valid, one might want to answer questions like these: If Powell's opinion stopped short of speaking of the narrow right to engage in private gay sex, because he supposed there might be some other constitutional foundation for such a right, what does his opinion indicate that that foundation is (or

whatever else there is to be said of the line between the Eighth and the Fourteenth Amendments toward which Powell's opinion seemed to gesture, the opinion does not elaborate, much less use, available distinctions between the two amendments to explain or to defend that line. To count as publicly accessible, hence to warrant our respect, I should have thought,[192] judicial reasons must be given and not merely hinted at or implied.[193]

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might be)? If the answer is the Eighth Amendment, might Powell's opinion not be interpreted as having relied on some notion that sodomy bans impose punishment for what amounts to a kind of "status crime"? If so, could Powell have held the line between the "cruel and unusual punishments" and "due process"—so that, for example, he could justifiably recognize a narrow right to engage in homosexual sodomy, but not a right to serve in the military, *see* JEFFRIES, *supra* note 103, at 527 ("Nevertheless, this [Eighth Amendment] reasoning allowed Powell—*at least in his own mind*—to forbid criminal punishment for homosexual sodomy without getting into the more difficult issues (such as . . . gays in the military) that he did not want to face." (emphasis added)), which at the time of *Hardwick* was "explicitly status-based"? HALLEY, DON'T, *supra* note 35, at 27. If Powell's opinion suggests sodomy laws imposed unconstitutional punishment for "homosexual status" under the Eighth Amendment, what might Powell have said about the current "compromise" ban on gays in the military, which turns on a distinction between "homosexual status" and "homosexual sodomy"—and which purportedly excludes gays from the armed services not for who they are, but what they do? *Id.* at 27; *see also id.* at 5 (noting that the 1993 revisions to the military's gay policy "are based on . . . *Hardwick*"). On as broad an interpretation of the Eighth Amendment as Powell's opinion may have contemplated, could Powell have maintained a distinction between "criminal" and "civil" punishment for homosexual sexual activity? Would a law denying lesbians or gay men full citizenship status—or a fine—after conviction for engaging in consensual, private same-sex sex not be a constitutionally untenable punishment? *See* LAFAVE & SCOTT, *supra* note 189, at 177 ("[E]ven a punishment which inflicts no physical hardship or pain [could we safely add imprisonment or a prison sentence?] may be found to be cruel and unusual [punishment], as with a deprivation of citizenship which results in the 'total destruction of the individual's status in organized society.' " (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))). On such an interpretation, does not the Eighth Amendment begin to blend into a notion of "due process"? Could it be otherwise? Does the notion of "incorporation" not itself effectively blur categorical distinctions between unconstitutional punishment and constitutionally-required process? Are there really always so clearly "two different kinds of substantive due process arguments, one involving the clause's function as the vehicle for incorporating provisions of the Bill of Rights and the other involving what usually is referred to as 'substantive due process' or 'unenumerated rights' "? Letter from Terrance Sandalow to Marc S. Spindelman (Mar. 6, 2000) (on file with the author).

192. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 95–127 (1996) (discussing the value of publicity); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 786 (1997) ("Public reason aims for public justification [which] .. is not simply valid reasoning, but argument addressed to others."). It is not clear to me whether judicial reasons such as those being imagined here would (or would not) count within a regime of deliberative democracy. Rawls, *supra*, at 772 n.21 ("Deliberative democracy limits the reasons citizens may give in supporting political opinions to reasons consistent with their seeing other citizens as equals." (citation omitted)); *cf.* JOHN RAWLS, POLITICAL LIBERALISM 212–54, 430–31 (1993) (discussing notion of "public reason").

193. Powell's opinion does, I must concede, state that "respondent [Hardwick] has not

We could, of course, fill in the missing gaps in the text of Powell's opinion. We could tell stories not only about the relevant differences between the Eighth and the Fourteenth Amendments, but also about why Powell's opinion contains no discussion of them.[194] We ought to be perfectly clear, however, that it is *we* who must do that work. It is *we* who must choose whether or not to tell those stories. And we ought likewise to be clear that because Powell's opinion itself fails to convey such stories, we can read that opinion as tantamount to a judgment that Hardwick's due process claim was not justiciable. If we ourselves need to provide reasons for reading Powell's opinion this way, they are available to us in the form of those intentionalist or consequentialist equations I mentioned before.[195]

This still leaves us to contend directly with what we might now, at last, see as a stark internal tension in Powell's text: the tension between Powell's disparaging remark about the broad due process right that Hardwick asserted and what I have argued can be read as his opinion's deferral of judgment on that right. While there are various ways to resolve that tension, one, indisputably, is to read Powell's statement regarding that broad due process right as nothing more than an "ink blot" on an arguably prudent but unmistakably prudential text.[196] (Indeed, if one thinks it legitimate to consider,

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raised the Eighth Amendment issue below," *Hardwick*, 478 U.S. at 198 (opinion of Powell, J.), and that for that, and other reasons, "this constitutional argument [was] not before" the Court. *Id.* (opinion of Powell, J.). One could, I suppose, propose that this amounts to a reason for not giving reasons for drawing the line Powell alluded to in his opinion. But as a reason, it might properly be thought of as insufficient, as Justice Blackmun's *Hardwick* opinion can be read to show. *Id.* at 201 (opinion of Blackmun, J.). Given that Powell himself raised the Eighth Amendment theory, and implied distinctions between it and the due process argument Hardwick made, the burden was on Powell to justify his theory even if he was not prepared, for reasons he gave, to base his ruling in *Hardwick* on it. Considerations of substantive equality require no less.

194. *Cf.* Halley, Romer v. Hardwick, *supra* note 35, at 432–33 (discussing the kind of assumptions and interpretive choices involved in filling in missing gaps in judicial opinions).

195. *See supra* note 174 and accompanying text. Although I am arguing for this reading of Powell's opinion, and thus of *Hardwick* itself, I am not (as I have already said) arguing that this is the result Powell or the Court should have reached. For the argument that the Court *should* have decided *Hardwick* on standing grounds, but did not, see generally Dripps, *supra* note 11.

196. BORK, *supra* note 37, at 166 (1990) (calling the Ninth Amendment an "ink blot" on the Constitution). I, myself, however, would not have thought of the Ninth Amendment as an "ink blot" on the text of the Constitution. Of the various arguments I have heard on the provision's meaning, I presently find Tribe and Dorf's the most appealing. *See* TRIBE & DORF, *supra* note 22, at 54–56 (proposing that the Ninth Amendment should be understood as a "rule of interpretation"). Whatever else may be said of Powell's opinion (hence *Hardwick*), if my interpretation of it is credited, it is not that Powell's non-decision, effectively on behalf of the Court, is strictly in derogation of

Powell's comment to Tribe about how *Hardwick* should have been handled could furnish us with a justification for saying, perhaps boldly, that this is how the internal tension in Powell's opinion *should* be resolved.[197] But one need not, strictly speaking, rely on that comment to provide the foundation for the move.)[198]

In the last analysis, I cannot say that Powell decided *Hardwick* in Hardwick's favor. But I do think his opinion can legitimately be interpreted as promising—or positioning the Court—to do so in a future case. Narrowly, Powell's opinion can be viewed as an indication that he was awaiting a case in which the state had put its sodomy law into play by breaking the "tacit agreement" not to punish by prosecuting individuals for engaging in private gay sex. In such a case, unlike *Hardwick*, the controversy would have been "real, not . . . hypothetical" beyond any reasonable doubt.[199] And, in such a case, as

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the Ninth Amendment, or the rule of interpretation Tribe (and Tribe and Dorf) understand that Amendment to entail.

197. *Cf.* Compassion in Dying v. Washington, 79 F.3d 790, 803 n.16 (9th Cir. 1996) (en banc) (questioning the vitality of *Hardwick*, in part, on the grounds that Powell "subsequently announced on several occasions that he regretted [his] vote [in the case]"), *rev'd on other grounds sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

198. Another reason for resolving the tension this way, which some might find more persuasive than reading Powell's opinion as if it did not reject the broad due process right to privacy (or sexual privacy), would begin by noting that Powell did not declare that Hardwick did not have a narrow substantive due process right to engage in homosexual sodomy, *see supra* notes 136–43 and accompanying text, and then go on to note that Powell "rejected" only the broader right to sexual privacy. Of course, Powell did not have to reach the question of the existence of the broader right. After all, the Court had rendered its earlier privacy decisions without ever endorsing a broad privacy right of the sort Powell mentioned. *See* Rubenfeld, *supra* note 13, at 751 & n.89 (discussing the Court's technique for avoiding the announcement of a broad right like the one argued for in *Hardwick*). Indeed, it is worth observing that Justice Blackmun used this very technique at one point in his *Hardwick* opinion. *See Hardwick*, 478 U.S. at 199–200 (opinion of Blackmun, J.) ("If that right [to privacy] means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice . . . is an 'abominable crime not fit to be named among Christians.' ") (internal quotation marks and citation omitted); *see also id.* at 209 n.4 (opinion of Blackmun, J.) (proposing "simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest . . . on the other" and thus avoiding recognition of a truly broad right to sexual intimacy in the privacy of the home); Cruz, *supra* note 38, at 325 n.139 ("[A]t least in *Eisenstadt* [*v. Baird*, 405 U.S. 438, 447 & n.7 (1972)] and *Carey* [*v. Population Services International, Inc.*, 431 U.S. 678, 688 n.5 (1972)], the Court represented that the question of the extent to which the Constitution protects decisions to engage in sexual activities was largely open."). Given all this, one could say Powell's "rejection" of a broad right to sexual privacy was (as his later remarks confirmed) merely a kind of dictum, not integral to his reasoning, hence justifiably overlooked or ignored.

199. Poe v. Ullman, 367 U.S. 497, 507 (1961) (plurality opinion) (internal quotation marks and citation omitted). For one such case, see *Garner v. Texas*, No. 14-99-00111-CR, 2000 Tex App. LEXIS 3760 (Tex. Crim. App. June 8, 2000).

I think Powell may have sensed, social disapproval of punishment for gay sex could be used as a constitutional device to trump social disapproval of gay sex itself.[200] With Donald Dripps, I would say that, "[i]n such a case, . . . we can be confident [Powell] would have voted to reverse a criminal conviction."[201] With admittedly somewhat less confidence, I believe one might also say that in a future case, Powell would have voted to strike down some other form of legal punishment a state had finally decided to impose on individuals for engaging in consensual, private same-sex sex.

As a result, if we read Powell's opinion, with its Eighth Amendment rationale, as incorporating the view that Hardwick's due process claim was non-justiciable at the time of decision in the case and promising or positioning the Court to provide someone in Hardwick's shoes with relief at some point in the future, we may at last come to some understanding of what kind of thinking may have prompted Powell to make White's opinion technically the "opinion of the Court."

Powell may have been concerned about a premature ruling for Hardwick. In part, he may have believed such a ruling was unnecessary since Hardwick faced no immediate threat of criminal prosecution for his conduct. And, in part, Powell may also have believed that a ruling for Hardwick would have been unwise. In order to vindicate Hardwick's claim, the Court would have had to disregard the existing social disapproval of homosexual sodomy (such as it was) and spend some of its limited institutional capital for the sake of what he seemed to regard as a "symbolic" victory for gays. Powell, I am inclined to say, may have been reluctant to shoulder the ultimate responsibility for committing the Court to such a course of action.[202]

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200. Powell did not, I think, truly regard Hardwick's constitutional claim as "facetious;" nor his claim as falling "far short" of overcoming the Court's expressed resistance to announce new fundamental rights. Powell's *Hardwick* opinion belies both those views. *See supra* note 143 (discussing Jeffries's comment that there was a "gulf" separating Powell from White and Burger).

201. Dripps, *supra* note 11, at 1435.

202. There may be something to Donald Dripps's proposal that "[d]efenders and detractors agree that the essential significance of sodomy laws is symbolic." *Id.* at 1442 (footnote omitted). Certainly, Powell seemed to view Hardwick's claim that way. *See infra* note 300 (reading a media report to suggest that Powell thought Hardwick was largely if not entirely symbolic or as he himself put it, "not very important," but brought "just to see what the court would do"). That Powell may have viewed matters this way might help explain why, for example, he did not join Justice Stevens's separate *Hardwick* opinion, although he might have done so. Stevens, recall, charted a somewhat different middle course than Powell between White's and Blackmun's opinions. *See Hardwick*, 478

It is in this light that one can read Powell's remark in that sentence bracketed above,[203] that "the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has *now* become a fundamental right."[204] What is key (for reasons already explained) is not that Powell may have agreed with White about the force and implications of the social norms that guided White's decision (what Powell called "the reasons stated by the Court"). Rather, it is that at that point in time—in that "now"—rather than at some point down the road, Powell may have been reluctant to announce both a new broad and a new narrow fundamental right to privacy. Instead of interpreting Powell's opinion to have decided the matter once and for all, we can regard it as an effort to split the difference between the Justices who were and those who were not prepared to recognize Hardwick's due process right to engage in consensual, private same-sex sexual activity,[205] an effort that took the form of Powell staying his hand for another day.

D. Looking Back—and Ahead

In sum, Justice White can be understood to have written an opinion holding that the Due Process Clause does not protect a broad right to sexual privacy that would itself include a right to engage in private gay sex, only solidly for himself, Chief Justice Burger, and Justices Rehnquist and O'Connor. Distinguished (and

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U.S. at 214 (opinion of Stevens, J.). But Stevens's opinion, which is close in many respects to Powell's, may have gone too far for Powell when it reached the merits of the case in its "bottom line holding." Stevens's reasoning might have been appropriate, and I could imagine Powell agreeing with it, in the future case I think Powell can be read to have had in mind.

203. *See supra* text accompanying note 144.

204. *Hardwick*, 478 U.S. at 198 n.2 (opinion of Powell, J.) (emphasis added).

205. As John Jeffries helpfully explains:

> From the beginning, Powell found the case deeply troubling. As the arguments mounted and the Justices took sides, Powell felt forced to an unwelcome choice between extremes. As he saw it, neither side was entirely right. While others vehemently asserted one position or the other, Powell shied away from both, instinctively searching for a middle course. But this time he did not find one. Neither his colleagues, nor his clerks, nor the lawyers in the case helped him out of the dilemma. Left to his own resources, Powell waited and waffled, accepting finally what he thought to be the lesser of two evils. He never really came to rest or resolved his inner conflict, which surfaced long after his retirement as lingering vacillation and doubt about the vote he had cast. Most importantly, Powell did not find the means to translate his moderate impulses into legal doctrine. He failed to craft and publish a clear statement of his own views. In this sense, *Bowers v. Hardwick* was Powell's greatest defeat.

JEFFRIES, *supra* note 103, at 514.

distinguishable) from Burger's, White's *Hardwick* opinion relied heavily throughout its analysis on a particular view of then-contemporaneous social norms disapproving of homosexuals and homosexuality. White's reliance on these norms thus ties the meaning and precedential force of his opinion to the cultural status of gay people and practices. As those norms warm (something I discuss later on[206]), the foundation of White's opinion—with its seemingly emphatic rejection of Hardwick's due process claim—is correspondingly diminished. The more lesbians' and gay men's social standing improves, the more the holding of White's *Hardwick* opinion looks like many now see it: a "derelict on the waters of the law."[207] But even those who believe White's opinion should be taken substantively as the opinion of the Court might agree on a different way of seeing things: as social mores change, growing increasingly accepting (or tolerant) of lesbians and gay men and same-sex sexuality, the more *Hardwick* is open to an alternative reading. White's *Hardwick* opinion lends itself to such dynamic interpretive possibilities (and others) in ways that Burger's opinion does not.

Either way, one cannot seriously deny the significance of Justice Powell's separate opinion in *Hardwick.* As the expression of the Justice who cast the crucial "swing vote" in the case, Powell's opinion deserves special attention. A close reading of that opinion reveals that it can be interpreted as having effectively declined to reach the merits of the substantive due process argument under consideration in the case. Accordingly, the text of Powell's observations presents us with a choice—a basic choice—about how to interpret *Hardwick.* One can say, as many have, that *Hardwick rejected* the due process right Michael Hardwick claimed. But one can also (or instead) say that the *Hardwick* Court did not ultimately pass judgment on the existence of such a right, *vel non.*

Which of the two interpretations should we choose? The question, no doubt, will strike some as terminally silly.[208] For them, the meaning of the relevant texts—the text of the *Hardwick* opinions and the text of the Constitution—is anything but dynamic.[209] The

206. *See infra* Part IV.C.

207. Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

208. Romer v. Evans, 517 U.S. 620, 639 (1996) (Scalia J., dissenting) ("If merely stating this alleged 'equal protection' violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.").

209. *See, e.g.,* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–47 (Amy Gutmann ed., 1997) (discussing constitutional interpretation).

alternative reading will thus seem to them to be misconstruing (or "perverting") the clear meaning of *Hardwick*; the standard reading, in contrast, will seem to identify correctly what the *Hardwick* opinions "say." Not coincidentally, for those who hold these views there will likely be a neat correspondence between a certain "right" reading of *Hardwick* and of the Constitution. To fail to challenge the question—which reading of *Hardwick* to choose?—would, for these individuals, be tantamount to giving up a decision and an interpretation that affirm the validity of a particular constitutional and perhaps extra-constitutional world-view. It would be foolish to ask for, or expect, such a concession. When faith, seeking reason, finally finds it, it is apostasy to let it go.[210]

Others may resist the question for quite different reasons. Although they believe the meaning of the Constitution is an evolving one, and therefore cannot persuasively appeal to the "fixed" text of *Hardwick* as the reason for rejecting the alternative interpretation, to recognize the validity of the question may seem to require them to give up some of the morally-high (if constitutionally-low) ground the standard reading undoubtedly provides. I am deeply sympathetic with this concern. Nevertheless, I fail to see how it does, or could, amount to an adequate justification for denying that there *is* a choice to be made about how to read *Hardwick*.

For those readers who support lesbian and gay rights or could be persuaded to support them, but who nevertheless find the interpretive choice I have presented unnerving, it may provide some comfort to reveal that, among other things, it aims to raise a series of strategic questions.[211] How should cases involving the rights of lesbians and

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210. *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1309–20 (1990); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1071–81 (1990). *See generally* SANFORD LEVINSON, CONSTITUTIONAL FAITHS (1988) (discussing links between religious views and judicial decisionmaking); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) (same).

211. Perhaps it will also be of some comfort to remember that other cases, including those in the privacy line, have changed meaning in the years since they were decided. *Roe v. Wade*, 410 U.S. 113 (1973), was originally thought to be a "due process" case, but in recent years, commentators have with increasing frequency suggested it is better understood as relying on "sex equality" principles. *See, e.g.*, GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 99–102 (1985); RICHARD POSNER, SEX AND REASON 339–40 (1992); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–1202 (1992); Ginsburg, *supra* note 42, at 382–86; Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 762 & nn. 124–27 (1995); Kenneth L. Karst, *1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–59 (1977); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1319–20 (1991); Francis

gay men be argued? What types of doctrinal arguments might the alternative reading of *Hardwick* enable advocates to make? What arguments might it foreclose? Does it temporarily or permanently preclude such arguments from being made? Limit them to certain institutional fora? How might we use the uncooperative, alternative reading of *Hardwick* I have proposed, cooperatively and productively? In the next Part, I will give some initial answers to these (and other) questions.

III. THE "MISCEGENATION ANALOGY" REVISITED

It is an open secret that courts, and especially the Supreme Court, are not impervious to pragmatic considerations in their pronouncement of constitutional principle. It is sometimes, as Professor Alexander Bickel has written, "a disagreeable fact, [but] it cannot be wished away."[212] To begin recalling why this is so, one may only need to hear Bickel's famous summation of the problem: "countermajoritarian difficulty."[213] Constitutional courts are in no institutional position to turn prudence a completely blind eye.

It is against this perhaps inevitable backdrop that a number of academic commentators have developed various theories urging courts to recognize the equality and liberty claims of lesbians and gay men. The great virtue of these theories lies in their devotion to principle. But such virtue is not free. The virtuous pursuit of principle is not infrequently paid at the expense of (among other things) its achievement.

It is not, then, altogether surprising that in the lesbian and gay rights literature, pragmatic considerations have, at times, been marginalized, suppressed, or bracketed, to be treated separately, if at all. The often unspoken intuition that pervades this literature seems to be that pragmatic considerations are, by definition, unprincipled, or at least inimical to a principled approach to lesbian and gay rights.[214]

Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 117–26 (1989); Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 350–80 (1992). For an instructive, related discussion of shifts in the meaning of what have come to be known as the Court's early "privacy" decisions, including *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Prince v. Massachusetts*, 321 U.S. 158 (1944), see Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959, 961–67 (1987).

212. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 69.

213. *Id.* at 16 (discussing the "countermajoritarian difficulty").

214. Some commentators have seemed to regard pragmatic considerations as

Something about this sort of thinking rings true. Pragmatic or prudential considerations always potentially modulate a principle's sweep. Not so very long ago, prudence may have practically stymied implementation of principled constitutional projects affecting lesbians and gay men.[215] Nevertheless, as social and political contexts change, incorporating pragmatism *into* relevant theories may well be the best way—it is assuredly one way—to advance efforts to secure constitutional protections for lesbians and gay men.[216]

Let me elaborate by turning to what may be a particular instantiation of a more general phenomenon, found in the academic literature dealing with the so-called "miscegenation" or "*Loving*"[217]

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insurmountable obstacles to the judicial implementation of their ideas. At the end of the introduction to his article on the Eighth Amendment as a basis for striking down sodomy laws, which (even though I disagree with his reading of Powell's *Hardwick* opinion) raises some thrilling prospects, Professor Kendall Thomas, for example, writes: "I harbor no illusions that the theoretical argument elaborated in these pages will find doctrinal expression in the constitutional jurisprudence of the current Supreme Court. Given the ideological and institutional realities of our time, one would have to be impossibly naive to entertain such a hope." Thomas, *Beyond the Privacy Principle*, *supra* note 14, at 1436. Thomas did well to clarify his aspirations. The social and political climate in which he wrote was quite hostile to claims of right by lesbians and gay men. *See infra* Part IV.C. That climate has warmed considerably, and as it does, it becomes less inconceivable that his theory could find doctrinal expression. Consequently, it is less and less necessary to bracket pragmatic considerations and perhaps more and more so not to do so. *See also, e.g.*, Marc A. Fajer, *With All Deliberate Speed? A Reply to Professor Sunstein*, 70 IND. L.J. 39, 39–40 (1994) [hereinafter Fajer, *With All Deliberate Speed?*] (resisting incorporation of prudential considerations into principled constitutional projects advanced on behalf of lesbians and gay men). For additional discussion of Fajer's argument, see *infra* notes 244–49 and accompanying text.

215. One should not forget, too, that pragmatic considerations were pressed on the Court as reasons for delaying racial desegregation efforts. *See* Cooper v. Aaron, 358 U.S. 1, 12–15 (1958); Brown v. Bd. of Educ., 349 U.S. 294, 299–301 (1955).

216. Whether one views the prospect as beginning or continuing to secure constitutional protection for lesbians and gay men will depend, in part, on how one reads the Court's decision in (among other cases) *Romer v. Evans*, 517 U.S. 620 (1996). There is no need presently to quarrel over the imagery. For present purposes, I stipulate, *see infra* note 250 and accompanying text, that the work of the miscegenation analogists has not achieved a single major judicial success *as a federal constitution project.* Some potential implications of incorporating prudence into the relevant theories will be considered in the Conclusion.

217. David Orgon Coolidge, *Playing The Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 201 (1998) ("Of all the legal arguments offered in favor of legalizing 'same-sex marriage' the one with the greatest rhetorical punch is the *Loving* analogy." (footnote omitted)); William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1508 (1993) (observing that "the *Loving* analogy has been accepted by the Hawaii Supreme Court"); Koppelman, *The Miscegenation Analogy*, *supra* note 40, at 148 (discussing the "*Loving* analogy" and its relationship to *Hardwick*); *id.* at 162 (discussing the "*Loving* analogy").

analogy, an analogy that has recently emerged to claim some notable prominence.

A. *The Analogy and its Critics*

By way of background, it will be helpful to recall the theoretical and doctrinal versions of the miscegenation analogy. Although the two versions of the analogy are mutually constituting,[218] and distinguishing between them therefore risks a certain degree of oversimplification, it will be useful for us to do so. Drawing the distinction will ultimately help us to understand the relationship between the theoretical and doctrinal objections to the miscegenation analogy more fully.

The theoretical elaboration of the miscegenation analogy has tended to focus on the ideological and material functions of discrimination against lesbians and gay men within a system of sex inequality. It has done so in large measure by drawing out the parallels between prohibitions against interracial and same-sex sexual expression.[219] As prohibitions against miscegenation once flowed from and reinforced an ideology of white supremacy which many (once) believed justified unjust discriminations against people of color, the argument runs, laws against same-sex sexuality reflect and bolster an ideology of male (and heterosexual) supremacy that provides the basis for unjust discriminations against lesbians and gay men.[220]

Translated into legal doctrine, these theoretical insights have typically taken the form of a sex equality argument for gay rights.[221]

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218. The theoretical and doctrinal aspects of the analogy seem likely to be mutually constituting or reinforcing. They are, however, analytically distinct, and distinguishable. One could have a complete theory about the relationship between sodomy and miscegenation bans without ever effectuating it in—or through—law. But there is a question, which I do not take up now, about whether one ever would have such a theory in the absence of the doctrinal considerations that help make it possible to imagine the theoretical insights being incorporated into law.

219. In terms which he takes great pains to elaborate, Koppelman has generally observed: "In the same way that the prohibition of miscegenation preserved the polarities of race on which white supremacy rested, the prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women." Koppelman, *Why Discrimination*, *supra* note 18, at 202. See generally *id.* for further elaboration of the analogy.

220. As Koppelman has explained: "[T]he taboo against homosexuality is not entirely irrational, but serves a function, and that . . . function is similar to the function served by the taboo against miscegenation. Both taboos police the boundary that separates the dominant from the dominated in a social hierarchy that rests on a condition of birth." *Id.* at 202.

221. For commentary within the legal academic literature dealing, one way or another,

Still, as did not escape Justices Blackmun or Stevens in *Hardwick*,[222] for example, the miscegenation analogy can also be expressed

with the argument that discrimination against lesbians and gay men is a form of sex discrimination, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 153–82 (1996) [hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE]; CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 200–06 (1979); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103, 114–18 (1994); Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 216 (1998); Jo Bennett, *Same-Sex Sexual Harassment*, 6 LAW & SEX. 1, 23–24 (1996); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 57–61 (1995); Amelia Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination*, 5 S. CAL. REV. L. & WOMEN'S STUD. 105, 108–09 (1995); Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271, 305–11 (1999); Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 22–23 (1998); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 633–49 (1992) [hereinafter Fajer, *Can Two Real Men Eat Quiche Together?*]; Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 731–40 (1997); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 563–581 (1991); Koppelman, *The Miscegenation Analogy*, *supra* note 40, at 154–62; Koppelman, *Why Discrimination*, *supra* note 18, at 215–19; Law, *supra* note 18, at 225–29; Samuel A. Marcosson, *Harrassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 *passim* (1992); Marie Elena Peluso, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1538–42 (1993); Deborah L. Rhode, *Sex-Based Discrimination: Common Legacies and Common Challenges*, 5 S. CAL. REV. L. & WOMEN'S STUD. 11, 12 (1995); David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 984–85 (1979); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1774–89 (1998); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677 (1998); Sunstein, *Homosexuality and the Constitution*, *supra* note 18, 1–2, 11–13; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 129–35 (1995); Alycia N. Broz, Note, Nabozny v. Podlesny*: A Teenager's Struggle to End Anti-Gay Violence in Public Schools*, 92 NW. U. L. REV. 750, 761–77 (1992); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159–63 (1991); Roger Craig Green, Note, *Equal Protection and the Status of Stereotypes*, 108 YALE L.J. 1885, 1890–92 (1999); *Sexual Orientation and the Law*, *supra* note 18, at 1584; *see also* ESKRIDGE, GAYLAW, *supra* note 51, at 218–31; *id.* at 219 (noting that, in congressional testimony on the proposed Equal Rights Amendment, Professor Paul Freund remarked that "if the law must be as undiscriminating toward sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as law forbidding miscegenation") (citing 118 CONG. REC. 9096–97 (Mar. 20, 1972) (testimony of Paul Freund)).

222. As Justice Blackmun observed in his *Hardwick* opinion:

> The parallel between *Loving* and this case is almost uncanny.... There, too, the State relied on a religious justification for its law. There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth

differently (though ordinarily it is not), as a claim about why discrimination against lesbians and gay men violates the Due Process Clause. Even before there was much talk about what has come to be known conventionally as the miscegenation analogy, many shared the intuition that *Loving* cleared the constitutional path that the *Hardwick* Court should have taken.[223] The miscegenation analogy, now that we have it available and accessible in that form, can be marshaled to thicken the explanation why.

As always, there are objections, two of which deserve to be mentioned here. The first is that the ambitious account of the miscegenation analogy is not ambitious enough on the level of theory; the second is that it is too ambitious on the level of doctrine.[224] The seemingly divergent objections share a common theme. The miscegenation analogy, to be either theoretically or doctrinally satisfying, or both, requires attention to the history and context of social identity movements.

Professor Janet Halley provides insights into troubles with the theory underlying the miscegenation analogy.[225] Her 1998 Harvard

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> Amendment was ratified, most of the States had similar prohibitions. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue. Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

Hardwick, 478 U.S. at 210–11 n.5 (opinion of Blackmun, J.) (citations omitted). Justice Stevens, as well, paused briefly to remark upon the relationship between *Hardwick* and *Loving* in his own *Hardwick* opinion. Stevens wrote, "Our prior cases make [it] abundantly clear.... [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Id.* at 216 (opinion of Stevens, J.). As support for the proposition, Stevens cited *Loving v. Virginia*, and parenthetically added that "[i]nterestingly, miscegenation was once treated as a crime similar to sodomy." *Id.* at 216 n.9 (opinion of Stevens, J.) (citations omitted).

223. Of course, as the earlier references to *Loving*, *see supra* note 109, 158, and 222, should make clear, one could maintain that *Hardwick* should have been governed by the constitutional method the Court followed in *Loving* without ever mentioning the *Loving* analogy. That analogy, at a bare minimum, enriches the normative claims, in addition to the simple precedential ones, that *Hardwick*'s error lies, in part, in not abiding by the constitutional approach followed by the Court in *Loving*. This holds true of White's reliance on history (to the extent he can properly be said to have relied on history), as well as his reliance on social norms in reaching the conclusion he did in *Hardwick*. *See supra* Part II.B. For more discussion of the error of White's opinion, see *infra* note 300.

224. *See infra* text accompanying notes 225–32.

225. Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115 (David Kairys ed., 3d ed. 1998) [hereinafter Halley, *Gay Rights and Identity Imitation*].

Law School Biddle Lecture critiques basic structures of thought within which it is possible to conceive of "sexual orientation and sexual identity" in what she calls "like race" terms.[226] One need not subscribe to all of what Halley says in her provocative lecture (and I, for one, do not) to be impressed by the ways her observations about the "ethics of representation" add depth and perspective to "like race" arguments. In particular, her remarks about the uniqueness of "sexual orientation and sexual identity movements" and the differences from the contours and development of racial identity movements her claims imply, cannot properly be gainsaid.[227] Halley's reservations about the use of certain race-based analogies and their concomitant potential to create social identity itself are far-reaching and ought properly to give pause.[228] They cast a long shadow over thinking about identity through simile. Happily, though perhaps a little inconsistently, Halley stops well short of making a bid to do away with "like race" arguments altogether. She resigns herself to the fact, even as she seems to lament, that " '[l]ike race' arguments are so intrinsically woven into American discourses of equal justice that they can never be entirely foregone."[229]

Other commentators, with more centrist and right-leaning impulses, have criticized the analogy's doctrinal exposition.[230] In their view, the analogy underdetermines the doctrinal results for which it stands as a call. Theirs is an emerging criticism within the literature reviewing or responding to the work of miscegenation analogists that the doctrinal analogy does not adequately account for the *process* of constitutional change.[231] It is not that the *Loving* analogy literature

226. *Id.* at 120.

227. *See id.* at 116 ("Sexual orientation and sexuality movements are perhaps unique among contemporary identity movements in harboring an unforgiving, corrosive critique of identity itself, and they have launched significant activist and theoretical impulses in the direction of a 'post-identity politics.' ").

228. *Id.* at 120–21 ("The following pages suggest that only some 'like race' arguments are unjustifiably coercive; others, even though inescapable, join sexual constituencies to race constituencies in a shared exposure to danger that identity politics cannot even apprehend . . . .").

229. *Id.* at 120. Halley writes, for example, that: "Indeed, analogies are probably an inescapable mode of human inquiry and are certainly so deeply ingrained in the logics of American adjudication that any proposal to do without them altogether would be boldly utopian, and beyond my aim here." *Id.*

230. *See, e.g.*, Coolidge, *supra* note 217, at 217.

231. *See* Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1613 (1997) (reviewing ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996)) ("Koppelman is uneasily aware of the need to cabin the scope of his project without making it nugatory. But he has no well-defined, intellectually satisfactory

contains no reflections that some constitutional process has been unfolding, but rather that it has appeared, at times, to distill the unshapely evolution of constitutional norms into neat syllogistic reasoning—reasoning with admittedly "radical implications."[232] Distilled, the doctrinal account of the miscegenation analogy is, for some, too ambitious.

Professor Andrew Koppelman, whose work is chiefly associated with the miscegenation analogy and its doctrinal counterpart, has sketched out its ambitions this way: not only does the *Loving* analogy call for courts to strike down state sodomy bans, but if "taken seriously, it follows that the Equal Protection Clause [or, I might add, the Due Process Clause] forbids the denial of marriage licenses to gay couples, or the use of homosexuality as a basis for denying custody of a child."[233] In his earliest work, Koppelman predicted—quite rightly, I should mention—that many would find "[t]he prospect of the Court attempting to impose such results on a resistant society . . . a daunting one."[234] Many, including those who might otherwise endorse the project in the courts or who *do* endorse it outside of them, have found it "daunting" indeed.

In all fairness, Koppelman took pains to observe in his early work that "[m]iscegenation once presented a similar problem."[235] He underscored his point by invoking *Naim v. Naim*,[236] the case in which the Court twice, on pragmatic grounds, refused to consider the merits

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way of doing so.... [His] general invocations of an otherwise unexplained 'balancing' test do not shed much light on ... his project." (internal citation omitted)); Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035, 2054–55 (2000) (reviewing ESKRIDGE, GAYLAW, *supra* note 51) [hereinafter, Koppelman, *Why Gay Legal History Matters*] (discussing prudential arguments in the context of the use of the miscegenation analogy to make the case for same-sex marriage); Richard A. Posner, *Should There be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1587 (1997) (reviewing ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 221) (It is "a significant weakness of Eskridge's book that it does not examine the pragmatic objections to constitutionalizing the question of same-sex marriage.... The country is not ready for Eskridge's proposal, [which] must give pause to any impulse within an unelected judiciary to impose it on the country in [the Constitution's] name."); Sunstein, *Homosexuality and the Constitution*, *supra* note 18, at 1–12. For further discussion of Sunstein's views, see *infra* text accompanying notes 241–43, 248–49. *See also infra* note 239 (quoting from KOPPELMAN, *supra*, regarding the role of a prudential calculation in judicial decision making).

232. Koppelman, *The Miscegenation Analogy*, *supra* note 40, at 162.

233. *Id.* (footnote omitted).

234. *Id.*

235. *Id.*

236. 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va. 1956) (per curiam), *appeal dismissed*, 350 U.S. 985 (1956). For further discussion of *Naim*, see *infra* Part IV.A.

of the Virginia miscegenation ban ultimately struck down in *Loving v. Virginia*.[237] Nevertheless, Koppelman passed up the analogy between *Hardwick* and *Naim* in favor of the analogy to *Loving*. Perhaps this helps explain why he did not propose, or propose with any gusto, that the miscegenation analogy he was developing should, or actually did, incorporate a notion of prudence to limit its sweeping, radical potential. In part, his reading of *Hardwick* (the standard reading, for what it is worth) provided him the grounds of avoidance: "Prudence does not . . . adequately explain or justify what the [*Hardwick*] Court did."[238]

That Koppelman did not mean to incorporate prudential concerns within his affirmative program became even more apparent in his illuminating later work on the analogy.[239] I do not wish to quibble: what is significant about Koppelman's choices are not the undoubtedly good reasons he had for making them. Instead, it is that, given the centrality of his writings within the literature promoting the *Loving* analogy, his choices helped establish a pattern that others who built on his thesis would—and did—follow.[240]

The notable exceptions to that pattern are relatively few. Among those who have endorsed the *Loving* analogy as a constitutional argument, Professor Cass Sunstein is one of the most prominent to argue with serious dedication that prudence should be a part of the analogy's doctrinal exposition. At least as long ago as the published version of his 1994 Harris Lecture, Sunstein described (the sex equality version of) the *Loving* analogy as "the most interesting and powerful argument" in the "range of constitutional arguments involving discrimination on the basis of sexual orientation."[241]

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237. Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

238. Koppelman, *The Miscegenation Analogy*, *supra* note 40, at 163. As explained in greater detail below, the alternative reading of *Hardwick* is not self-justifying, nor does it immunize the case against criticism. *See infra* note 300.

239. *See, e.g.*, KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996) (no similar discussion of *Naim*); *id.* at 103 ("It follows that the equal protection clause obligates the state to act in furtherance of the [antidiscrimination] project to the extent that it reasonably can. Such action, like policymaking in general, necessarily involves a multitude of prudential and predictive judgments, *of a kind for which courts are not particularly well suited.*" (emphasis added)); *see also* Hills, *supra* note 231, at 634–38; *see generally* Koppelman, *Why Discrimination*, *supra* note 18 (omitting *Naim* from discussion).

240. *See* Fajer, *Can Two Real Men Eat Quiche Together?*, *supra* note 221 at 634–38. Koppelman's recent work, *Why Gay Legal History Matters*, *supra* note 231, at 2054–55, returns to, and reiterates, the theme of prudence found in his *The Miscegenation Analogy*, *supra* note 40, at 162.

241. Sunstein, *Homosexuality and the Constitution*, *supra* note 18, at 1. Sunstein may not endorse the alternative reading of *Hardwick*. In part, it frustrates the argument he has

Nevertheless, immediately after saying so, Sunstein went on to stress that "the judicial role is properly limited in this context, especially because of a need to limit the clash between public judgments and judicial judgments in so sensitive an area."[242] Accordingly, he:

> argue[d] for the narrowest and most incremental of ... judicial possibilities. In all likelihood, laws against homosexual orientation and behavior will soon come to be seen as products of unfounded prejudice and hostility, and private prejudice and hostility will themselves recede. Courts should play a limited if perhaps catalytic role in this process.[243]

Demonstrating the tendency among some miscegenation analogists to resist a pragmatic check on the reach of their efforts is Professor Marc Fajer's barbed rebuke of Sunstein's proposal.[244] Fajer, who a few years earlier had become one of the first commentators self-consciously to build on Koppelman's work,[245] took a position that many within the lesbian and gay communities undoubtedly did and would share. "To a gay activist," Fajer commented, "what is most notable about [Sunstein's] discussion is his repeated insistence that the federal courts act cautiously in deciding cases that raise the theories he discusses."[246] Of these theories, the example Fajer chose to focus on in an important footnote was (perhaps not surprisingly) the sex equality argument for lesbian and gay rights contained within the miscegenation analogy.[247]

It may be, as Fajer pointed out, that Sunstein expressed "a concern for the long-term good of the gay rights movement."[248] But,

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made about the distinction between the Due Process and Equal Protection Clauses. *See* Sunstein, *Sexual Orientation and the Constitution*, *supra* note 24. As well, Sunstein might disagree with the suggestion that White's *Hardwick* opinion was not primarily backwards-looking, except insofar as the glance to the past added perspective to White's view of the then-current, widespread social disapproval of homosexuals and homosexuality. For criticism of Sunstein's distinction between due process and equal protection, see TRIBE & DORF, *supra* note 22, at 115–16 (noting some troubles with Sunstein's theory).

242. Sunstein, *Homosexuality and the Constitution*, *supra* note 18, at 1–2.

243. *Id.* at 2.

244. *See* Fajer, *With All Deliberate Speed?*, *supra* 214, at 39.

245. *See* Fajer, *Can Two Real Men Eat Quiche Together?*, *supra* note 221, at 634–38.

246. Fajer, *With All Deliberate Speed?*, *supra* note 214, at 39. *But see* ESKRIDGE, GAYLAW, *supra* note 51, at 230 ("For the foreseeable future, the Court should leave state courts alone to develop the sex discrimination argument for same-sex marriage.").

247. Fajer, *With All Deliberate Speed?*, *supra* note 214, at 39 n.6. Fajer's choice to focus on the sex equality argument for gay rights might have come as no surprise given both his own and Sunstein's interest in the argument (and the miscegenation analogy). *See* Fajer, *Can Two Real Mean Eat Quiche Together?*, *supra* note 221, at 634–38.

248. *Id.* at 39.

as Fajer assuredly did not fail to recognize, that was not *all* Sunstein was doing. More fundamentally, Sunstein was advocating a "limited role of Courts under the Constitution and indicat[ing] how judicial limitations might bear on the judicial role with respect to laws that disadvantage homosexuals."[249] Sunstein did not himself put it in these words, but without doing unpardonable damage to his argument, one might read it as a solid vote for incorporating broader insights about how courts do (and, in his view, should) function within our constitutional system into the narrower, substantive doctrinal exposition of (among other arguments for lesbian and gay rights) the miscegenation analogy.

B. Answering Objections

Having laid out some objections to the miscegenation analogy, perhaps we can turn to the alternative reading of *Hardwick* for assistance in formulating a response. Before explaining how, it will be useful to make a few stipulations about why those who wish to gain judicial acceptance of the analogy (and I put myself in this camp) can ill afford to ignore or marginalize the pragmatic objections to their (or maybe I should say, "our") program. First, although the miscegenation analogy has achieved a certain prominence in the academic literature, drawing with it considerable attention to the depth and pervasiveness of discrimination against lesbians and gay men, it has not achieved a single major success *as a federal constitutional argument.*[250] Indeed, its temporary success in Hawaii[251] (maybe Alaska,[252] as well) precipitated a flurry of antagonistic legislative activity on both the state and federal level.[253] This activity makes the realization of the project's ultimate success—full and equal citizenship status for lesbians and gay men, including a national constitutional right to same-sex marriage—seem highly unlikely at

249. Sunstein, *Homosexuality and the Constitution*, *supra* note 18, at 2. As it happens, Fajer's objections can be read to address Sunstein's more general point, as well.

250. For present purposes, the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), will be included within the stipulation.

251. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *reconsideration and clarification granted in part*, 875 P.2d 225 (Haw. 1993). *Baehr* was declared moot without being overturned six years later in *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

252. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). In November 1998, the voters of Alaska approved a state constitutional amendment that effectively overturned the court's ruling in *Brause*. ALASKA CONST. art 1, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

253. For a recent survey of the pattern of state laws dealing with same-sex marriage, see ESKRIDGE, GAYLAW, *supra* note 51, app. B3 at 362–71.

any time in the immediate or even the foreseeable future.[254] Second, to succeed, the project will require the cooperation and support of a number of sympathetic individuals whose rights and freedoms are not abridged because they identify themselves or they are identified as lesbians and gay men. And third, in important ways, that cooperation appears to have been conditioned on the incorporation of prudence into the analogy's doctrinal exposition.

One last prefatory note is in order. What follows may require, as Professor Fajer might wish it would not, that "individual litigants ... sacrifice individual justice in the short-term for the possibility that doing so might improve the chances for justice for all gay people in the long-term."[255] To say the least, it is discomfiting even to contemplate such a sacrifice.[256] As Fajer rightly observes, "[t]hese litigants already risk status and security merely to pursue their claims."[257] I may be missing something, but I somehow cannot see, even on closer inspection, how would-be individual litigants are truly being asked "to give up important tangible benefits for an amorphous long-range hope."[258] I think I can appreciate how the "hope" might properly be described as "amorphous" and "long-range." But I

254. *See* Sunstein, *Homosexuality and the Constitution*, *supra* note 18, at 27 ("A relatively radical attack on the prohibition of same-sex marriages might come many years down the road, when the basic principle has been vindicated in many other less controversial contexts.").

255. Fajer, *With All Deliberate Speed?*, *supra* note 214, at 40.

256. Much more must be said about the conditions of sacrifice, and its conceptualization, within political struggles than is possible here. For now, there is this. "Sacrifice" is as capable of being regarded as radically ennobling and empowering as it is a form of demoralizing or corrupting collaboration. If asking for "sacrifice" from the lesbian and gay communities is something better off avoided, it may be because those within the gay community have a particular view of what that term means, including, socially speaking, its gender, race, and class aspects. For some discussion of gender and sacrifice, see Marc Spindelman, *Some Initial Thoughts on Sexuality and Gay Men with AIDS in Relation to Physician-Assisted Suicide*, 2 GEO. J. GENDER & L. (forthcoming 2001) (on file with the North Carolina Law Review). If gay men (or lesbians and gay men) are unwilling to make such sacrifices, it may be in part because there is a sense that sacrifice should be borne by those whose constitutional and political worldviews block recognition and respect for lesbian and gay rights, including those who believe such sacrifices to be of a spiritual dimension. No matter how "wrong" or "right" such views may be to those of us who do not hold them, one cannot simply deny that they are embraced by many within our constitutional community. It may, finally, be interesting to think about the potential reasons why there seems to be no robust conception of sacrifice (at least) in significant pockets of modern sexual orientation and sexual identity movements. Its absence (if it is that) might be one way of discussing what separates those movements from, and binds them to, earlier political movements, such as the civil rights and sex equality movements.

257. Fajer, *With All Deliberate Speed?*, *supra* note 214, at 40.

258. *Id.*

would have thought that, in the absence of sacrifice, the "important tangible benefits" of litigating cases might well remain as hypothetical as real. Without pragmatic concession, I am saddened to think, individual litigants may simply not receive "individual justice [even] in the short-term."[259]

The pragmatic concession that I am about to propose, may be thought of as a kind of constitutional compromise. At the outset, I want to be clear: I am not sure I myself would unreservedly endorse it. The compromise is an effort to help give tangible effect to the short- and long-term hopes of the miscegenation analogists and lesbian and gay rights advocates alike. It may also have implications for other arguments explaining why lesbians and gay men should be respected in our constitutional community as full and equal citizens.[260] Despite the concerns it will probably raise, the concession is too important not, at least, to consider, and too well known in its form for anyone to suppose it will not divide, even as it aspires to conjoin. Some of its possible minimal effects for agenda setting will be considered more fully in the Conclusion.

The theoretical equation between sodomy and miscegenation bans tells us nothing about how the two should be treated as a matter of constitutional law. The force of the equation—and it *is* forceful—stems, to an appreciable degree, from the moral and constitutional status of laws that discriminate on the basis of race. Were the subordination of people of color not so obviously odious, both morally and constitutionally, the relationship between sodomy and miscegenation bans might be nothing more than an interesting thought of no legal moment. It is, however, precisely because there is no serious question that the Court's decision in *Loving v. Virginia*[261] was right as a moral and legal judgment, that the *Loving* analogy offers such persuasive reasons for declaring laws that discriminate against lesbians and gay men to be inconsistent with Fourteenth Amendment demands. But it should not be forgotten that the theoretical similarities, such as they are, between discrimination against people of color, on the one hand, and discrimination against lesbians and gay men, on the other, do not of their own motion compel analogy to *Loving*. That analogy, it must be said, is a normative claim. It is a claim with which many may ultimately agree. But it is normative just the same.

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259. *Id.*
260. These broader implications are beyond the scope of this Article.
261. 388 U.S. 1 (1967).

Once stripped of whatever descriptive mask might appear to be hanging from it, the *Loving* analogy can be seen to be carrying much, if not all, of the weight of the lesbian and gay rights project on the doctrinal level. Likewise, it becomes possible to see the pragmatic objections to the miscegenation analogy as objections to the radical burden placed on *Loving*'s shoulders. Perhaps such objections would not have surfaced if *Loving* had more modestly been asked to bear an analogy only to laws against sodomy. Under those circumstances, those who have some sympathies with constitutional claims made on behalf of lesbians and gay men might not have been made so uneasy. But, in addition to sodomy laws, the *Loving* analogy has been relied on simultaneously to carry much heavier freight, such as child custody denial and same-sex marriage. Embracing these other issues, although in a sense they are related to sodomy laws by principle, has seemed to some (and a very important "some," at that) to be asking for too much, too soon, not to mention from the wrong legal institution.[262]

The various claims that fall under the auspices of the miscegenation analogy can be distinguished from one another—if not on the principle (or principles) that can bind them, then on prudential grounds. A sensitive response to the pragmatic critique of the analogy may counsel, or require, that such distinctions be made. In concept, the effect is simple: queuing the discrimination claims and relying on the miscegenation analogy, somewhat modified, to transport them to the other side of constitutional protection, serially, one case at a time.[263] The alternative reading of *Hardwick* (though by

262. As my colleague Andrew Siegel has suggested to me, some may believe that these views implicitly diminish discrimination against gays vis-à-vis discrimination against other identity groups. In a sense, this is right. Nobody would, for example, suggest that a law imposing separate but unequal educational facilities along the lines of race should not properly be struck down as unconstitutional by the courts, and with speed. Nevertheless, to the extent that the suggestion that centrist critiques are somehow unique in diminishing discrimination against gays vis-à-vis discrimination against other groups, it seems mistaken. Subjecting claims of discrimination against gays to a process of reasoned argument might itself be thought to compromise the "obvious" immorality and unlawfulness of such discrimination. Moreover, to the extent that the suggestion that subjecting constitutional claims of lesbians and gay men to debate is to disparage such claims carries weight, it seems to depend on a notion that has elsewhere been eschewed: that the now-obvious moral and constitutional arguments regarding, for example, racism, were not (and still are not) themselves subject to evolution or progression. In this respect, the ideas debunking some of the popular misconceptions of the history of the Court's race equality jurisprudence, reflected in the commentary referred to *infra* note 315, should not be overlooked.

263. *See generally* SUNSTEIN, ONE CASE AT A TIME, *supra* note 51, at 159–61 (arguing for pragmatic incrementalism in the context of constitutional claims made on behalf of

no means strictly necessary to the endeavor) offers a kind of distinguishing principle that can enable the revised miscegenation project—without abandoning the miscegenation analogy altogether.

Which brings us directly to one way the alternative reading of *Hardwick* may help. That reading, recall, views the case as having avoided a judgment on the substantive merits of Michael Hardwick's constitutional argument. It thus suggests that *Hardwick* itself can be read as a prudential decision. One can understand it to stand for the proposition that courts should vindicate constitutional claims for lesbians and gay men cautiously, perhaps only when individual claims are no longer precluded by prudential considerations.[264] Until such a time, it can be understood to suggest that courts, by and large, avoid a substantive adjudication of the merits of lesbian and gay rights cases.[265] If so, instead of calling for *Hardwick* to be overturned, as a good many have, lesbians and gay rights advocates might choose to *defend* the decision (the alternative reading of it, of course).[266] Indeed, those advocates might go so far as to *urge* courts that *Hardwick* (again, the alternative interpretation) be left on the books as a kind of pragmatic, interpretive rule.[267] "No, Your Honor," one can imagine counsel earnestly reporting to a court, "this case challenging the State's law against sodomy does not require the court to hold that the State's law prohibiting same-sex marriage is unconstitutional. That law, as *Hardwick* teaches, is distinguishable from this one. Some day that law, too, might be held unconstitutional, but today is not that day. All that is now properly before the court is the State's sodomy ban."[268]

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lesbians or gay men). For further discussion of the (potential) minimal commitments of responding to the pragmatic critique, see *infra* Conclusion.

264. The "conditions of prudence" are the subject of Part IV, *infra*. One might think that the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), already serves such purposes. *But see infra* note 392 and accompanying text (discussing another way to understand *Evan*'s symbolic significance).

265. For the Court, this may mean using certiorari to deny jurisdiction, or in some cases, using certiorari to grant jurisdiction and then to vacate a judgment on the merits. *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 51, at 161 (suggesting "[a]t a minimum, . . . that courts should generally use their discretion over their docket in order to limit the timing of relevant intrusions into the political processes").

266. Notice, for what it is worth, that the alternative interpretation of *Hardwick* can be squared nicely with the Court's more recent decision in *Romer v. Evans*, 517 U.S. 620 (1996). *See supra* text accompanying notes 51–58 (discussing *Hardwick* and *Evans*).

267. *Cf.* TRIBE & DORF, *supra* note 22, at 54–55 (proposing that the Ninth Amendment be understood as a rule of interpretation). Please note, again, that the alternative reading of *Hardwick* is not strictly necessary as a predicate for the pragmatic compromise, but may instead be used to symbolize it.

268. *Accord* Tribe, *Hardwick* Brief, *supra* note 95, at 23 ("Marriage, unlike other

The idea that *Hardwick* might be inducted into the service of lesbian and gay rights claims, defended by advocates of lesbians and gay rights, like the idea that *Hardwick* might not be regarded as inconsistent with a decision to strike down a state's sodomy law, may strike quite a few as fanciful, at best. If it does, it may, in part, be because of the time and effort so many have spent excoriating *Hardwick*, based on the standard interpretation of the case. These ideas may be a good deal less shocking, however, when one keeps firmly in mind that the "*Hardwick*" they deal with is the alternative—and *not the standard*—interpretation. To those who continue to find the ideas implausible, it is tempting to ask, why should these (or other) ideas should be dismissed out of hand simply because they seem queer?[269]

Were advocates of gay rights to interpret *Hardwick* as I have proposed it can be, the miscegenation analogy (revised in an important way) could be invoked to inform a court's judgment about whether (and when) pragmatic considerations would tend to authorize a principled constitutional decision on the merits or instead counsel judicial restraint. Rather than looking to *Loving* as the sole (or primary) source of judgment, a court could look for guidance to the process of constitutional change, as represented by some of the social and legal changes that took place in the time between the Court's decision in *Loving* and its earlier pragmatic non-decisions in *Naim v. Naim*.[270]

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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.' " (citation and footnote omitted)); *id.* at n.44 ("Hardwick ... claims no right ... to have any homosexual relationship recognized as a marriage." (citation omitted)); *id.* at 24 ("There is thus no cause for worry that affirmance of the decision below ... would cast doubt on any administrative programs that states might fashion to encourage traditional heterosexual unions.").

269. *See generally* ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 1 (1996) ("Once the term 'queer' was, at best, slang for homosexual, at worst, a term of homophobic abuse. In recent years, 'queer' has come to be used differently....").

270. 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955) (per curiam), *aff'd*, 90 S.E.2d 849 (Va. 1956) (per curiam), *appeal dismissed*, 350 U.S. 985 (1956). *See* ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 221, at 120–21 (discussing the "United State's Supreme Court's temporizing between *Naim* and *Loving*" and suggesting its parallels to same-sex marriage). One senses in Professor Eskridge's latest book, ESKRIDGE, GAYLAW, *supra* note 51, 228–31, some, perhaps qualified, support for the federal constitutional compromise I have been and will be discussing. As Eskridge argues, "[T]here are ways of negotiating the bind [the Supreme Court is in], what Alexander Bickel called techniques of 'not doing,' devices for disposing of a case while avoiding judgment on the constitutional issues it raises." *Id.* at 230. Eskridge goes on to comment that, "If a state appeals court were bold enough to rely on the U.S. Constitution to strike down a state constitutional amendment barring same-sex marriage, the Supreme

C. *Looking Back—And Ahead (Again)*

The elemental structure of a possible compromise has been set in place. It gives centrist and right-leaning doubters a response to their concern that the doctrinal version of the miscegenation analogy has not adequately incorporated pragmatic considerations into its affirmative constitutional case for lesbian and gay rights. And it gives proponents of the miscegenation analogy a way to forge the kind of coalition that will be necessary to advance their *constitutional* project in a meaningful way.

Miscegenation analogists, of course, along with others in the lesbian and gay communities, may still object to the compromise for, well, being a compromise.[271] One must not take these objections lightly. To repeat, it is understandably troublesome to contemplate compromising justifiable claims of equality and liberty. That the constitutional claims of lesbians and gay men *are* justifiable in that sense, as the collective work of the miscegenation analogists and others has shown, should be obvious within a community that purports to prize equality and liberty so highly that they are enshrined as constitutional values. Consequently, an initial gesture of good will by those presently in or near the center may be required to garner critical support for the compromise within the lesbian and gay communities. The shape that that gesture might take will be discussed shortly.[272] But before it is, I must fill in some details of the outlined accord.

Court should avoid the case, either by denying review or *finding the case prudentially or constitutionally nonjusticiable*, courses of action that would have saved the Court embarrassment in *Hardwick*." *Id.* at 230–31 (emphasis added). Eskridge does not say—at least not in these pages—whether he would similarly endorse avoidance of the constitutional question were a lower court to rule against same-sex marriage or other constitutional claims on behalf of lesbians and gay men. Nevertheless, he does recognize that "[f]or pragmatic reasons, the U.S. Supreme Court might decline . . . to require state or federal antidiscrimination law to include sexual orientation. Such a move might be considered a retreat from principle and the reasoning of precedent. But, as before, the Court has available to it techniques for avoiding the constitutional issue." *Id.* at 231. Against the seemingly qualified support in his latest work, one must measure his previous seemingly unqualified rejection of a pragmatic compromise. *See* ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 221, at 121–22 (1996) ("Judge Posner's pragmatism counsels not just delay but compromise .... The main thing that a Danish-style compromise would sacrifice is formal equality. How important is that sacrifice? I consider it critically important and would oppose a halfway house to marriage.").

271. *See* ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 221, at 121.

272. *See* text accompanying *infra* note 415.

IV. THE CONDITIONS OF PRUDENCE

I begin this Part by introducing *Naim v. Naim* more fully. Following that introduction is a brief review of the legal academic debate about the case. Then, picking up where Part III left off, I consider the "conditions of prudence"—some of the changes on social and legal fronts that took place in the years between *Naim* and *Loving v. Virginia*[273]—that may have led the Court to finish in *Loving* the principled business it pragmatically postponed in *Naim*. Finally, building on the revised miscegenation analogy, I offer some observations on the lessons the conditions of prudence may teach in the specific case of sodomy bans. I ask, and provide thoughts on the question: What action do the conditions of prudence today recommend to a court faced with a constitutional challenge to a state law against sodomy?

A. *A Primer on* Naim *and the Academic Debate It Spawned*

The time has come to turn to *Naim v. Naim* and some of the academic commentary about the case.[274] *Naim* came to the Court on

273. 388 U.S. 1 (1967).

274. Naim v. Naim, 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955) (per curiam), *aff'd*, 90 S.E.2d 849 (Va. 1956) (per curiam), *appeal dismissed*, 350 U.S. 985 (1956). For a fine, concise discussion of the Court's deliberations in *Naim*, see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 62–67 (1979); see also GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 106–07 (1993) ("*Naim v. Naim* has been the target of considerable criticism. The Court's dismissal is understood to have been a concession to perceived majoritarian pressure in the post-*Brown* era, when it had been asserted that school desegregation would lead to 'mongrelization of the race.' " (footnotes omitted)); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 at 367 n.2 (1994); Mark Tushnet, *The Warren Court as History: An Interpretation*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 1, 5 (Mark Tushnet ed. 1993) [hereinafter Tushnet, *The Warren Court as History*] ("The justices knew they could not uphold the statute [involved in *Naim*] without undermining *Brown*'s moral force, yet they knew as well that they could not invalidate the statute, which represented the heart of the white South's emotional commitment to segregation, without exacerbating an already difficult situation . . . ." (footnotes omitted)). For other earlier sources dealing with the issues raised by *Naim*, see generally *Jackson v. Alabama*, 348 U.S. 888 (1954) (denying certiorari in a case in which the Alabama Supreme Court had let the state's miscegenation statute stand against Fourteenth Amendment challenge); Andrew D. Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 CORNELL. L.Q. 208, 212–14, 221 (1957) (arguing that the Equal Protection Clause governs the right to marry); Note, *Racial Intermarriage—A Constitutional Problem*, 11 CASE W. RES. L. REV. 93, 96 (1959) (discussing *Naim* as an example of litigation arising out of the idea that "the preservation of racial purity is a legitimate objective") (both this student note and Weinberger, *supra*, are cited in Hutchinson, *supra*, at 62–63 n.526); Note,

the heels of its decision in *Brown v. Board of Education*.[275] *Naim* squarely raised the question, among others, whether "a state [here, Virginia,] consistent with the requirements of the equal protection and due process clauses of the 14th Amendment, [may] annul the marriage of a Caucasian and a non-Caucasian solely because of the races of the parties?"[276] The Supreme Court twice dodged that question, leaving Virginia's law to stand for another dozen or so years (until *Loving*).

The first time that *Naim* came before the Court, it vacated and remanded an opinion of the Virginia Supreme Court of Appeals. The High Court issued a *per curiam* that stated:

> The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered "in clean-cut and concrete form, unclouded" by such problems.[277]

On remand, the Virginia court affirmed its earlier judgment.[278] When appeal was again taken to the Supreme Court, it evaded its jurisdiction (even though jurisdiction was mandated by federal law),[279] and dismissed the appeal with an "opinion" which provided that:

> The motion to recall the mandate and to set the case down for oral argument upon the merits, or, in the alternative, to

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The Constitutionality of Miscegenation Statutes, 1 HOW. L.J. 87, 92–93 (1955) (discussing why miscegenation statutes violate the Due Process Clause of the Fourteenth Amendment).

275. 347 U.S. 483 (1954).

276. Appellant's Statement as to Jurisdiction at 3, Naim v. Naim, 350 U.S. 891 (1955) (No. 366) (on file with the North Carolina Law Review). *Cf.* Weinberger, *supra* note 274, at 209 (proposing that *Naim* "squarely raised the question whether a state statute proscribing the marriage of the Chinese appellant to a Caucasian woman was violative of the equal protection clause of the Fourteenth Amendment"). Although not cited in the appellant's jurisdictional statement or the Brief in Opposition to Appellee's Motion to Dismiss or Affirm, Naim v. Naim, 350 U.S. 891 (1955) (No. 366) (on file with the North Carolina Law Review), the inaugural issue of the HOWARD LAW JOURNAL elaborated the due process argument for striking down state miscegenation laws. *See* Note, *The Constitutionality of Miscegenation Statutes*, *supra* note 274, at 92–93. For another pre-*Naim* due process argument against miscegenation laws, see Note, *Statutory Ban on Interracial Marriage Invalidated by Fourteenth Amendment*, 1 STAN. L. REV. 289, 293–97 (1949).

277. Naim v. Naim, 350 U.S. 891, 891 (1955) (per curiam) (citation omitted).

278. Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956) (per curiam).

279. 28 U.S.C. §§ 1252–1257 (1952) (cited in Gunther, *Subtle Vices*, *supra* note 165, at 12 n.77).

> recall and amend the mandate is denied. The decision of the Supreme Court of Appeals of Virginia . . . in response to our [earlier] order . . . leaves the case devoid of a properly presented federal question.[280]

To understand the Court's inaction in *Naim*, which Professor Herbert Wechsler, in a strong turn of phrase, later described as "wholly without basis in the law,"[281] one must look to the argument that Justice Frankfurter—the "moving force" behind the Court's non-decision in the case—had successfully made to the Conference:[282]

> Even if one regards the issue, as I do, of a seriousness that cannot be rejected as frivolous, I candidly face the fact that what I call moral considerations far outweigh the technical considerations in noting jurisdiction. The moral considerations are, of course, those raised by the bearing of adjudicating this question to the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases. I assume, of course, serious division here on the merits. For I find it difficult to believe that there is a single member of this Court who does not think that to throw a decision of this Court other than validating this legislation into the vortex of the present disquietude would not seriously, I believe very seriously, embarrass the carrying-out of the Court's decree of last May.[283]

In his biography of Chief Justice Earl Warren, Professor Bernard Schwartz has filled in some of the gaps of the Court's officially unofficial prudential "rationale" for its inaction in *Naim* this way:

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280. Naim v. Naim, 350 U.S. 985 (1956) (citations omitted). *See also* CHARLES A. WRIGHT ET AL, 16B FEDERAL PRACTICE AND PROCEDURE 253, § 14 (1992) (discussing *Naim*); *see also* Tushnet, *The Warren Court as History*, *supra* note 274, at 5 ("On entirely specious grounds the Court refused to consider the constitutional challenge. The Court invoked technical grounds to explain its refusal, and only an insider could appreciate that on the facts of *Naim*, those grounds were quite ridiculous.").

281. Wechsler, *supra* note 165, at 34.

282. As Hutchinson explains, "the moving force behind the Court's non-decision [in *Naim*] was Mr. Justice Frankfurter." Hutchinson, *supra* note 274, at 64; *see also* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 161 (1983) (referring to "the majority, led by Frankfurter"). Frankfurter himself fairly boasted of his role in persuading the Court to postpone a ruling on the miscegenation question to his friend Learned Hand. *See* GUNTHER, *supra* note 165, at 664–72.

283. Hutchinson, *supra* note 274, at 95–96; *see id.* app. D. (reproducing the Memorandum of Mr. Justice Frankfurter on *Naim v. Naim* (November 4, 1955)). Justice Frankfurter was, I think, implicitly referring to the Court's decision in *Brown v. Board of Education*, 349 U.S. 294 (1955).

> Countless students of constitutional law have puzzled over the enigmatic *Naim* opinion. But the majority, led by Frankfurter, was simply seeking a make-weight excuse to avoid dealing with the miscegenation issue so soon after the school segregation decisions. As a former Warren law clerk put it, the reaction in the South would have been,
>
> > "Well, you know, first blacks in the school room, and then the next thing they are going to be doing is sleeping with your daughters and marrying your daughters," and so on, the mongrelization of the races. And so I think that the Court back in 1955 . . . didn't want to deal with it right away, it wanted to build up to it.
>
> A memo on the *Naim* case to Justice Burton by one of his law clerks took the same position: "In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time."[284]

Speculation can be an unstable component of a prudential choice. Perhaps this helps explain why prudence is so often maligned as a source of constitutional judgment by academic commentators.[285] But, without a doubt, it helps explain why so precious few commentators defended the Court's action (or inaction, as the case may be) in *Naim*.

One of the most eminent of those who did defend the Court was former Frankfurter clerk Professor Alexander Bickel, who "praised [the] dismissal [in *Naim*] as an example of the operation of 'techniques that allow leeway to expediency without abandoning

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284. SCHWARTZ, *supra* note 282, at 161 (footnotes omitted). As another Warren biographer has explained, "*Naim v. Naim* came at an awkward time. Still hoping the South would rally behind the school desegregation decisions, the justices were reluctant to provoke resistance by striking down miscegenation laws." ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 451 (1997); *see also* MURPHY, *supra* note 59, at 192–93 (discussing *Jackson v. Alabama*, 348 U.S. 888 (1954), an even earlier post-*Brown* challenge to Alabama's miscegenation statute, and noting that "racial intermarriage—'mongrelization'—has been the great bête noire of white southern society and one of the chief reasons behind the resistance to school integration," and then later commenting that "[t]he Court's intricate maneuvering to avoid the miscegenation issue in another case, *Naim v. Naim*, indicates the Justices' awareness of the volatile nature of the problem, as does the remark which one Justice is supposed to have made after leaving the *Naim v. Naim* conference: 'One bombshell at a time is enough' ").

285. *Cf.* KOPPELMAN, *supra* note 239, at 103 ("It follows that the equal protection clause obligates the state to act [to further the antidiscrimination] project to the extent that it reasonably can. Such action . . . necessarily involves a multitude of prudential and predictive judgments, *of a kind for which courts are not particularly well suited.*" (emphasis added)); *see also infra* text accompanying note 298.

principle[.]' "[286] As he himself wrote: "[T]he Court found no insuperable difficulty in leaving open the question of the constitutionality of antimiscegenation statutes, though it would surely seem to [have been] governed by the principle of the *Segregation Cases*" handed down but a short time earlier.[287] Indeed, "a decision on the validity of anti-miscegenation statutes was avoided through the dismissal of an appeal, which is to be explained in terms of the discretionary considerations that go to determine the lack of ripeness."[288]

Although Bickel trumpeted "discretionary adjudications" (what he elsewhere called "the techniques and allied devices for staying the Court's hand"[289]), he went to lengths to underscore that he did not mean to "concede unchanneled, undirected, uncharted discretion"[290] or "decision proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned."[291] According to Bickel, "[t]he antithesis of principle in an institution that represents decency and reason is not whim or even expediency, but prudence."[292] For Bickel, however, prudence in declining to rule on a case, which is what *Naim* represented, was not the same as prudence in deciding the merits. He thus did not consider it "the antithesis of principle"[293] for the Court to stay its hand in *Naim*, at least (perhaps) so long as the Court (as he put it) "was subject to scurrilous attack by men who predicted that the integration of the schools would lead directly to 'mongrelization of the race.' "[294]

Professor Gerald Gunther adamantly disagreed. He indignantly maintained that Bickel's defense of *Naim* amounted to an extension of the passive virtues "beyond the blithe disregard of principles

286. Gunther, *Subtle Vices*, *supra* note 165, at 11.

287. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 71.

288. *Id.* at 126. In a narrowly limited context, "discretionary adjudications" may not be terribly objectionable. But no sooner does one utter "discretion" than one may be reminded of Judge Walter Schaefer's skepticism about its actual judicial use. "I have come to believe," explained Judge Schaefer in a different context, "that if enforcement of the rules of evidence were turned over on a broad scale to the discretion of trial judges, the rule to be applied would depend on the personality of the individual judge." WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINES 34 (1967).

289. BICKEL, THE LEAST DANGEROUS BRANCH, supra note 165, at 132.

290. *Id.*

291. *Id.* at 132–33.

292. *Id.*

293. *Id.* at 133.

294. *Id.* at 174. For a more complete, albeit parenthetical, explanation why these "attack[s]" were constitutionally and pragmatically significant beyond themselves, see *infra* note 316.

essential to jurisdictional doctrines" that "compromise[d] the very principle—the impermissibility of racial classification—that [the Court] purport[ed] to protect."[295]

Disagreement, however, should not be overstated. There was a narrow, but significant point of convergence between Bickel and Gunther. As Bickel wrote, "[T]he techniques and allied devices for staying the Court's hand . . . mark the point at which the Court gives the electoral institutions their head ... and there is nothing paradoxical in finding that here is where the Court is most a political animal."[296] For their differences, I think, Gunther would have agreed with Bickel about this much, at least: the Court was indeed a most political animal when it avoided the merits of the constitutional claim presented by *Naim*. For Gunther, one might say, that was precisely the problem with the Court's actions in the case.

By acting as it did, the *Naim* Court may well have been "giving the electoral institutions their head."[297] But many must have found themselves agreeing with Gunther, that the Court erred when it decided to make "conjecture about the complexities of political reactions ... a primary ingredient of [its] deliberations."[298] For, even a willowy precedent like *Naim*, once set, held out a real possibility of infecting the constitutional principle that the segregation cases then appeared to entail.[299] Holding the line against the possibility that *Naim* would undermine the principle of those cases was Bickel's goal. Gunther, for his part, had grave doubts it could be done.[300]

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295. Gunther, *Subtle Vices*, *supra* note 165, at 24. It is difficult to imagine Gunther disagreeing with Chief Justice Warren's view that "the failure to take the case was an evasion of the Court's responsibility." CRAY, *supra* note 284, at 451.

296. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 132.

297. *Id.*

298. Gunther, *Subtle Vices*, *supra* note 165, at 7.

299. Gunther put it this way: "Expediency as to avoidance devices is contagious; the effort to shield the integrity of adjudications on the merits from infection fails." *Id.* at 14.

300. Bickel and Gunther were not the first, nor the last, to debate the tension between principle and prudence. And it is not difficult to imagine how one might use that debate as the starting point for criticizing the alternative reading of *Hardwick*, or, for that matter, White's opinion in the case.

Although *Hardwick* might have been one of those "discretionary adjudications" of which Bickel would have approved, such techniques, as Gunther taught, are not free of doubt. One might argue that if the Court supposed it was striking a balance between two speculative harms, one to gays and one to itself, it was, quite simply, mistaken. Powell, at least, seemed to think that the harm sodomy laws worked on gays was largely, if not entirely, symbolic, but not (or so he said) "very important." *See* Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3 (" 'That case was not a major case, and one of the reasons I voted the way I did was the case was a frivolous case .... So far as I'm concerned it's just a part of my past and not very important ....' " (quoting Powell)). (For some evidence that Powell may have spent some more time

thinking about the decision, at least later on, see JEFFRIES, *supra* note 103, at 530.) One might well say that the only *truly* speculative harm in *Hardwick* was the Court's (or Powell's) "conjecture about the complexities of political reactions," Gunther, *Subtle Vices*, *supra* note 165, at 7, that might have resulted from a decision on the merits favorable to Hardwick. Various amici in *Hardwick* valiantly attempted to explain to the Court that sodomy laws, apart from direct enforcement, work material harm on lesbians and gay men. *See* Brief Amicus Curiae for Lesbian Rights Project, *et al.*, in Support of Respondents, at Part II, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140); Brief Amicus Curiae for Lambda Legal Defense and Education Fund, Inc., *et al.*, in Support of Respondents, at Part III, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140). *Hardwick*, these amici rightly intimated, scarcely involved a "merely symbolic" claim. Accordingly, and especially in light of the Court's earlier privacy decisions, one might conclude that the only appropriate balance to have struck in weighing the competing considerations in the case was for Hardwick. Failing to do so, *Hardwick* effectively "compromised ... the very principle"—the impermissibility of regulating private, consensual sexual activity between adults—that its prior cases seemed to protect. Indeed, White's *Hardwick* opinion may further go to show just how contagious "expediency as to avoidance devices is." Gunther, *Subtle Vices*, *supra* note 165, at 14.

A good deal more, of course, would need to be said in order for a critique following these lines to be persuasive. Any argument that an outright judgment for Hardwick was more appropriate than a non-decision would have to take great care to draw a crisper line than any so far provided between the Court's prudential decision in *Hardwick* and such decisions more generally. Unless, that is, one was prepared to defend Gunther's line between "discretionary adjudications" and the "principles *essential* to jurisdictional doctrines," *id.* at 24 (emphasis added), or to solve the seemingly intractable riddle of the countermajoritarian difficulty.

One could well develop an adequate critique of *Hardwick* (as it is understood here). But no more than the foregoing brief drawing will presently be attempted. Even assuming error in *Hardwick*'s reliance on prudence, its days are numbered. Prudence will not forever impose itself between lesbians and gay men and the Constitution. As Sunstein has explained, "In all likelihood, laws against homosexual orientation and behavior will soon come to be seen as products of unfounded prejudice and hostility, and private prejudice and hostility will themselves recede." Sunstein, *Homosexuality and the Constitution*, *supra* note 18, at 2. Sunstein's predictions may be optimistic, though I hope not too much.

Not everyone will be able to resist the urge to hasten *Hardwick*'s death—even a "reoriented" *Hardwick*. Those who cannot may be motivated, in part, by their substantive views about the possible transitional compromise the alternative reading of the case sets forth. One way to challenge the compromise, already mentioned, is to dispute the plausibility of reading *Hardwick* to have effectively decided not to decide the case's merits. Another, whose contours can now be discerned, is to accept the plausibility of the alternative reading and then proclaim the error of the Court's decision to reach a prudential judgment in the case.

Before moving on, I should add a few words about White's opinion in *Hardwick*. Whereas Bickel adamantly maintained that "discretionary adjudications" should be limited to the realm of the "passive virtues," one might say that White confidently, but far too casually, pushed those adjudications into the very realm the Burkean Bickel studiously avoided taking them. White happily let "discretionary adjudications" control his decision on the merits in *Hardwick*. On them he pinned his denial of the existence of a fundamental right to same-sex sexual activity in private, notwithstanding precedents fairly indicating, to the contrary, the existence of constitutional protection for such activity.

Some, of course, might not be moved by such an argument, thinking that White's opinion was an appropriate expression of constitutional *realpolitik*. In White's defense,

B. *Illuminating the Conditions of Prudence: What Happened Between* Naim *and* Loving*?*

Let me begin with a quick reminder of where we are. As I suggested earlier, the alternative reading of *Hardwick* can be viewed as offering a pragmatic interpretive rule for courts to follow in cases involving constitutional disputes over laws that discriminate against lesbians and gay men.[301] In deciding whether, in such a case, pragmatic considerations would permit a principled constitutional decision on the merits or counsel judicial restraint, a court (I proposed) might look for guidance to some of the social and legal changes that took place in the time between *Naim* and *Loving*. These changes embody what I generally call "the conditions of prudence."[302]

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they might say, the Court's decisions on the merits will—and ought to—be governed by social norms, institutional legitimacy, or both. *See, e.g.*, Sandalow, *Constitutional Interpretation*, *supra* note 94, at 1033–34. There is much to be said in response to such an argument, but Bickel himself may have said it best: " '[I]f the estimate of reality on which [this defense of White's opinion] feeds is in any degree correct, then the reality must be changed to exactly that degree.' " Gunther, *Subtle Vices*, *supra* note 165, at 13 (quoting BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 84). For " '[I]f men are told complacently enough that this is how things are, they will become accustomed to it and accept it. And in the end this is how things will be.' " *Id.*

301. How broad should the scope of *Hardwick*, understood as a pragmatic interpretive rule, be? Should it be treated as a general rule of application? Should it apply differently to due process or equal protection theories? Should it apply to First Amendment claims? To some but not others? Should we recognize a distinction for pragmatic purposes between, say, a case like *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that the exclusion of gays from St. Patrick's day parade is protected by First Amendment rights of private parade organizers), and other First Amendment claims on behalf of lesbians and gay men that have been developed in the literature? *See, e.g.*, David Cole & William N. Eskridge, Jr. *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 325–30 (1994). How, if at all, would viewing the First Amendment, as infused with an equality notion change the pragmatic calculation? *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23–26 (1975). Would *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that a state law requiring Boy Scouts not to exclude gays from organization violates the First Amendment), have been decided differently if the Court had adopted Karst's (or similar) theories? *See generally* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY *passim* (Laura J. Lederer & Richard Delgado eds., 1995) (collecting various essays discussing this point more or less explicitly). These questions may be part of a future discussion of my present efforts.

302. Before turning directly to the discussion of the conditions of prudence a few words about conceptualization are in order. I must acknowledge a basic conceptual limitation to my present discussion. It is quite likely true that the conditions of prudence in constitutional adjudication (whether, as here, in the specific context of the constitutionality of miscegenation bans, or elsewhere) can never be entirely known. Prudence is not readily susceptible of being defined by tidy calculation. That there may be no grand theory of prudence to be articulated, however, does not mean it entails no calculation or that the calculation lacks any conditions. Nor does it mean that an effort to

It may be obvious, or if not, can readily be agreed, that the conditions of prudence played a role in the Court's treatment of the lawfulness of miscegenation bans in both *Naim* and *Loving*. Even so, attempting to discern *which* social and legal changes may have altered the Court's prudential calculations—so that it did in *Loving* what it avoided doing in *Naim*—points to a substantial methodological obstacle one encounters when attempting to talk about the conditions of prudence.[303] One could, of course, look to any of the myriad commonplace changes individual citizens brought about in their own—and others'—daily lives in the span between *Naim* and *Loving* as a starting point for the Court's prudential calculations. On this level, however, the potential field of prudential vision seems too large to contemplate efficiently and too "twitchy," except perhaps in hindsight, to be counted chiefly among the prudential conditions that slowly eroded *Naim* to channel a course toward, and for, *Loving*.[304]

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speak of the conditions of prudence cannot pay its way. Something may not be everything, but it is not nothing either. Indeed, even these initial efforts suggest that there may yet be a way to guard against idiosyncratic reliance on prudence, or its wild excess. It may, as well, begin to provide a response to claims, mentioned elsewhere, that courts are simply ill-suited to make prudential judgments. *See, e.g.*, *supra* note 285 and text accompanying note 298.

Moreover, the conditions of prudence identified in the analysis that follows may yield insights applicable beyond the particular context—the constitutionality of miscegenation bans—in which they are adduced. It is not necessary, though it would surely be interesting, to explore the full extent of their capacity to be generalized and applied in other arenas. The only claim that need, and will, presently be advanced is decidedly more modest: the conditions of prudence as they operated in the Court's constitutional treatment of laws against miscegenation are relevant, by analogy, to the constitutional consideration of laws that discriminate against lesbians and gay men. So much, I think, is suggested and may already have been justified by the theoretical work of the miscegenation analogists. Elaboration of thoughts on these issues will wait for another day.

303. It presents a number of theoretical challenges, in addition to those already mentioned. In order to deal thoroughly with the conditions of prudence, one ought to ask (and try to answer) questions like these: Should prudence have played any role in the Court's deliberations on the miscegenation question? If so, why and what role? And if not, why not? Should the Court have counted in its pragmatic calculation its own decisions widening the scope of Fourteenth Amendment equality protections? To answer these questions, one would have to say a good deal more about the idea of "prudence" as a constitutional value. Among other things, it would require further observations on more basic concepts like "law," "judicial review," and "democracy" (perhaps "federalism," as well). The full theoretical defense of the conditions of prudence is well beyond the scope of this Article. All I will do here is gesture in the defense's vast directions. For a related and more complete account of prudence as a constitutional value and the more basic concepts it implies, see generally SUNSTEIN, ONE CASE AT A TIME, *supra* note 51. (discussing and defending prudence and incrementalism in constitutional adjudication).

304. Sandalow, *Judicial Protection of Minorities*, *supra* note 31, at 1186 ("Just as every 'intuitive twitch' is not to be taken as expressing the values of an individual, not every action of government is to be understood as expressing the values of the society." (citing

It may well be that the highly individualized and local changes (or foot-dragging) that took place between *Naim* and *Loving* played a role in informing the Court's imagination of what prudence counseled then and again on the miscegenation question. Nevertheless, one might think it appropriate to be mindful of Dean Terrance Sandalow's observation that "[a] consensus achieved through a broadly representative political process is . . . as close as we are likely to get to the statement of a norm that can be said to reflect the values of the society."[305] Likewise, one can perhaps understand why it may be at that level—at the level of social norms, expressed through those institutions and processes vested with cultural and legal authority—that the Court might have found surer signals to guide it toward (in *Loving*) or away (in *Naim*) from a principled decision on the merits of what, for relevant constitutional purposes, was the very same case.[306] More about why as the narrative unfolds.

Thomas Grey, *The First Virtue*, 25 STAN. L. REV. 286, 300 (1972))).

305. Sandalow, *Judicial Protection of Minorities*, *supra* note 31, at 1187.

306. There is a related, but much more controversial argument than the one being made here. One could say, though I do not, that the "correct"—or principled—constitutional decision should be defined with reference to laws that "reflect and embody consensus about the inappropriateness of using race to distinguish between people." Telephone Interview with Terrance Sandalow, University of Michigan Law School (Dec. 21, 1999); *see generally* Sandalow, *Constitutional Interpretation*, *supra* note 94. Congressional enactments, on this view, can (at least in some cases) be taken as reflecting the relevant constitutional consensus. The Court seemed to accept this sort of thinking as a principle of statutory interpretation in *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). The kind of consensus-based argument that would justify extending *Bob Jones University* to the constitutional context (as I argue Justice White did in *Hardwick*), however, is not the one I am developing. My argument, rather, seeks to explain that the enactments which some, including Dean Terrance Sandalow, believe should inform a court's judgment about the meaning of a particular constitutional provision can also be used to inform a court's judgment about when a principled decision of a particular sort would be timely or feasible or "prudent."

Reading "social" or "cultural" norms, whether for purposes for which I am not going to read them or for those for which I will, presses on that well-rehearsed "level of abstraction" problem. *Cf.* BORK, *supra* note 37, at 203–04; Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 350 (1992). *See generally* Tribe & Dorf, *supra* note 29. Let me give rest to any idea that the problem's solution might be found in these pages. It will not. For what it is worth, the approach to these matters in the pages that follow is what strikes me as likely to be the way many—including some number of judges—would intuitively tend to understand them, which means neither that they are ungrounded in reason nor necessarily the most appealing theoretical approach one could offer. But the approach has to recommend it that it is both serviceable and understandable. *See* Thomas Reed Powell, *The Logic and Rhetoric of Constitutional Law*, *in* ESSAYS IN CONSTITUTIONAL LAW 85, 91 (Robert G. McCloskey ed., 1957) ("The controlling considerations in the solution of these [constitutional] problems have been considerations of common sense—none the less common sense because it may not have been your common sense or my common sense . . . .").

Let us start with the signals from Congress. In the time between *Naim* and *Loving*, Congress, over the strong objections of various lawmakers who defended racial segregation against all comers,[307] enacted some of those famous Civil Rights Acts, among them the Civil Rights Acts of 1957,[308] 1960,[309] and 1964,[310] as well as the Voting Rights Act of 1965.[311] It is easy to get bogged down in the detailed provisions of these various statutes and caught up in the thought that, by their express terms, they neither attempted nor purported to put to rest the lawfulness of miscegenation bans.[312]

But we should not forget that vetting statutory minutiae from colon to colon is not the only way to read a law. Although the Civil Rights Acts reflected the political compromise that is as part and parcel of the legislative process, they were still susceptible of being understood, pragmatically, as reflections of congressional respect for the constitutional principle ensuring and requiring that people of color be treated as full and equal citizens.[313] They could (and can),

307. *See* Alvin Schuster, *96 in Congress Open Drive to Upset Integration Ruling*, N.Y. TIMES, Mar. 12, 1956, at A1 (reporting on the so-called "Declaration of Constitutional Principles," or what may more commonly be known as the "Congressional Manifesto").

308. Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 U.S.C. & 42 U.S.C.). In his 1957 State of the Union Address, President Eisenhower proposed, among other things, what would become the Civil Rights Act of 1957; some, however, gave credit and "congratulat[ions to] the then Democratic Senate Majority Leader Lyndon B. Johnson for 'getting even this little bit from the Southerners.' " HARRY GOLDEN, MR. KENNEDY AND THE NEGROES 111 (1964). As Judge Louis Pollak has observed, "[T]he [1957] Act conceptually followed the extraordinary victories of [William H.] Hastie and [Thurgood] Marshall in pre-*Brown* voting cases. *The impetus for the Act, however, was the decision in* Brown *itself.*" Louis H. Pollak, *The Limitless Horizons of* Brown v. Board of Education, 61 FORDHAM L. REV. 19, 20 (1992) (emphasis added).

309. Pub. L. No. 86-449, 74 Stat. 90 (codified as amended in scattered sections of 18, 33, 42 U.S.C.).

310. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. 1447 and scattered in 42 U.S.C.).

311. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.). Other federal legislation in the period could, of course, be counted as statements about Civil Rights. The federal school-aid and economic programs, for example, are federal laws that Bickel might have counted within a prudential calculation. *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 271 (citing 1 UNITED STATES CIVIL RIGHTS COMMISSION REPORT 143–98 (1961)).

312. *Cf.* Robert B. McKay, *"With All Deliberate Speed": Legislative Reaction and Judicial Development 1956–1957*, 43 VA. L. REV. 1205 (1957).

313. In the years since *Brown*, commentators have recognized a number of theories of race equality that could support the Court's judgment in that and other race discrimination cases. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 31–36 (Kimberlé Crenshaw et al. eds., 1995) (discussing various ways of stating the principle of

that is, be regarded as assent for the principle of the Court's segregation decisions by a coordinate branch of government within the "colloquy that can take place after the declaration of governing principle by the Court,"[314] and I would add, before.[315] The Civil Rights Acts, we might say, contributed to the reconfiguration of the prudential calculus that had once (or, more accurately, twice) led the Court to stay its hand in *Naim*.

By 1967, the year of the *Loving* decision, the potential implications of those "scurrilous attack[s] by men who predicted that the integration of the schools would lead directly to the 'mongrelization of the race' "[316] had somewhat subsided. The Court could thus balance significant support within congressional chambers on the side of a principled ruling on the merits in a miscegenation case. A conservative reading of the signals emanating from Civil Rights Acts might have led the Justices to suppose they could, at a bare minimum, count on enough active sympathy within Congress to quash reactionary attempts to marshal that institution's constitutional authority to undermine—or undo—a decision by the Court striking

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Brown).

314. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 244.

315. The idea that the Court's race equality jurisprudence, and especially its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), burst forth on the constitutional scene largely or entirely without warning has, in recent years, been revealed as more mythic than real. For commentary discussing these matters, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–169 (1991); Randall Kennedy, *Cast a Cautious Eye on the Supreme Court*, 12 MEDIA STUDS. J., Winter 1998, at 112; Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 452–53 (1994) (reviewing MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994)); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7-8 (1996); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2012-15 (1990); Mark V. Tushnet, *The Significance of Brown*, 80 VA. L. REV. 173, 178-79 (1994) (critiquing Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1993)). For an earlier account of the slow evolution of the Court's race equality jurisprudence leading up to and shortly following *Brown*, see Yale Kamisar, *The School Desegregation Cases in Retrospect: Some Reflections on Causes and Effects*, *in* ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA 1952–55 at xii (Leon Friedman ed., 1969).

316. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 174; *see also id.* at 250 ("This is the unpalatable but undeniable fact that the principle of the integration of the races ran counter to the views and strong emotions not merely the customary practice, of a majority of the people to whose way of life it was chiefly to be applicable . . . ."); *id.* at 251 ("The foreseeable opposition [to execution the segregation cases' principles] was localized, indeed isolated; but, by the same token, it was entrenched in a cluster of states, where it formed a majority. Thus concentrated, it could wield power disproportionate to what its numbers would give it if distributed nationwide.").

down laws against miscegenation.[317] If "the cooperation of the political branches might be needed in fostering the necessary acceptance" of a decision constitutionally to protect miscegenation from state prohibition, the Civil Rights Acts seemed to indicate, and certainly could be read to indicate, that the Court had that cooperation from Congress.[318]

But there was cooperation from the Executive Branch, too. President Eisenhower's "tepid" support for desegregation efforts[319]

317. Such means might include efforts aimed at constitutional amendment, jurisdiction stripping, or impeachment of the Justice, or Justices, who would join in such a ruling.

318. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 251. My account is somewhat at odds with the one found in BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 244–72 (discussing the social and political context of the school segregation cases); *id.* at 265 ("At best, the President [Eisenhower]—and, for its own reasons, also the Congress—politely declined the Court's invitation to join with it in ensuring the success of its now hazardous undertaking."); *id.* at 271 ("Here a federal school-aid bill and programs for the development of what is now a sick one-crop economy may be more important than principles declared by the Supreme Court or the Civil Rights Acts of 1957 and 1960.").

Though not strictly necessary to defend my present argument, one might also have read the Civil Rights Acts, with their various explicit and implicit jurisdictional provisions, as amounting to a kind of legislative authorization—or invitation—for the courts to elaborate and expand the principle of the school segregation cases—up to and including laws against miscegenation. Indeed, the Justices were hardly impervious to various Civil Rights Acts' grants of power to the courts. See *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), where, in dissent, Justice Hugo Black wrote: "I think one of the chief purposes of the 1964 Civil Rights Act was to take . . . disputes out of the streets and restaurants and *into the courts, which Congress has granted power to provide an adequate and orderly judicial remedy.*" *Id.* at 318–19 (Black, J., dissenting) (emphasis added); *see also* Bell v. Maryland, 378 U.S. 226, 311–12 (1964) (noting that the Fourteenth Amendment requires nondiscriminatory treatment in public accommodations and then observing that, in the words of Professor Ira Michael Heyman, "[t]he Civil Rights Act created the substantive rights that Mr. Justice Goldberg found within the Fourteenth Amendment," Ira Michael Heyman, *Civil Rights 1964 Term: Responses to Direct Action*, 1965 SUP. CT. REV. 159, 174). Perhaps some number of the Justices viewed the congressional invitation in the Civil Rights Acts as a kind of roving constitutional warrant to "do justice" for people of color. *See, e.g.*, *Hamm*, 379 U.S. at 315 ("The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our history.").

319. Golden's account of President Eisenhower's lack of enthusiasm for pre- and post-*Brown* race desegregation efforts somewhat undermines the force of Bickel's boldish suggestion that the "cooperation of the political branches [with such efforts] could well be looked for, since the Solicitor General of the United States, responding to the Court's request for an expression of views as amicus curiae, had appeared and supported the cause of the Negro Plaintiffs." BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 251. There was, as Golden points out, a significant distance separating Eisenhower's enthusiasm for desegregation, on the one hand, from that of his Attorney General, Herbert Brownell, and his Solicitor General, Simon Sobeloff, on the other. *See* GOLDEN, *supra* note 308, at 104 ("Despite their chief's sentiments, they soon argued an advisory brief with the Supreme Court regarding desegregation procedures which employed such terms as 'promptly' and 'immediately.' The Brownell brief and the Sobeloff argument clearly indicated that the 'moderate' President had an 'extremist' Attorney General and

gave way to the promises Senator John F. Kennedy, Jr., made on the presidential hustings to uphold and defend the Constitution as the Court had been interpreting it (at least) since the segregation cases.[320] Those promises—some sooner, some later, some not at all[321]—turned into President Kennedy's various civil rights programs, reflected in Executive Orders,[322] legislative proposals,[323] administrative regulations,[324] and the campaign of the Justice Department under his brother's stewardship, all aimed at making race equality a meaningful reality throughout the country, particularly in the South, in the years leading up to *Loving*.

The Kennedy Administration's institutional support for civil rights, which many believed inadequate to the task at hand, became more vigorous when Vice President Lyndon B. Johnson assumed the responsibilities of the Oval Office and became, as he put it, "the trustee and custodian of the Kennedy administration ...."[325]

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an 'extremist' Solicitor General."). Bickel did, however, note Eisenhower's limited support for the Court's desegregation efforts. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 266.

320. *See* GOLDEN, *supra* note 308, at 130 (explaining that the "romance" between then-Senator John Kennedy and white Southerners "was shattered once and for all" when, on June 23, 1960, Kennedy "addressed the Liberal party of New York and said that he hoped to win the Democratic nomination for President without a single Southern vote in the convention"); *see also id.* at 118 ("[I]t was two years before Mr. Kennedy issued an Executive directive against discrimination in government housing. Political considerations had stayed him. He had been a member of both the House and the Senate and he appreciated the *quid pro quo* of politics."); *id.* (explaining some of the reasons why Kennedy's "appreciation" for the "quid pro quo of politics" mattered).

321. Many, for example, "complained that President Kennedy had wasted two years before he ended housing segregation in government-financed units; and that when the President did end it by his celebrated promise of 'a stroke of the pen' it was not half as strong as they hoped it would be." *Id.* at 135.

322. *See* Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963) (dealing with the non-discriminatory employment practices of government contractors under the auspices of the President's Equal Employment Opportunity Committee); Exec. Order No. 11,063, 3 C.F.R. 652 (1959–1963), *reprinted as amended in* 42 U.S.C. 1982 (1964) (creating equal opportunity in housing); and Exec. Order No. 11,114, 3 C.F.R. 774 (1959–1963) (extending the authority of the President's Equal Employment Opportunity Committee). Following President Kennedy's assassination, Executive Orders Number 10,925 and 11,114 were both superseded by Executive Order Number 11,246.

323. *See* President Kennedy's Special Message to Congress on Civil Rights, 1963 PUB. PAPERS 82 app. at 221 (Feb. 28, 1963). Criticism of Kennedy's original Civil Rights bill, as well as events in April and May of 1963 in Birmingham, Alabama, helped lead to the bill's enhancement. IRWIN UNGER & DEBI UNGER, LBJ: A LIFE 267–68 (1999).

324. As Professor Gerald Rosenberg reports, it was not until late in May 1961 that "Attorney General Robert Kennedy, supported by other cabinet members[,] petitioned the [Interstate Commerce Commission] to adopt more stringent regulations. In September 1961, the [Commission] issued new and stronger regulations." ROSENBERG, *supra* note 315, at 64 (citation omitted).

325. UNGER & UNGER, *supra* note 323, at 291 (citing LYNDON JOHNSON, THE

President Johnson, whose efforts as Senate Majority Leader had been instrumental in the passage of, among other important pieces of civil rights legislation, the 1957 and 1960 Civil Rights Acts,[326] played a catalytic role in the enactment of the Civil Rights Act of 1964[327] and the Voting Rights Act of 1965.[328] If by the time of *Loving*, then, the Court could include congressional assent within its pragmatic assessment whether to declare miscegenation prohibitions unconstitutional, it could, by then, include Executive assent, as well.

What may be the most important of the conditions of prudence, however, has not yet been mentioned. The oral arguments in *Loving* appear to indicate something of the actual significance of what might be thought of as "federalist assent" to the Court's prudential reflections. Notice, for example, that the very first question from the Bench in *Loving* went directly to the kind of opposition on the state level that a decision declaring miscegenation bans unconstitutional might have encountered: "How many states," asked one of the Justices, "have laws like [Virginia's]?"[329] The answer returned—sixteen[330]—stood in stark contrast to the one given in the literature the same year that *Naim* first arrived at the Court—twenty-nine.[331]

VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963–1969 at 19 (1971)).

326. *See id.* at 203–19 (discussing Johnson's role in the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 U.S.C. & 42 U.S.C.)); *id.* at 232–35 (same for Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18, 33, 42 U.S.C.)); *id.* at 306–11 (same for Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 24 (codified as amended at 28 U.S.C. 1447 and scattered in 42 U.S.C.)); *id.* at 357–59 (same for Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.)); *see also* VAUGHN DAVIS BORNET, THE PRESIDENCY OF LYNDON B. JOHNSON 95 (1983) (same for Civil Rights Act of 1957); *id.* at 98–99 (same for Civil Rights Act of 1964).

327. Johnson, according to Unger and Unger, "publicly stayed in the background during the fight over the [1964] Civil Rights Act, but he was everywhere behind the scenes cajoling and threatening southern senators." UNGER & UNGER, *supra* note 323, at 309.

328. *See id.* at 357–59.

329. Oral Argument for Appellants, Loving v. Virginia, 399 U.S. 1 (1967), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 961 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Loving *Oral* Arguments].

330. *Id.* ("There are 16 states, Your Honor, that have these [miscegenation bans] presently. Maryland just repealed theirs.").

331. Naim v. Naim, 87 S.E.2d 749, 753 (Va. 1955) ("More than half of the States of the Union have miscegenation statutes."), *vacated by* 350 U.S. 891 (1955); Note, *The Constitutionality of Miscegenation Statutes*, *supra* note 274, at 88 & n.12 (1955) (counting twenty-nine states with laws against miscegenation). As late as 1957, one observer began his "reappraisal of the constitutionality of miscegenation statutes" with the finding that: "Today, twenty-five States of the Union by statute forbid marriages on racial grounds." Weinberger, *supra* note 274, at 208 & n.1 (collecting statutes).

The Court did not fail to comprehend that sheer numbers told only part of the story. Picking up on the parallels between the pattern of laws prohibiting miscegenation and the earlier pattern of school segregation laws, one of the Justices commented: "I've just been looking at the list [of the states that then prohibited miscegenation], and I can't—I can't see a single one of these states that wasn't among those that had the school segregation laws. You may find one, but I think they're identical."[332] This last note was, of course, as important to strike as its salience was, at least publicly, to dampen. And dampened it was. "Well," one Justice (about the general line of inquiry) eventually remarked, "it isn't a matter of any great consequence."[333]

Officially, it may not have been a matter of "any great consequence." But can there be any serious doubt that, at the very least, subliminally, it really was more than an idle point of information? The number and pattern of state laws barring miscegenation had shifted considerably since *Naim*, a time when the states that prohibited interracial marriages were scattered illiberally throughout the South, East and West. As the transcripts of the oral arguments in *Loving* suggest, that shift may well have bolstered the Court's confidence that *Loving* was the occasion for finishing the

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332. *Loving* Oral Arguments, *supra* note 329, at 1001. The list was not exactly identical. The list of states, reproduced *infra* note 333, did not include Kansas, which, as the Justice who made this observation could not have forgotten, was "among those [states] that had the school segregation laws." *See* Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954).

333. *Loving* Oral Arguments, *supra* note 329, at 1001. Although the *Loving* opinion *did* mention the "fact" of the number of states that then prohibited miscegenation, it seemed to avoid expressly attributing any significance to it. The Court simply stated: "Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications." Loving v. Virginia, 388 U.S. 1, 6 (1967). In a footnote, the Court added, "After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage." *Id.* at n.5 (listing the following state law sources: "Alabama, Ala. Const., Art. 4, § 102, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55-104 (1947); Delaware, Del. Code Ann., Tit. 13, § 101 (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53-106 (1961); Kentucky, Ky. Rev. Stat. Ann. § 402.020 (Supp. 1966); Louisiana, La. Rev. Stat. § 14:79 (1950); Mississippi, Miss. Const., Art. 14, § 263, Miss. Code Ann. § 459 (1956); Missouri, Mo. Rev. Stat. § 451.020 (Supp. 1966); North Carolina, N.C. Const., Art. XIV, § 8, N.C. Gen. Stat. § 14-181 (1953); Oklahoma, Okla. Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, S.C. Const., Art. 3, § 33, S.C. Code Ann. § 20-7 (1962); Tennessee, Tenn. Const., Art. 11, § 14, Tenn. Code Ann. § 36-402 (1955); Texas, Tex. Pen. Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961)"). Into this silence about the significance of these laws (and their pattern), I think, at least some measure of constitutional prudence can justifiably be read.

business left unfinished by *Naim*. Based on more than a decade's experience contending with Southern opponents of its race-equality rulings,[334] experience significant in its own right, the Court may have had a pretty good "feel" for how well it, standing alone, could handle the resentment that might be engendered by concluding that miscegenation laws did not square with the Constitution's demands. The growing assent for the principle of race equality on the national and state level could not but have reassured the Court that, in any event, it would not have to—or no longer did—stand alone.

C. *On Prudence and Sodomy*

What lessons might these conditions of prudence hold for the choices courts face when deciding whether to declare that the Constitution forbids governmental discrimination against lesbians and gay men? Again, without thinking of them as a perfectly neat prudential calculation, might prudential considerations tend to lead courts toward—or away—from the merits of such cases? The answer, of course, will vary from law to law. Rather than analyzing the entire spectrum, in this Subpart I will illustrate how a court might operationalize *Hardwick*, understood as a pragmatic interpretive rule, and translate the conditions of prudence from the miscegenation into the lesbian and gay rights arena. As I mentioned earlier, the chosen illustration will be a constitutional challenge to a state's sodomy ban.

In the years leading up to *Hardwick*, as well as in the years since, "[t]here has not been a piece of watershed legislation [from Congress] that has truly delivered practical benefit and safety to gay Americans."[335] The absence of watershed legislation, however, should not lead us to overlook the noteworthy ways Congress can be seen to have expressed its interest in participating in that "vital

334. *See* Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954); Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

335. *Ballot Box Key to Getting Change for Gays in Military, Clinton Says*, UNION-TRIBUNE (San Diego), Dec. 17, 1999, at A9 (remarks of Elizabeth Birch, Executive Director of the Human Rights Campaign). Congressional authorization for funds dedicated to AIDS and AIDS-related research, treatment and prevention in the years before and after *Hardwick* might be thought of as an earlier "breakthrough." Without meaning to deny the import of such funding, my current discussion sets out to show how, since *Hardwick*, Congress has spoken in ways a court might consider relevant to a prudential calculation of whether to reach the merits of the constitutionality of a state's sodomy prohibition. I cannot now say for certain, but the federal government's funding in the AIDS arena may have helped forge a link between AIDS and sexual orientation in ways that, as will be discussed shortly, did not much help lesbians and gay men in their constitutional arguments. *See infra* text accompanying notes 345–73.

national seminar"[336] that the *Hardwick* Court indicated it preferred not to lead.

As the Court's sometime student, Congress may have been reticent to disagree with its sometime teacher's views.[337] Nevertheless, by 1990, just four years after *Hardwick*, Congress started making its thoughts known. First came the notion, through the Hate Crimes Statistics Act of 1990 (HCSA),[338] that discrimination against lesbians and gay men was worthy of federal notice. One commentator has recounted that Congress had been considering the law "[f]or several years," but its "passage was blocked by legislators unwilling to include sexual orientation as a category" within it.[339] The HCSA, enacted, was a modest thought, to be sure, but considered: in principle, discrimination against lesbians and gay men might properly be the subject of future congressional action.

Shortly thereafter, almost as if Congress had it in mind when speaking through the HCSA and demonstrating that the HCSA was more than an empty, abstract observation, Congress approved the Immigration Reform Act of 1990 (IRA)[340] which, as a technical matter, repealed the categorical exclusion of lesbians and gay men from immigration by "eliminat[ing] the statutory ground [in previously-existing law] for exclusion based on 'sexual deviancy.' "[341]

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336. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

337. *Cf.* JACQUES DERRIDA, WRITING AND DIFFERENCE 31–32 (Alan Bass trans., 1978) (discussing "the disciple's" relationship to "the master").

338. Pub. L. No. 101-275, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 note (1994 & Supp. IV 1998)); *cf. Congress Bill on Hate and Violent Acts Gains*, N.Y. TIMES, May 22, 1988, at A18 (discussing Reagan Justice Department study concluding that gays are more commonly victims of "hate crimes" than members of other minority identity groups).

"The Act requires the Department of Justice to collect data on [hate crimes]. The purposes of the Act are to (1) compile the empirical data necessary to develop effective policies to fight the problem of hate-motivated violence; (2) raise public awareness; and (3) provoke an official response." Aklilu Dunlap, *The Bellows of Dying Elephants: Gay-, Lesbian-, and Bisexual-Protective Hate Crime Statutes after* R.A.V. v. City of St. Paul, 12 L. & INEQ. J. 205, 210 (1993). For criticism of the Hate Crimes Statistics Act of 1990, and its qualified support for lesbian and gay rights, see *id.* at 206 n.6 (collecting authorities).

339. Capers, *supra* note 221, at 1164 n.25 (citing Moore, *Hate Crimes*, 21 NAT'L J. 1604 (1989), and Robert W. Stewart, *Dannemeyer Suggests White House Policy Encourages Homosexuality*, L.A. TIMES, July 1, 1989, at 28). "Representative William Dannemeyer ... and Senator Jesse Helms ... led efforts to exclude sexual orientation from the categories of biases, with [Helms] going so far as proposing to amend the bill by adding antigay language urging the enforcement of sodomy statutes and depicting homosexuality as a threat to families." *Id.*

340. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8, 18, 22, 26, 29, 42 U.S.C.).

341. Yepes-Prado v. INS, 10 F.3d 1363, 1369 & n.12 (9th Cir. 1993). For discussions of

In what can be understood as an arrow shot in the direction of Justice White's *Hardwick* opinion, the IRA's legislative history described the categorical exclusion as "being out of step with current notions of privacy and personal dignity."[342] In sweeping language, Congress added that the IRA's amendments show that "*the United States does not view personal decisions about sexual orientation as a danger to other people in our society.*"[343] The IRA's provisions themselves may be unassuming, but the rationale for enacting them (which one could read into the law anyway) was not. No mental acrobatics are needed to see why a court might include the IRA within its pragmatic assessment of the unlawfulness of a state's sodomy ban. If majorities in both Houses of Congress supported the IRA, a court would not be acting entirely on its own in concluding that a state's sodomy ban was unconstitutional. Nor, unlike the *Hardwick* Court (or any other court at the time of *Hardwick*), would it be acting without good reason to believe it could square such a conclusion with a congressional judgment about what "current notions of privacy and personal dignity"[344] dictated.

Far more significant than the judgment expressed by Congress through the IRA is the declaration one can find in the Americans with Disabilities Act of 1990 (ADA)[345]—that undeniably "watershed" civil rights legislation protecting disabled Americans against a broad array of discriminations. The implications of the ADA for the kind of pragmatic assessment presently under consideration might not be apparent at first glance. The ADA, after all, does not protect lesbians

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homosexuality and immigration, see Ellen Vagelos, *The Social Group that Dare Not Speak its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on* Re: Inaudi, 17 FORDHAM INT'L L.J. 229, 231–32 (1993); *see also* Samuel M. Silvers, Note, *The Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV. 295, 295-96 (1984).

342. H.R. REP. NO. 723(1), at pt. 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6736 (emphasis added) (Sup. Docs. No. Y1.1/8: 101-723/pt.2).

343. *Id.* As further evidence for congressional views about what "current notions of privacy and personal dignity" dictated, compare the attempt in the District of Columbia to repeal its sodomy ban as part of the Sexual Assualt Reform Act of 1981, 28 D.C. Reg. 3409 (1981), which Congress rebuffed that same year, H.R. Res. 208, 97th Cong., 127 CONG. REC. 22,572–79 (1981), with a similar but successful effort to repeal the District's sodomy ban in 1993. 1993 D.C. Stat. 10-14. In 1993, notably, Congress failed to take the action necessary to negate the District's repeal of its sodomy ban. *See* Rene Sanchez, *D.C. Sodomy Law is Off the Books: Congress Allows Repeal, Ending 12-Year Battle by Gay-Rights Advocates*, WASH. POST, Sept. 18, 1993, at B3.

344. H.R. REP. NO. 723(1), at pt. 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6736 (emphasis added) (Sup. Docs. No. Y1.1/8: 101-723/pt.2).

345. 42 U.S.C. §§ 12101–12213 (1994).

and gay men *as* lesbians and gay men from discrimination.[346] As Professor Chai Feldblum, one of the ADA's chief architects and strategic masterminds, has explained: "Congress specifically affirmed that homosexuality and bisexuality are not physical or mental impairments and hence not covered under the ADA."[347] However, Feldblum continued:

> [A]lthough sexual orientation is not a disability protected under the ADA, a gay man, lesbian, or bisexual person who has a disability covered under the law *is* protected from discrimination on the basis of the covered disability. Thus, for example, a homosexual or bisexual person who has HIV disease, uses a wheelchair, or is blind is protected against unjustified discrimination based on those covered disabilities. Moreover, if a gay man, lesbian, or bisexual person is discriminated against by an employer or business owner because the person is *regarded* as having AIDS or HIV infection, that person is protected under ... the definition of disability.[348]

On what grounds, then, might one say the ADA's provisions can properly be understood to have altered the prudential calculations about the lawfulness of sodomy bans in the years since *Hardwick* was decided—or, more ambitiously, that those provisions altered the calculus in a fairly substantial way? To explain, one must bring to mind a feature of the social background against which *Hardwick* was handed down that is often, though by no means always,[349] overlooked. It is a feature about which little or nothing need be said by way of "proof," for, as Professor Charles Black observed in a different context, it is a matter "of common notoriety, [a] matter[] not so much for judicial notice as for the background knowledge of educated [women and] men who live in the world."[350]

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346. *See* Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting). Justice Scalia read the specific exclusion of lesbians and gay men from the Americans with Disabilities Act as congressional "unresponsive[ness] to repeated attempts to extend homosexuals the protections of federal civil rights laws." *Id.* (Scalia, J., dissenting). No mention of the Hate Crimes Statistics Act or the Immigration Reform Act, or Congress's failure in 1993 to override the repeal of the District of Columbia's sodomy ban is to be found in Scalia's *Evans* opinion.

347. Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 35, 41 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (citing 42 U.S.C. § 12211(a) (Supp. II 1990)).

348. *Id.* (emphasis added).

349. *See, e.g.*, *Sexual Orientation and the Law*, *supra* note 18, at 1518–20 (discussing sodomy, public health, and HIV/AIDS).

350. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J.

It is what Black might have called a "plain fact"[351] of American history that *Hardwick* was decided in the midst, maybe even at the height, of the national moral panic over AIDS.[352] It was hardly a coincidence, for example, that amici in *Hardwick*, chiefly among them the American Public Health Association, sought to reassure the Court that, neither as a matter of constitutional law, nor, significantly, as a matter of public health policy, should prohibitions against same-sex sexual activity in private be sustained.[353] Nor was it a coincidence that the then (at least) rhetorically potent arguments on the "other side" were pressed on the Court with a certain urgency. As Professor William Eskridge has recently reminded us, for example, there was "an amicus brief in *Hardwick* [filed by a professor of law] arguing that

421, 426 (1960) (relying on quoted languge to describe the inequalities and well-known social meaning of racial segregation).

351. *Id.* at 427 ("[I]t would be the most unneutral of principles, improvised *ad hoc*, to require that a court faced with the present problem refuse to note a plain fact about the society of the United States.").

352. For the classic articulation of the theory of "moral panic," see STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 9–12 (Martin Robinson ed., 1980) (1972). For a later elaboration of the theory, see ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE (1994). As Professor Cohen explained:

> Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.... Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way the society conceives itself.

COHEN, *supra*, at 9. Thanks to my colleague Orit Kamir for introducing me to Cohen's work and for helping me to begin to think through some of the ways it may have shaped public discussion of the constitutionality of laws against sodomy at the time *Hardwick* was decided. Kamir herself, at moments, relies on Cohens's work in her fascinating book on stalking. *See* ORIT KAMIR, EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW (forthcoming 2001).

353. *See* Brief of Amici Curiae Am. Psychological Ass'n and American Pub. Health Ass'n at 19–27, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) (arguing that prohibitions against sodomy do not prevent the spread of AIDS and may, indeed, adversely affect public health). Perhaps it is worth noting that the term "HIV" was coined in 1986. *See* STEVEN EPSTEIN, IMPURE SCIENCE: AIDS, ACTIVISM, AND THE POLITICS OF KNOWLEDGE 77 (1996) ("In response to the confusing array of acronyms then in use—HTVL-III, LAV, ARV, HTLV-III/LAV, and others—the Human Retrovirus Subcommittee of the International Committee on the Taxonomy of Viruses rebuffed Gallo and agreed on a new, compromise, name in 1986: HIV, human immunodeficiency virus.").

sodomy laws [were] justified as a way to prevent the spread of HIV, the virus that causes AIDS."[354] The State of Georgia, too, defended its sodomy law, in part, on similar grounds.[355] With Eskridge, then, one might heave a sigh of relief that "[t]he Supreme Court correctly ignored the argument"[356] that sought to defend state sodomy bans on

354. ESKRIDGE, GAYLAW, *supra* note 51, at 171. For the brief Eskridge had in mind, see Brief of Amicus Curiae David Robinson, Jr., Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

355. *See* Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 37, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

356. ESKRIDGE, GAYLAW, *supra* note 51, at 171. Eskridge elaborates reasons for thinking that the Court ignored the AIDS-related argument elsewhere, where he has written that "the AIDS epidemic is never mentioned by the various opinions in *Bowers v. Hardwick*." William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 385 n.25 (1992) [hereinafter Eskridge, *Posner's Sex and Reason*] (book review).

Nevertheless, it may be worth pointing out that a law review article Justice White cited in his *Hardwick* opinion, *see Hardwick*, 478 U.S. at 192 (opinion of White, J.) (citing Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986)), contains an interesting proposal. As the article (though not the portion cited by White) explains:

> Notwithstanding the possibility that the Supreme Court may find the Georgia sodomy statute unconstitutional, the Court may provide the states with guidelines for enacting AIDS legislation that would pass constitutional muster. In this respect, the Court may use *Hardwick* in the same manner it used *Roe*. Although the Court in *Roe* struck down the antiabortion statute, the Court utilized available medical data so as to provide states with guidelines for enacting constitutional antiabortion legislation.

Id. at 631. Ordinarily, we may suppose a declaration striking down a state's sodomy law as unconstitutional would not require on-going judicial supervision. In contrast to ordinary supposition, however, was the proposal that the Court treat the occasion presented by *Hardwick* as an opportunity to revisit and build on *Roe* by providing legislative "guidelines for enacting AIDS legislation that would pass constitutional muster." *Id.* However sensible, such a proposal might have struck some one or more of the Justices as yet another reason to avoid a ruling in *Hardwick* for Hardwick altogether—especially given the on-going assualt, including by the Reagan Administration, on *Roe*. *See supra* text accompanying note 110. For the kind of criticism that such a proposal, had it been embraced by the Court, might have precipitated, even among those who might have been sympathetic with some of its premises (e.g., that private gay sex is constitutionally protected, minimally under some circumstances, as a fundamental right), see Ely, *supra* note 106, at 943–44. Indeed, it is at just this point, the intersection between homosexuality, disease, and death, that Ely's suggestion that, unlike homosexual sodomy, "[a]bortion ends ... the life of a human being other than the one making the choice," begins to stumble without further elaboration. *Id.* at 929. In any event, if White—or some other of the Justices—had in mind a proposal that the Court should, following *Roe*, extend a trimester-like framework to the regulation of sodomy, it would certainly have given added dimension to that declaration White made "about the limits of the Court's role in carrying out its constitutional mandate." *Id; see also supra* text accompanying notes 128–32. *Cf.* Leo Bersani, *Is the Rectum a Grave? in* AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVSM 197 (Douglas Crimp ed., 1988).

public health grounds. I myself, however, would not rush too quickly to sigh; such an expression, I think, may come too soon.

Consider the following colloquy between Justice Sandra Day O'Connor and Professor Laurence Tribe at the very end of Tribe's oral argument in *Hardwick*.[357] The colloquy offers us some reason to think that the Court's failure to grapple with the AIDS defense of Georgia's sodomy ban should not be confused with a court decision actually rejecting that defense, or "ignoring" it:

> QUESTION: Well, Mr. Tribe, under your analysis what sort of explanation would be required? You suggested that if the state were to assert its desire to promote traditional families instead of homosexual relationships would not suffice in your view and yet that is an articulate[d]—potentially articulate[d] reason. Perhaps the state can say its desire to deter the spread of a communicable disease or something of that sort.
>
> MR. TRIBE: Yes.
>
> QUESTION: Now, what suffices here?
>
> MR. TRIBE: As to the first, if the State of Georgia were simply defending—Might I finish the answer to this question, Mr. Chief Justice?
>
> If the State of Georgia were defending its refusal to sanction homosexual marriage, there would be a close connection between that and the first rationale. The connection, however, would be so weak between this sweeping law and the rationale of endorsing or helping marriage that I doubt that would work.
>
> As to avoiding the spread of communicable diseases, the American Public Health Association . . . think[s] that this law and laws like it would be counter-productive to that end, but you don't even reach that issue until you have some kind of meaningful inquiry.
>
> Surely, if a narrowly tailored law could be shown necessary to protect the public health, that would be a compelling justification, but Georgia offers no such justification here.[358]

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357. Though official transcripts generally do not identify which Justice asks which questions during Supreme Court oral arguments, listening to the recording of the oral arguments in *Hardwick* strongly suggests that it was Justice O'Connor who pressed the line of inquiry that follows in the text. The recording of the oral arguments in *Hardwick* can be found conveniently at http://oyez.nwu.edu.

358. *Hardwick* Oral Arguments, *supra* note 138, at 656.

The exchange spawns questions. What was O'Connor *really* asking? Did she (or did she not) have AIDS in mind when she pressed Tribe the way she did? If she did, was she alone? Were other Justices impervious to the considerations to which O'Connor seems to have been giving voice?

Professor Janet Halley has helpfully explained that in *Hardwick*, homosexual sodomy was a metonym for homosexuality.[359] Others, in a similar vein, have noted that, particularly around the time of *Hardwick*,[360] both homosexual sodomy and homosexuality were synonymous with AIDS.[361] Even if the Justices themselves did not

359. Halley, *Reasoning About Sodomy*, *supra* note 15, at 1737 ("Sodomy in these formulations is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym."); *see also* Feldblum, *supra* note 23, at 288 ("From the beginning of the opinion, in which Justice White first described the question on which the Court granted certiorari, the conflation between 'engaging in sodomy' and 'being a homosexual' is apparent.").

360. Not only at the time of *Hardwick*, of course. The thought still lingers. It may even be found, for example, in the coyly odious but seemingly unmistakable invocation of the equation between HIV/AIDS and gays found in Justice Scalia's opinion in *Romer v. Evans*. *See* 517 U.S. 620, 638 (1996) (Scalia, J., dissenting) (interpreting Colorado's Amendment 2, which the majority ruled unconstitutional, to mean that "homosexuals could not be denied coverage, or charged a greater premium, with respect to auto collision insurance; but neither the State nor any municipality could require that distinctive health insurance risks associated with homosexuality (*if there are any*) be ignored." (emphasis added)).

361. *See* STYCHIN, *supra* note 114, at 48 ("The 'promotion' of homosexuality, then, is highly dangerous because of the contagiousness, not only of the disease of [AIDS], but also of the disease of homosexuality. In fact, the two become virtually synonymous (which, incidentally, further facilitates the erasure of lesbians from the discourse)."). Of the 1987 congressional debate over the "Helms Amendment," which barred providing federal funds to state governments or private groups that would use those funds to offer "AIDS education, information, or prevention materials" or to engage in "activities that promote or encourage, directly or indirectly, homosexual sexual activities," Stychin writes: "[G]ay male sexuality became inextricably linked to the [AIDS] pandemic, such that the gay male body is *the* vessel which contains and spreads HIV." *Id.* at 50. As Senator Jesse Helms had said: "Every AIDS case can be traced back to a homosexual act." 133 CONG. REC. 27747, 27754 (1987) (statement of Sen. Helms). As Helms also proposed: "Many . . . experts, self-proclaimed, tell us that the source of the AIDS epidemic is the AIDS virus. That is like saying that the source of a fire set by an arsonist was the match that the arsonist used, rather than the arsonist who struck the match and set the fire." *Id.* I do not make mention of the Helms Amendment in my general discussion of the conditions of prudence, because *although it passed the Congress* in 1987, *see* STYCHIN, *supra* note 114, at 50, it was "rejected the following year in the debate on the appropriations bill, and was replaced by a more 'neutral' clause that focused on whether [AIDS] educational materials were 'designed' to encourage sexual activity[.]" *Id.* at 51. For other commentators who have noted the metonymic or synecdochical equation between gay male sexual activity, sexual identity, and AIDS, see CATHERINE WALDBY, AIDS AND THE BODY POLITIC: BIOMEDICINE AND SEXUAL DIFFERENCE 11 (1996) ("[G]ay masculinity has been so intensely medicalised and so closely associated with the AIDS epidemic that gay men are effectively treated by much public health discourse *as if they themselves were the virus*, the

and would not have indulged such reductionist and integrationist (and not a little hateful) equations,[362] were there not others who *did* and *would have*? Might these considerations not have given the Justices pause?[363] Were there not those ascendant on the national political scene in 1986 who might have exploited the equations to criticize a decision in the case favorable to Hardwick?[364] Who might have fanned the already fulsome fears of the American public, claiming the Court had endangered the public's health by "promoting" homosexuality and homosexual sodomy?[365]

On this level, should we fail to notice the parallels between *Hardwick* and *Naim*? The claims of "mongrelization"? Of forced commingling of blood, pure with impure?[366] Of rending "the fabric of

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origins of infection."); Judith Butler, *Sexual Inversions*, *in* DISCOURSES OF SEXUALITY: FROM ARISTOTLE TO AIDS 344, 357 (Dona C. Stanton ed., 1992) ("The pathologization of homosexuality was to have a future that Foucault could not have foreseen in 1976. For if homosexuality is pathological from the start, then any disease that homosexuals may sometimes contract will be uneasily conflated with the disease that they already are."). *Cf.* Thomas R. Mendicino, Note, *Characterization and Diseases: Homosexuals and the Threat of AIDS*, 66 N.C. L. REV. 226 (1987).

362. The justices of the Missouri Supreme Court who decided *State v. Walsh*, 713 S.W.2d 508, 512 (Mo. 1986), holding that the state sodomy ban was rationally related to the State's interest in protecting and preserving the public's health, cannot properly be given this same benefit of the doubt. *But see* State v. Cogshell, 997 S.W.2d 534, 537 (Mo. Ct. App. 1999) (holding that a legislative revision of the state's sodomy law effectively decriminalized consensual sodomy in the state); *Litigation Notes*, LESBIAN AND GAY LAW NOTES, Oct. 1999, at 19, *available at* http://www.qrd.org/qrd/www/legal/lgln/10.99.html (on file with the North Carolina Law Review) ("[Missouri State] Attorney General Jay Nixon urged the court to reconsider or clarify its opinion, but the court has refused to do so, and Nixon, who has since told the local press that he believes consensual sodomy should not be a crime, has announced he will not try to appeal the ruling further.").

363. Eskridge, *Posner's Sex and Reason*, *supra* note 356, at 338 n.25 (1992) ("Posner notes that AIDS was discussed in the briefs . . . *and is widely believed to have had some influence on the Justices who formed the majority.*" (emphasis added)).

364. *See supra* note 75; *see also* text accompanying note 110.

365. *Cf.* STYCHIN, *supra* note 114, at 151. Stychin writes:

> The predominant factor, however, which may have fuelled an anti-assimilationist politics was the urgency, panic, frustration, and anger that was experienced around the American government's gross inaction over the [AIDS] pandemic in the 1980s. The message here was completely compatible with the Supreme Court's reasoning in *Hardwick*, namely that gay men were sodomites and that sodomy led inexorably to death from [AIDS]. Gay men thus were *the* cause of [AIDS], which was the logical result of engaging in sodomy. Within these rhetorical tropes, gay men were constitutionally unprotected and, furthermore, their lives were beyond protection from the relentless pursuit of the virus (no matter what "protection" was adopted).

366. *Cf.* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOLUME ONE: AN INTRODUCTION 149–50 (1990) (noting the relationship between racism, sexuality, blood, and "blood myth").

life"? Of violence and bloodshed?[367] Did *Hardwick*, in its own way, not rehearse and reconstitute the moral panic surrounding *Naim*? If so, would it have been any more or less unprincipled, any more or less pragmatic than the Court's decisions in *Naim*, for the *Hardwick* Court (or one of more of the Justices, even in the quiet hush of sober deliberations) to believe that the safer course to follow in the case would be to wait for another day, when (and if) the political climate had changed and the hysteria had died down to declare sodomy laws unconstitutional?[368]

Whatever else might be said by way of response to these questions, in hindsight there is this: The Supreme Court missed an opportunity in *Hardwick* to show the kind of (principled) moral leadership that we so like, and may even need, to think the Court ought to provide.[369] Fortunately, there was teaching, eventually. Not by the Court, however, but by Congress, through—to return to the federal law we have been discussing—the ADA.[370]

In its fashion, the ADA taught the country, once again, that each moral panic must some day (begin to) end, and that the time had

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367. For a decrepit view of the importance of upholding miscegenation bans, see *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 299–300 (Tenn. 1871) (defending a law criminalizing miscegenation by arguing that it "prevent[ed] violence and bloodshed which would arise from such cohabitation, distasteful to our people, and unfit to produce the human race in any of the types in which it was created"). For further discussion of *Lonas*, and of the miscegenation analogy in the context of same-sex marriage, see James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 103 (1993).

368. *See* WALDBY, *supra* note 361, at 3 ("[S]cientific knowledge has drained away the potential for political conflict from the field of AIDS .... Science has prevented nature from contaminating culture, and so stopped us reverting to a state of nature, the war of each against each.").

369. Even the *Hardwick* opinions written by Justices Blackmun and Stevens provided no moral leadership on this front. As Judge Richard Posner observed some year ago:

> There is also a profound lack of empathy [in *Hardwick*] for the situation of the male homosexual in America in the age of AIDS. (AIDS is not mentioned in any of the opinions, although it was mentioned in several of the briefs.) In this respect [Blackmun's and Stevens's] opinions, in their bland decorousness and their formulaic generality, do not differ notably from [White's, Burger's and Powell's] opinions, but in this they reflect faithfully the tone and emphasis of Hardwick's brief.

POSNER, *supra* note 211, at 346.

370. Only in 1998 did the Supreme Court reach the AIDS question under the ADA, holding that asymptomatic HIV-positive individuals can receive protection under the statute. Bragdon v. Abbott, 524 U.S. 624, 655 (1998). *Bragdon*, however, and one thinks it is no sheer coincidence, did not involve an HIV-infected gay or bisexual man, or even a lesbian or bisexual woman, but a presumably straight woman. The Court's decision, years before, in *School Board v. Arline*, 480 U.S. 273 (1986), might have hinted that the Court would ultimately take the direction it did in *Bragdon*.

come, by law officially, to put the moral panic relating to AIDS to rest.[371] Although the ADA did not extend protections against discrimination to gays *as* gays, it is a mistake to conclude that that statutory exclusion makes the law irrelevant for a pragmatic consideration of the constitutionality of a state's sodomy ban. Counterintuitively perhaps, it is *precisely because the ADA did not* protect gays as gays that the ADA, as a text, can be heard speaking prudence. In distinguishing between gays as a class and those who were (or were thought to be) suffering from AIDS,[372] the text of the ADA disrupted, even if it did not cleanly break, the link once so virulent in the public's imagination between homosexuality and disease.[373] The statutory language of the ADA can thus be interpreted as reflecting a shift, perhaps a marked one, in congressional and cultural attitudes that have come about since *Hardwick*. The statute speaks to the relationship between homosexuality and disease, and in doing so, to the pragmatic reasons that mediated the relationship between private gay sex and the Constitution at the time *Hardwick* was handed down.

In one of her recent books, Professor Martha Minow has elegantly shown how the ADA provides exciting points of departure for thinking about, among other things, "community" and what she calls the "paradox of identity"—the ways in which social identity simultaneously both is and is not "real."[374] These points of departure,

371. Whether the lesson has been *learned*, is of course, another question entirely. For some reason to think that some judges have not fully (and correctly) appreciated the implications of the ADA's provisions, see *EEOC v. Prevo's Family Market*, 135 F.3d 1089, 1090 (6th Cir. 1998) (holding that an employer did not violate the ADA when it required a supermarket employee suspected of having HIV to submit to a medical exam as a condition of continued employment). For a powerful argument that the *Prevo* majority's decision was in error, see *id.* at 1098 (Moore, J., dissenting). Thanks to Ruth Colker for bringing the case to my attention.

372. Or, I might add, those who were (or were thought to be) HIV-infected.

373. On some level, the history of the ADA might appear to be in some tension with this reading. Some legislators, for example, undoubtedly believed the express statutory exclusion of gays as gays from the ADA's protections was necessary in order to make it clear that by protecting individuals with certain disabilities—for example, those infected with HIV or who had AIDS-the law did not aim to protect gays as gays. That is, some legislators surely saw homosexuality (or some manifestations of it) as the equivalent of AIDS (or HIV, or both). Nevertheless, the exclusion they, among others, called for can still be interpreted as teaching through text the lesson I suggest it teaches. It deserves mention that, at the time the ADA was being considered within Congress, there were undoubtedly those who recognized the potential benefits of this statutory exclusion for gays. Feldblum, as her gloss on the ADA, *supra* note 347, may be taken to suggest, may have been among them.

374. MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW 22–29 (1997) (discussing "community" and the "paradoxes of identity").

as Minow herself points out, are available for reflecting on how we do and do not live in peaceable community with lesbians and gay men and what that might mean.[375]

All the same, at least for the near future, it may be a pragmatic misstep for courts to read the ADA as a *general* warrant for creative redefinition of our constitutional community. While it might, as just explained, safely be read in the context of sodomy bans as reflecting changes in congressional and social attitudes about private gay sex in the days since *Hardwick* (and maybe elsewhere, as well),[376] Congress has offered guidance about where it would, fairly clearly, object to such judicial creativity.

Two laws, in particular, spell out those limits: the so-called "Don't Ask, Don't Tell" policy of 1993 (DADT)[377] and the (equally so-called) "Defense of Marriage Act" of 1996 (DOMA).[378] Because each of the laws has received a good deal of attention elsewhere, my discussion of them here will be quite brief. The ultimate point about each of these laws is that it might, like community and identity, be understood not only in terms of what it is but also what it is not.[379] Neither DADT nor DOMA is a sweeping congressional judgment rising to the level of a prudential *bar* to any and all principled judicial decisions on the merits of laws that discriminate against those who do (or might) identify themselves as lesbians or gay men. A challenge to a state's sodomy ban in this sense is but one example of a case in which DADT and DOMA may not block a court from taking constitutional action.[380]

DADT, of course, established by legislative compromise that there is some place within the military community for lesbians and gay men. Without suggesting they do not matter (they do), let us put to one side DADT's dramatic shortcomings and failures,[381] along with

375. *See id.* at 63–64.

376. Williams v. Pryor, 229 F.3d 1331 (11th Cir. 2000); Louisiana v. Smith, 766 So. 2d 501 (La. 2000); Louisiana v. Brenan, 99-KA-2291, 2000 La. LEXIS 1271 (La. May 16, 2000).

377. National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654 (1994).

378. 104 Pub. L. No. 199, 110 Stat. 2419 (codified as amended at 28 U.S.C. § 1738C (Supp. IV 1998)).

379. *See infra* Conclusion.

380. *See* Romer v. Evans, 517 U.S. 620, 633-35 (1996) (holding that an amendment that precluded state action designed to protect individuals against discrimination on grounds of non-heterosexuality violated the Equal Protection Clause).

381. Janet Halley, for example, has boldly proposed that "[t]he new military policy is *much, much worse* than its predecessor." HALLEY, DON'T, *supra* note 35, at 1 (emphasis in original). The predecessor policy, Halley has explained, "required the separation of any servicemember deemed to be 'homosexual' and defined the excludable servicemember as

the repeated calls to re-consider or repeal it. For present purposes, what needs to be noted is the distinction between homosexual "status" and homosexual "conduct" on which the law purports to rest.[382] For that distinction, as should be easy to see, is the very distinction often supposed implicated by sodomy bans. Thus, if DADT were a law of general application (assuming for the sake of discussion that Congress had the authority to enact such a law), one might take it as a sign of congressional disapproval of a judgment that sodomy bans are unconstitutional. But one must not forget that the policy is *not* a law of general application. It is limited in its scope to the military. And that difference, sometimes for good, sometimes for bad, is one to which the Supreme Court has bowed on any number of occasions.[383] Accordingly, there is reason to think a court would bow needlessly and improvidently to a state law against sodomy based exclusively on "Don't Ask, Don't Tell."

Much the same can and should be said based on nothing more than DOMA. Even if, as it unfortunately seems to do, DOMA manifests congressional hostility toward same-sex marriage as part of an effort to "protect" that cornerstone of community and identity—marriage—the law's emanations should not be thought prudentially

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'a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.' " *Id.* at 27 (citation omitted). As Halley continued, mere statements by a servicemember, under the old policy, "that he or she was gay," did not necessarily require separation from the services, so long as there was "a further finding that the member is not *a homosexual or bisexual.*" HALLEY, DON'T, *supra* note 35, at 1.

382. *See* ESKRIDGE, GAYLAW, *supra* note 51, at 170 (Eskridge notes that overruling *Hardwick* may unsettle "the armed forces' exclusion of lesbian, gay, and bisexual personnel. The exclusion is defended in part as a corollary to the military's criminal prohibition of sodomy. Gay soldiers can be excluded either because they commit sodomy, or because they have a 'propensity' to commit sodomy."); *see also id.* ("If *Hardwick* were overruled, the consensual sodomy prohibition in the Uniform Code of Military Justice [(UCMJ), 10 U.S.C. § 5, art. 125 (1994); *Cf.* 18 U.S.C. § 21 (Supp. 1998) (providing the consequences of illegal sexual activity)] would be more vulnerable to constitutional attack."). *But see* ESKRIDGE, GAYLAW, *supra* note 51, at 170. ("Because the Supreme Court often defers to military statutes and regulations that would be invalid if adopted in a civilian context or by the states, this is not a foregone conclusion."). I agree with those who believe that "Don't Ask, Don't Tell" is unconstitutional. Nevetheless, *Hardwick*—understood as a pragmatic interpretive rule—would not necessarily call for it, or the UCMJ's sodomy prohibition, immediately to be overturned. For an explanation why the qualification in the text—"purports"—has been (and should be) added to the claim that DADT rests on a distinction between homosexual "status" and homosexual "conduct," see generally HALLEY, DON'T, *supra* note 35.

383. *See, e.g.,* Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986); Rostker v. Goldberg, 453 U.S. 57, 64–66 (1981); *see also* Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998) (holding that the National Defense Authorization Act's prohibition of homosexual conduct by service memebers is constitutional, in part, because of the deference courts pay to Congress in military matters).

to cover the entire field of lesbian and gay rights.[384] The Hate Crimes Statistics Act,[385] the Immigration Reform Act,[386] and the Americans With Disability Act,[387] all of which remain "good law," block those emanations, just as DOMA, where marriage is concerned, blocks theirs.

One could notice that an additional constraint on DOMA's emanations is the ever-growing support in Congress for the sort of watershed legislation that assuredly would amount to the kind of congressional "green light" a court considering the constitutionality of a state's sodomy laws might, ideally, like to know it had.[388] But it is not necessary (or necessarily advisable) for a court to incorporate even increasing support for proposed legislation into its pragmatic evaluation of the lawfulness of a state sodomy ban. Though such support assuredly adds color and scope to the evaluation, it may not amount to a "consensus achieved through a broadly representative political process" and hence may not be a "statement of a norm that can be said to reflect the values of the society."[389]

The discussion presented so far has simply been an initial attempt to sketch some of the most significant conditions of prudence that might indicate congressional assent to a judicial decision on the merits, striking down a state's sodomy ban on constitutional grounds. There are surely other congressional signals that a court might detect. The Senate confirmation hearings of Judge Robert Bork, for example, might be considered a kind of senatorial referendum on the constitutional right of privacy.[390] Just so, although indications of

384. Perhaps one might say that DOMA is a strong red light on judicial invalidation of sodomy bans because it implicates gay sex. It would be strange, of course, for Congress to disapprove of marriage and approve of non-marital sex. But I have not seen any reason to believe that in enacting DOMA, Congress meant to preclude the possibility of federal protections for lesbians and gay men against anti-gay sex discrimination, or sex discrimination more generally, of which sodomy bans and laws against same-sex marriage are a part.

385. Pub. L. No. 101-275, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 note (1994 & Supp. IV 1998)).

386. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 7, 8, 18, 20, 29, 42 U.S.C.).

387. 42 U.S.C. §§ 12101–12213 (1994).

388. The likeliest candidate here may be federal protection against hate crimes motivated by sexual orientation-based animus or federal protection against workplace discrimination based on sexual orientation. *See* Bill Ghent, *What Happened to the Hate-Crimes Bill?*, 31 NAT'L J. 3616 (1999), 1999 WL 28248318 (discussing the future of federal hate crimes law including sexual orientation as one of the bases of prohibited discrimination). *See infra* note 401.

389. Sandalow, *Judicial Protection of Minorities*, *supra* note 31, at 1187.

390. *See, e.g.*, Linda Greenhouse, *Why Bork Is Still a Verb In Politics, 10 Years Later*,

congressional assent are not so strong or certain as those Congress offered the Court in the years between *Naim* and *Loving*, a court might correctly count on, as forthcoming from Congress, a degree of cooperation in bringing about that necessary acceptance for the view that a state's sodomy prohibition should no longer be treated as "good" law. Based on what has been said, a court might well believe, at a minimum, that there would be enough active support within Congress to quell efforts to use Congress's authority to unravel such a decision. Indeed, a court might even read the congressional signals I have mentioned as an invitation to the High Court to resume its pedagogical responsibilities in that constitutional seminar on community and sexual identity. In the meantime, lower courts seem at liberty to understand the Court's decision in *Romer v. Evans*[391] as a formal reply accepting Congress's invitation, and to proceed—cautiously, to be sure—but to proceed nonetheless.[392]

Were these the only conditions of prudence to be described, however, a court might remain wary of declaring a state's sodomy ban inconsisitent with constitutional demands. But that wariness is one that additional conditions of prudence may assuage or remove.[393] In turn, let us consider the signals, such as they are, of executive and federalist assent.

In the years since *Hardwick*, executive cooperation in the sort of venture that striking down state sodomy laws might entail has been emerging by drips and drabs. Without a doubt, no official support for

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N.Y. TIMES, Oct. 5, 1997, Week in Review, at 3; Timothy J. McNulty, *Surgeon General: Beyond a Medical Post*, CHI. TRIB., May 14, 1995, Perspective, at 1.

391. 517 U.S. 620 (1996).

392. Indeed, this symbolic message may be more auspicious than the substantive effect of *Evans* on the Colorado ballot initiative at issue in the case. It is for this reason that I earlier assumed for argument's sake that the miscegenation project, for example, has not enjoyed a single major success on the federal constitutional level. *See supra* note 250 and accompanying text. Perhaps it is equally true for the lesbian and gay rights project, more generally. This point about *Evans* is significant, generally, and here particularly. It helps explain why the Court's *Evans* decision has played such a minor role in my text, although its presence has been lurking all along. The Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), seems to bear out the point of *Evans*'s (for now) largely symbolic significance.

393. A version of hate crimes legislation was passed by the U.S. Senate as part of the National Defense Authorization Act for Fiscal Year 2001, H.R. 4205, 106th Cong. (2000). A non-binding motion to instruct conferees to accept language passed by the Senate with regard to Hate Crimes legislation was approved by the House of Representatives by a vote of 232 to 192. *See* 146 CONG. REC. H7523–41 (daily ed. Sept. 13, 2000). Another non-binding motion to contrary effect was defeated by a margin of 196 to 227. The hate crimes legislation language, however, was eventually struck from the Defense Authorization Act, Pub. L. No. 106-398, 114 Stat. 1654 (2000), which President Clinton signed into law on October 30, 2000.

lesbian and gay rights was forthcoming during the Reagan Administration—indeed, at times, the Administration's actions and inactions were more appropriately described in contrary terms. I cannot fail to mention, however, that, officially, the Reagan Administration kept its silence in *Hardwick*. The United States filed no brief in the case.[394] Reagan's successor, President George H.W. Bush, with the exception of his signature on the various pieces of legislation already mentioned, likewise showed little enthusiasm for staking out significant official positions favorable to lesbians and gay men.

Many thought that Governor William Clinton's promises to lesbians and gay men, made during his first, successful run for the Oval Office, would bring about trailblazing changes on the Executive front. One should not overlook the fact that some changes did occur during the Clinton Administration that are important and path-breaking in their own ways, significant not least of all for their symbolic and historical importance.[395] And yet, it can hardly be said that the Clinton Administration provided the kind of national leadership on lesbian and gay rights that President Lyndon Johnson, for instance, provided on race equality matters. It remains, however, too early to sum up as history what the Clinton Administration did for lesbians and gay men.

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394. *See* TRIBE & DORF, *supra* note 22, at 56 ("Former Attorney General Meese ... was quoted as saying that the Reagan administration regarded [*Hardwick*] as its major victory of the Supreme Court's 1985 term—even though it had not been a party to the case and had filed no brief.").

395. As early as 1993, for example, the Clinton Administration interpreted the Civil Service Reform Act of 1978 to bar various forms of discrimination against lesbians and gay men in government and government-related employment. More recently, the Administration converted that interpretation into an independent Executive Order. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998) (prohibiting discrimination on the basis of sexual orientation in the federal government); Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 2, 2000) (prohibiting discrimination on the basis of parental status in the federal government and authorizing the Office of Personnel Management "to develop guidance on the provisions of this order"). The Executive Order was sustained against congressional attempts to overturn it. The Clinton Administration also made sexual orientation-related changes to the requirements for federal security clearances. Additionally, the Administration pushed (though there are serious questions about just how hard) for the federal hate crimes legislation and broader federal protection against employment discrimination. Other examples of Presidential action in this arena exist, such as the nomination and appointment of the first openly gay American Ambassador, *see The Clinton-Gore Administration: A Record of Progress for Gays and Lesbians Americans*, *at* http://www.whitehouse.gov/WH/Accomplishments/ac399.html (last visited Jan. 1, 2001) (on file with the North Carolina Law Review), and, of course, the ultimately failed efforts to repeal the ban on gays in the military.

The recent, historic elections, moreover, make it unwise for courts to place much reliance on executive cooperation with a decision striking down a state's sodomy ban.[396] Although President George W. Bush demonstrated no tremendous fondness for lesbians and gay men during his bid for national office, he hardly stumped along the way to step up efforts to legislate or enforce existing laws that prohibit private, same-sex sex. For all the talk of gays, gay marriage, and gays in the military that took place in the presidential primaries and the general election campaigns, a certain silence descended around same-sex sexual activity, once again. The setting of that silence, however, seemed to have changed from what it had been only years before. So long as the love that dare not speak its name spoke privately, relatively few people on the public political scene seriously appeared to care.[397]

396. Of course, the same could be said for congressional cooperation. Still Congress has shown no interest in undoing the legislative accomplishments outlined above. The trend here seems to be toward liberalization with the obvious caveats to be added about DADT and DOMA. Even in the years that the Republicans have controlled either or both Houses of Congress, years in which there has been no new legislation enacted into law that can be classified as very "favorable" to those who identify themselves as lesbians and gay men, there have been no broad-based efforts to turn the clock back, at least none that has met with any stunning success. *See, e.g.*, *supra* note 343 (dealing with congressional inaction on D.C. sodomy ban).

397. One cannot entirely discount the possibility that, as President, George W. Bush may reverse some of the Clinton Administration's efforts on behalf of lesbians and gay men. *See, e.g.*, *Comparison Shopping: How Bush and Gore Stack Up on Gay Issues*, WASH. BLADE, Nov. 3, 2000, at 29 (reporting Bush's opposition to a civil rights bill proposed in the Texas legislature that would have prohibited workplace discrimination against lesbians and gay men); *id.* (referring to "the lead role [Bush took] in killing a bill before the Texas Legislature that sought to add sexual orientation to the state's existing hate crimes law," and discussing Bush's opposition to federal hate crimes legislation that includes sexual orientation); *id.* (observing that Bush "[o]pposed repeal of the Texas sodomy law, saying it is a symbolic measure upholding 'traditional values' "). However, some of Bush's remarks and gestures during the 2000 election campaign might be understood to indicate that he will not go out of his way to reverse all the advances that have recently been made on behalf of lesbian and gay rights. *See, e.g.*, Andrew Sullivan, *Is he up to it?*, SUNDAY TIMES (LONDON), Dec. 17, 2000, § 4, at 1 ("At last August's [Republican party] convention, Bush made all the right symbolic gestures. ... He gave a coveted primetime speaking slot to the only openly gay Republican congressman, Jim Kolbe."); Commission on Presidential Debates, *The Second 2000 Gore-Bush Presidential Debate: October 11, 2000*, http://www.debates.org/pages/trans2000b.html (on file with the North Carolina Law Review) (reporting Bush's response to the question, "Do you believe in general terms that gays and lesbians should have the same rights as other Americans?", as "Yes. I don't think they ought to have special rights, but I think they ought to have the same rights."). Indeed, Bush indicated during his run for the White House that he had no intention (and had not previously been in the practice) of inquiring into the sexual orientation of those who would (or did) work under him. *See, e.g.*, Katharine Q. Seelye, *Gay Voters Finding G.O.P. Newly Receptive to Support*, N.Y. TIMES, Aug. 11, 1999, at A1 ("Mr. Bush ... has said he would have no qualms about hiring homosexuals. 'If someone

can do a job, and a job that he's qualified for, that person ought to be allowed to do his job,' he said earlier this year."); *see also, e.g., From Social Security to Environment, the Candidates' Positions*, N.Y. TIMES, Nov. 5, 2000, at A44 ("Asked about gay rights and civil unions in the second presidential debate, Mr. Bush said that 'how you conduct your sex life' is a private matter."); *Excerpts from the Debate Among G.O.P. Candidates*, N.Y. TIMES, Jan. 7, 2000, at A15 (reprinting Gov. Bush's answer to the question, "Would you appoint an openly gay person to a senior staff or cabinet position?", as "How would I know. I don't ask. Somebody's sexual orientation is their personal business as far as I'm concerned."). *But see* Nicholas Confessore, *The Rorschach Candidate: George W. Bush and the Politics of No Politics*, AM. PROSPECT, Jan. 31, 2000, at 34, LEXIS, News, Major Stories, Combined File (rehearsing Bush's remarks, just quoted, and then going on to point out that "a few months after *that*, during a private meeting with the Madison Group—a clique of religious conservative power brokers—Bush reportedly promised that he would not 'knowingly' appoint open homosexuals to any top administration post"); Alison Mitchell, *Bush Talks to Gays and Calls it Beneficial*, N.Y. TIMES, Apr. 14, 2000, at A26 (reporting that when asked "by a Christian radio station in Charleston, S.C., whether he would appoint an openly gay person, Mr. Bush said, 'An openly known homosexual is somebody who probably wouldn't share my philosophy[,]' " and then observing that Bush subsequently indicated that "sexual preference 'is not a factor' in naming someone to do a job"). Bush's seemingly equivocal position may reflect a growing receptiveness among certain segments of the Republican Party toward lesbians and gay men. *See* Richard L. Berke, *Flurry of Anti-Gay Remarks Has G.O.P. Fearing Backlash*, N.Y. TIMES, June 30, 1998, at A1 ("Prominent Republican politicians and strategists say they are troubled by a wave of harsh anti-homosexual oratory from other Republicans, fearing it could make the party appear intolerant and drive out moderates and economic conservatives."); Seelye, *supra* ("Prominent Republican candidates for President are creating an atmosphere that is subtly but fundamentally more inviting to gay and lesbian voters than party leaders have been in recent memory."); *see also, e.g.*, Marc Sandalow, *McCain Welcomes Support of Gays in GOP*, SAN FRANCISCO CHRON., Nov. 9, 1999, at A3 ("Setting himself apart from more socially conservative candidates, Arizona Sen. John McCain assured gay Republicans yesterday that he welcomes their support and would work to eliminate discrimination if elected president."). In any case, the current openness in the Republican Party stands in contrast to the anti-gay aspects of President George H.W. Bush's unsuccessful efforts in 1992 to defeat then-Governor William Clinton. *See, e.g.*, Jeffrey Schmalz, *Gay Rights and AIDS Emerging As Divisive Issues in Campaign*, N.Y. TIMES, Aug. 20, 1992, at A1 (citing speeches by Patrick Buchanan and other Republicans as evidence that "the party made it clear that it would make its opposition to homosexual rights a major issue in the campaign, portraying Bill Clinton and the Democrats as wanting to give preferential treatment to gay men and lesbians"); Seelye, *supra* ("The new message on gay supporters is a far cry . . . from 1992, when the dominant voice on the issue from Republicans was that of Patrick J. Buchanan, whose declaration of a 'culture war' was aimed squarely at homosexuals.").

Perhaps the sexual identity of Vice-President Dick Cheney's daughter Mary, *see, e.g.*, Sarah Wildman, *Hiding in plain sight: Mary Cheney May Be Silent, But Her Presence Speaks Volumes About the Relationship Between Family and Sexual Identity*, ADVOCATE, Sept. 12, 2000, at 26, 26 (noting, inter alia, sexual identity of Cheney's daughter) (on file with the North Carolina Law Review), and Cheney's own remarks about same-sex relations, *see* Michael Cooper, *Cheney's Marriage Remarks Irk Conservatives*, N.Y. TIMES, Oct. 10, 2000, at A23 ("Asked at the [vice-presidential] debate [with Senator Joseph Lieberman] . . . whether homosexuals should have all the constitutional rights enjoyed by other citizens, Mr. Cheney said that 'people should be free to enter into any kind of relationship they want to enter into' and that the issue of gay marriages should be decided by the states."); Anne Hull, *Daughter's Gay Life May Prove Awkward for Cheney*, WASH.

In contrast to executive ambivalence if not moderate support, the signals from the states would seem to smile (or at least not frown) on a principled judgment on the merits that sodomy bans are unconstitutional. In the years since *Hardwick*, there have been no radical changes in the treatment of sodomy as a matter of state law. The trend to decriminalize private same-sex sexual activity, which began in 1961[398] continued until the early 1980s.[399] From then through the early 1990s, twenty-four states, as well as the District of Columbia,[400] prohibited sodomy in one form or another.[401] More

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POST, Aug. 6, 2000, at A19 (quoting Richard Cheney as saying, "[g]enerally, the society is more tolerant [on the issue of gay rights] today than it used to be and the [Republican] party is reflective of that tolerance"), provide further reason to hope that the second Bush's Administration will not roll the clock back much (or too much) where lesbian and gay rights are concerned. After all, even the Reverend Jerry Falwell, who is more likely known for his anti-gay positions than his support for lesbian and gay rights, has begun a dialogue with those in the lesbian and gay communities. Frank Rich, *Has Jerry Falwell Seen the Light?*, N.Y. TIMES, Nov. 6, 1999, at A17 (discussing the October 1999 meeting between Falwell and gays, organized, in part, by Reverend Mel White, and suggesting that "it would be wrong to dismiss the conference as mere posturing"); *see, e.g.*, *Falwell Finds an Accord With Gay Rights Backer*, N.Y. TIMES, Oct. 23, 1999, at A15 (reporting that "[t]wo months ago the Rev. Jerry Falwell, well known for conservative political and theological views, took the unusual step of agreeing with the Rev. Mel White, a supporter of gay rights, to convene a meeting bringing together 200 of each man's associates").

To be sure, Vice-President Al Gore was far more supportive of lesbian and gay rights than Bush, *see generally, e.g.*, Chris Bull, *Al Gore's Gay Vision*, ADVOCATE, Sept. 14, 1999, http://www.advocate.com/html/stories/794/794_gore.html (on file with the North Carolina Law Review) (discussing Gore's views on gay rights); *Comparison Shopping: How Bush and Gore Stack Up on Gay issues*, *supra*, at 29, 31 (detailing Gore's positions on various gay rights issues relative to George W. Bush's). But even Gore's support for lesbian and gay equality, we should not forget, had its limits. *See, e.g.*, Chris Bull, *Al Gore's Gay Vision*, ADVOCATE, Sept. 14, 1999, http://www.advocate.com/html/stories/794/794_gore.html (on file with the North Carolina Law Review) (discussing Gore's views on gay rights)("I'm in favor of legal protection for [same-sex] domestic partnership, but I'm not in favor of changing the institution of marriage as it is presently understood—between a man and a woman.") (remarks of Vice-President Al Gore).

398. As White noted in his *Hardwick* opinion, "until 1961, all 50 States outlawed sodomy." *Hardwick*, 478 U.S. at 193 (opinion of White, J.) (footnote omitted). For one fascinating history of the sodomy project and its significance within the larger litigation efforts of the lesbian and gay rights movements, see Cain, *supra* note 185, at 1589–612.

399. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1344 (2000) ("Although states continued to repeal their sodomy laws through the 1970s, the repeal movement slowed, and two states re-regulated sodomy, for no promo homo reasons." (footnote omitted)); *id.* ("The wind went out of the sails of legislative sodomy repeal after the House vote" to veto repeal of the District of Columbia's sodomy ban in 1981.).

400. *See supra* note 343 (dealing with the repeal of the sodomy ban in the District of Columbia).

401. Doubtless any explanation of the stall in the trend—there were no state sodomy ban repeals in the years between 1983 and 1991 (plus or minus)—would have to take

recently, the trend toward decriminalization has resumed, with sodomy laws in six states and in the District of Columbia being erased from the statute books,[402] leaving, today, only eighteen states, counting conservatively, that make sodomy a criminal offense.[403] Less conservatively, the laws of *at least* four of the eighteen states—Massachusetts,[404] Michigan,[405] Missouri,[406] and Texas[407]—are of

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Hardwick, the moral panic over AIDS, and the country's general political climate into account. *See, e.g.*, Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects on Human Rights*, 61 ALB. L. REV. 897, 907–10 (1998).

402. One of the most important symbolic victories in the movement to decriminalize sodomy is the Georgia Supreme Court's 1998 decision in *Powell v. State*, 510 S.E.2d 18 (Ga. 1998), declaring that the law that the Supreme Court of the United States did not strike down in *Hardwick* violated the state constitution's guarantee of privacy. *Powell* is a case that has some very troubling aspects to it, not least of all the facts of the case that one can piece together from various available news reports. I leave for another day my views on the politics of privacy challenges by the lesbian and gay communities to state sodomy bans. *See also* 1998 R.I. GEN. LAWS § 11-10-1 (Supp. 1999) (decriminalizing sodomy under state law); Kentucky v. Wasson, 842 S.W.2d 487, 502 (Ky. 1992) (invalidating state's sodomy law); Gryczan v. Montana, 942 P.2d 112, 126 (Mont. 1997) (same).

403. The eighteen states are: Alabama, ALA. CODE § 13A-6-65 (1994); Arizona, ARIZ. REV. STAT. § 13-1411 (1989); Arkansas, ARK. CODE ANN. § 5-14-122 (Michie 1997); Florida, FLA. STAT. ch. 800.02 (2000); Idaho, IDAHO CODE § 18-6605 (Michie 1997); Kansas, KAN. STAT. ANN. § 21-3505 (1995); Louisiana, LA. REV. STAT. ANN. § 14:89 (West 1986); Massachusetts, MASS. GEN. LAWS ch. 272. § 34 (1992); Michigan, MICH. COMP. LAWS § 750.158 (1991) (MICH. STAT. ANN. § 28.355 (Michie 1990)); Minnesota, MINN. STAT. ANN. § 609.293 (West 1987); Mississippi, MISS. CODE ANN. § 97-29-59 (1999); Missouri, MO. REV. STAT. § 566.090 (1999); North Carolina, N.C. GEN. STAT. § 14-177 (1999); Oklahoma, OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 2001); South Carolina, S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); Texas, TEX. PENAL CODE ANN. § 21.06 (Vernon 1994); Utah, UTAH CODE ANN. § 76-5-403 (1999); and Virginia, VA. CODE ANN. § 18.2-361 (Michie 1996). *See also* ESKRIDGE, GAYLAW, *supra* note 51, at 362–71 app. B3 (collecting statutes).

404. Tribe, *Hardwick* Brief, *supra* note 95, at 14 n.23 (arguing that the State's brief "erroneously" included the Commonwealth of Massachusetts in its list of jurisdictions that then still outlawed "oral and anal sexual contacts," and citing *Commonwealth v. Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974), for the proposition that the Commonwealth "ha[d] long since held its sodomy law unconstitutional as applied to the acts of consenting adults in private").

405. Michigan's sodomy prohibition was struck down by a Wayne County Circuit Court in 1990. Mich. Org. for Human Rights v. Kelley, No. 88-815820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990). The State's Attorney General did not appeal the case, and the law in Wayne County might, as a result, appear to be null. Several years later, however, the state court of appeals upheld the statute in a decision that had effect in its region, but not Wayne County. People v. Brashier, 496 N.W.2d 385 (Mich. Ct. App. 1992) (per curiam). To this list might be added Maryland's sodomy law. According to William Eskridge, a state trial court has struck down the state's sodomy ban. ESKRIDGE, GAYLAW, *supra* note 51, at 337.

406. *See supra* note 362 (discussing the state of the law in Missouri).

407. *See* Garner v. Texas, No. 14-99-00111-CR, 2000 Tex. App. LEXIS 3760 (Tx. Ct. App., June 8, 2000).

somewhat uncertain legal status. Pending judicial and legislative actions may reduce the total number of state sodomy bans still further.[408] Again, counting conservatively, only five of the states that continue to ban sodomy target only gay sex,[409] down one from the time of *Hardwick*. Thus, the number of laws against sodomy now compares roughly (a few more or a few less, depending) to the number of statutes barring miscegenation that were in force when *Loving* was decided by the Court—sixteen.[410] Interestingly, the current map of state sodomy bans bears a noticeable resemblance to the map of miscegenation bans that one could have drawn for the Court in 1967. With the exception of the scattered outlier states, criminalization of sodomy is most prominent, geographically, in southern and southern-border states, ten (or so) of whose miscegenation laws were effectively stripped from the books by the Supreme Court in *Loving*.

Having spent some time looking at them, what might we say about congressional, executive, and federalist assent in the context of a state's sodomy law? At a minimum, they do not in any strong sense counsel *against* a principled judgment on the merits that such a law is unconstitutional.[411] Indeed, they can reasonably, if not definitively, be read as saying that such a judgment is warranted.

Fair-minded people can—and will—disagree whether, as a strategic matter, the time has come for the Supreme Court to strike down state sodomy prohibitions. But even if the conditions of prudence here perfectly paralleled the conditions of prudence in the miscegenation arena (which they do not), it seems to me anything but obvious how today's (or tomorrow's) Court would regard them.

It is tempting to speculate how, with a sodomy case before it, the Supreme Court might rule. In thinking it through, one might want to start with questions like these: What is the Court's "mood"? How might the prospect of striking down as many as eighteen states'

408. Arkansas's sodomy law is winding its way through the state judicial pipelines. *See* Bryant v. Picado, 996 S.W.2d 17 (Ark. 1999).

409. Those five states are: Arkansas, ARK. CODE ANN. § 5-14-122 (Michie 1997); Kansas, KAN. STAT. ANN. § 21-3505 (1995); Missouri, MO. REV. STAT. § 566.090 (1999); Okalahoma, OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 2001); and Texas, TEX. PENAL CODE ANN. § 21.06 (Vernon 1994).

410. Loving v. Virginia, 388 U.S. 1, 6 (1967) ("Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications." (footnote omitted)).

411. This, of course, assumes a principled judgment on the merits would favor lesbians and gay men. And whether the principle is one of sex equality or one of privacy, for example, or even grounds of equal protection "rationality," others have adequately explained why the assumption of principle may very well be justified.

sodomy laws look to the Justices who now (or soon may) sit on the Court? How much more daunting would it look, for example, than *Evans* where, as William Eskridge has colorfully described it, the Court "pounced on a squirrelly antigay initiative adopted by narrow margins in an outlier state[?]"[412] How significant would the difference be? How, if at all, might the Court's recent federalism jurisprudence modify the significance of federalist assent within its prudential calculations? Could the Justices look at a law against sodomy, if one were before them, without DADT or DOMA, or both, stalking their imaginations? Might the alternative reading of *Hardwick* help—by giving the Justices a way to correct what is widely believed to be the Court's error in *Hardwick*? By enabling the Court to make that correction without sharply breaking with its decisional past? By allowing the Court to make that correction without also promising to strike down all laws that discriminate against lesbians and gay men? Might the alternative reading of *Hardwick* help—by not committing the Court to follow a path that would immediately disrupt cultural and legal norms that have *not* changed, or have not changed very much, in the years since *Hardwick*?

There seems little point in trying to predict how the Court would decide a new sodomy case, no matter how alluring the endeavor may seem. To borrow a phrase from Laurence Tribe, he "who lives by the crystal ball [is bound] to eat lots of ground glass."[413] Prediction aside, there is an important difference between what the Supreme Court *would* do in a particular case and what a lower court, in the interim, *can* and *should* do.[414]

So let us approach the interim matter somewhat more directly. Is a lower court free within the constraints of Supreme Court precedent to declare that a state's law against sodomy is unconstitutional? The alternative reading of *Hardwick* offers one way of understanding why the answer is "yes." *Should* a lower court issue such a ruling? Others have amply explained elsewhere why—on various grounds—a court should strike down a state's sodomy law as a matter of constitutional principle. In addition, now, there are

412. ESKRIDGE, GAYLAW, *supra* note 51, at 229.

413. JESSE H. CHOPER ET AL, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 236 (1982) (remarks of Laurence Tribe).

414. *Cf.* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 165, at 126–27 ("[L]ower courts do not and should not as a rule base judgment on a guess of what the Supreme Court would do; they must follow what it has done in the past as best they can. No doubt, this is not a mechanical process, and the lower courts have decision-making power; but it is comparatively interstitial.").

growing prudential reasons for a court to do so, reasons that provide a path by which a court can distinguish between a sodomy law and, for example, a law against same-sex marriage. For, while the conditions of prudence may (already) counsel in favor of striking down a state's sodomy prohibition, they do not similarly seem to recommend, for example, invalidating a state's law barring same-sex marriage on constitutional grounds.

None of this will make much, if any, practical difference, however, if we cannot reach even provisional agreement that, *at least sometimes*, courts may properly—and not just inevitably—proceed with an eye to prudential considerations when adjudicating cases involving the constitutionality of laws that discriminate against lesbians and gay men. The proposed pragmatic compromise seeks to do just that. But is it possible? Can we achieve the agreement necessary for that compromise to work?

Earlier, recall, I suggested that the possibility of a successful compromise might be enhanced if those presently in or near the center would be willing to make an initial gesture of good will to their lesbian and gay friends.[415] Its form can now be seen. At least in the first case, where prudence presents no obvious obstacle to a principled decision on the merits and may even be thought to authorize it (be it a case involving a constitutional challenge to a law against sodomy or some other similar law that discriminates against lesbians and gay men), dedicated pragmatists should be widely heard drumming the message that principle must be given free rein to prevail, as we ordinarily believe it should, to put an end to that particular form of discrimination. This even though, as is presently the case with a state law against sodomy, the conditions of prudence are not *perfectly* analogous to what they were in 1967 when the *Loving* Court struck down the remaining state miscegenation bans. Why should such a gesture be contemplated? Among other reasons, no less than these: The Constitution demands it. Courts can afford it. And lesbians and gay men deserve it. This is the very least they—no, we—deserve.

CONCLUSION

In conclusion, I want to set forth in rudimentary sketch the minimal commitments the proposed compromise might call for from those within the lesbian and gay communities. Then I will share a few thoughts on whether or not those communities should endorse the

415. *See* text accompanying *supra* note 272.

compromise, mentioning along the way a few additional terms they should insist upon if they do. Finally, I end by offering one interpretation of my own text.

The compromise I have proposed likely means that there would have to be some modifications made to the litigation agendas of lesbian and gay rights organizations. Simultaneous pursuit of multiple cases constitutionally challenging an array of laws and other governmental actions that discriminate against lesbians and gay men would have to be reconsidered. The spectrum of governmental discriminations against lesbians and gay men, theoretically and practically interconnected, would have to be broken down into discrete component parts. Litigation would be pursued in a sequence corresponding to the conditions of prudence; the most promising claims would be advanced first, the weakest, last.

In the abstract, this sounds unexceptionable, even obvious. It is the litigation strategy pursued in other civil rights campaigns.[416] In the lesbian and gay rights context, however, it may currently present certain difficulties. It would, for example, appear to recommend that federal constitutional attacks on DOMA or corresponding state laws be postponed until a time in the future when the conditions of prudence would no longer obviously preclude them. Which may require waiting to litigate these and other otherwise powerful constitutional claims beyond, if not far beyond, the time that might ideally be preferred.

Moreover, the proposed compromise might call upon lesbian and gay rights organizations *at least to consider* what may seem an very unsavory possibility: to prepare themselves as a last resort to argue in court for a prudential non-decision on the merits in certain lesbian and gay rights cases. This course of action, however distasteful it may be or seem, is not inconsistent with the moral suasion lesbian and gay rights organizations have shown themselves ready to bring to bear on individual claimants who wish to pursue a litigation strategy other

416. *See* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 131–55 (1983) (documenting aspects of the step-by-step approach to race equality litigation that Charles Hamilton Houston and others, with him, pursued); *id.* at 135 ("Houston believed the step-by-step process would have greater long-range effects [among other reasons], because it would take into account the lack of tradition for equality within the American system."); *see also* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 202–20 (1998) (documenting aspects of the case-by-case approach to sex equality litigation undertaken in the early 1970s by the American Civil Liberty Union's Women's Right Project, headed at the time by then-Professor Ruth Bader Ginsburg, and intersections of sex-equality and race-equality litigation).

than the one that is nationally set.[417] In one sense, then, making the prudential arguments in court—if it were to be a term of the compromise—might be nothing (or not much) more than a public reflection of the intra-community maneuvering that we know already does go (and has gone) on.[418]

But, squarely to ask the question that must certainly be on the minds of some readers, does the compromise spell the end of the marriage project? Not necessarily, no. The compromise need, at a minimum, only clarify what would already appear to be the current litigation approach: to postpone federal attacks on marriage laws.[419] The same would hold true for various other, non-priority claims.

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417. *Cf.* Fajer, *With All Deliberate Speed?*, *supra* note 214, at 43. Sunstein's "approach may be appropriate for gay advocacy organizations, which choose cases to support with an eye to long-term strategy. Indeed, these organizations sometimes employ just the kind of strategic thinking the approach suggests." *Id.* Recently, "Lambda Legal Defense and Education Fund . . . announced that it currently would not pursue gay marriage claims 'in states where the prospect for defeat seems great,' pending the outcome of its case in Hawaii." *Id.* at 43 n.31 (citation omitted); *see also* Halley, *Gay Rights and Identity Imitation*, *supra* note 225, at 129 (discussing the practice in terms of "natural rights"). In order to avoid confusion, I want to underscore that as to the particular suggestion here, as well as the other minimal commitments that the proposed compromise might entail, I am not presently advocating for them. I am rather trying to set them forth for purposes of future discussion.

418. I am not prepared—and am not seeking—to defend as ethical all aspects of the existing practice of attempting to persuade individual lesbian and gay rights litigants not to bring cases they may be (or are) entitled on their own to bring. I am too ambivalent about the practice, which obviously raises a series of intensely complex ethical issues, to defend it across the board. Nevertheless, assuming for argument's sake that, at least in some instances, lesbian and gay rights organizations can ethically engage in the practice, I do not see how the same might not be said of its more open, public expression.

419. Evan Wolfson, the Director of the Marriage Project at the Lambda Legal Defense and Education Fund, has thoughtfully explained Lambda's marriage litigation strategy this way:

> Our opponents know that we are in the battle not just for the hearts and minds of the public, but also for the map of the country.... It is a struggle that is taking place in history—not just in one court, not just in one legal solution, not within one legal theory, but in events, battles, and in engagement going state by state, community by community.... Part of our challenge is to keep such engagement going, not to let it be shut down by any one defeat or any one legal argument or any one battle or any one problem because it is bigger than all the rest.

Evan Wolfson, *The Freedom to Marry: Our Struggle for the Map of the Country*, 16 QUINNIPIAC L. REV. 209, 212–13 (1996); *see also* Wolfson & Mower, *supra* note 180, at 1001 ("In the wake of *Hardwick* and its progeny, those of us seeking to challenge the constitutionality of 'sodomy' statutes have, of necessity, turned to state courts and state constitutions to secure the protection of private sexual intimacy denied by federal courts."). The strategy may have been set as early as the day after *Hardwick* was decided. *See* Larry Rohter, *Friend and Foe See Homosexual Defeat*, N.Y. TIMES, July 1, 1986, at A19 (reporting that "[h]omosexual activists said that the focus of their efforts to gain legal protection is now likely to shift from the national level to states and cities."); *see also* Fajer, *With All Deliberate Speed?*, *supra* note 214, at 43 n.31 (explaining that the Lamda

As for non-litigation legal agendas, the proposed compromise would, on the federal level, suggest that the primary recourse for protection against discrimination on the basis of sexual orientation, "actual" or "perceived," would be congressional and executive action. In view of the potential constitutional implications of these forms of governmental action, legislative and executive proposals might be framed more consciously in ways that key into the kinds of prudential arguments that those who are speaking to courts might find useful.[420] There would probably need to be close coordination and cooperation between the legislative and litigation wings of the lesbian and gay civil rights communities. This kind of coordination and cooperation is, of course, nothing new, and, in this respect, the compromise may merely serve as a reminder of the need for what already happens to continue to do so.

It is important to stress one last time that the proposed compromise would first and foremost be a federal constitutional compromise limited to the kinds of arguments made in the courts. It should leave ample room for constitutional and other arguments from principle to be made and gain acceptance in other social and legal institutional fora. Moderate success in the judicial arena might be precipitated by, and then once again amplified through, federal (and state) legislative and executive action, helping incrementally to shift views in the broader realm of public opinion and culture.

All things considered, should the lesbian and gay communities accept the compromise? In candor, the most I can comfortably say is that the possibilities the compromise holds out seem well worth exploring in greater detail. Many have profitably spent considerable energies outlining the various principles on which the equality project for lesbians and gay men might rest. Looking to ways to put one or more of those principles into operation seems to me an idea whose time has come. I think and hope that others will agree. Still, it should not be forgotten how impossible it would be to conceive of a prudential compromise were it not for previous principled efforts. Neither principle nor prudence would now be what it is without the other.

That said, I must add that should the lesbian and gay communities decide to proceed with the compromise, they should

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Legal Defense and Education Fund would no longer proceed with gay marriage claims in states likely to reject such claims).

420. This might take the form (as I am inclined to think it should) of defining discrimination based on sexual orientation, actual or perceived, as a form of sex discrimination.

insist that it be understood as provisional. They should be clear that, while it existed, the compromise would be subject to robust and ongoing criticism and that such criticism would be vital to ensuring that principle was not being sacrificed in prudence's name any more than it ever needed to be.[421]

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In closing, let me offer an interpretation of my own text. As I understand it, it is a study in the paradoxes of identity. The three most significant textual moves—the suggestion that the standard interpretation of *Hardwick* has been shaped by more than text alone, the proffer of an alternative reading of the case, and the use of that reading as the basis for the proposed constitutional compromise—converge on the paradoxical identities of *Hardwick* and of the Constitution.

We do not usually think this way, and so it may sound strange. But judicial decisions have identities. Where *Hardwick*'s is concerned, we have largely tended, and largely continue, to interpret the case as if its holding—the "essence" of its identity as a matter of legal doctrine—were fixed, determinate, knowable, and known. Part I began the effort to draw that thinking into question, contending that something beyond text alone has generated (and perpetuated) the standard interpretation of *Hardwick*. Part II continued, highlighting that *Hardwick* does not necessarily mean what the standard reading posits it does. Establishing the plausibility of an alternative reading of *Hardwick* thus cast light on the interpretive

421. The suggestion of the sacrifice that "need (or need not) be," of course, begs questions, some of which will have to be worked out in the conversation over the compromise itself. Among them, there are these: How will we, those of us party to the compromise, figure out how to negotiate the inevitable disagreements among us? Will that be simply a responsibility of the courts? Or should we create mechanisms by which to attempt to resolve these matters more informally, before remitting them to the courts? How will we continually re-evaluate the compromise—both in terms of the balance it is striking, as well as its continuing utility? Will we do so "objectively" or "subjectively?" Democratically? Will the voices of centrists trump others'? The voices of lesbians and gay men? What happens as the compromise, if it does, yields success? Who will then occupy the center? Should the compromise be extended now—or later—to include others who are often counted as members of the lesbian and gay communities, such as bisexuals and transgendered people? How will we deal with problems of collective action or decisionmaking? Recognizing that questions like these perhaps need to be answered does not require them to be answered today. If no compromise can actually be forged along the imagined lines, they are effectively moot, although whether that compromise can be forged, in the end, may depend on the answers one has for these questions.

choices that are ultimately involved in speaking of what *Hardwick* does or does not say. Together, these moves reveal *Hardwick* as the congealed product of an interpretive process and not the simple deduction of "some stabilized preinterpretive something" already imbedded in the text of the *Hardwick* opinions.[422]

Once we see these interpretive choices for the choices they are, we might begin to appreciate the paradoxes of *Hardwick*'s identity. *Hardwick* both is and is not a case that held there is no substantive due process right to engage in homosexual sodomy. It both is and is not a case that decided not to decide the merits of the substantive due process arguments that Michael Hardwick made.

Choices about how to interpret *Hardwick*, of course, cannot properly and entirely be separated from choices about how to interpret the Constitution. Accordingly, to be interesting and meaningful, it would not have been enough to leave off with the alternative reading. Something had to be said about how the alternative reading of *Hardwick* might be related through an interpretive method to the Constitution itself. The criticisms of the miscegenation analogy provided the occasion for exploring the relationship between *Hardwick* and the Constitution. As to the span between them, the conditions of prudence provided a suitable bridge. But as an interpretive method, or to put it another way, as a process of constitutional interpretation, the conditions of prudence reveal, if there had been any doubt of it after *Evans*, that the Constitution does not simply authorize the state to legislate sexual identity—or to legislate on the basis of sexual identity. Like *Hardwick*'s, the Constitution's identity is a paradox.[423] It both does and does not authorize the state to define—and discriminate—against lesbians and gay men.

If my text is understood as a study in the paradoxes of identities, one might be inclined to ask, are sexual orientation identities choices, too? The answer, naturally, is that they are—at least in the following sense: we choose to orient our thinking so that sexual orientation identities have, and continue to, become meaningful axes of self-understanding and discrimination. As with *Hardwick*'s and the Constitution's, however, we often only notice sexual orientation identities' revealed forms. We more commonly see "lesbians" and "gay men" (or "dykes" and "faggots") than the processes by which

422. Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1687 (1996).

423. *Id.* at 1681 ("For some, the Constitution is fixed. For others, it is changing. For still others, it is both fixed and changing.").

they are created, among others, by individuals, by ideology, and through law.[424] And yet, focusing on those processes can lead us to overlook, if not social identities themselves, then the harms worked and experienced through them.[425] It may be that those harms are just another form of text whose meanings we create, but saying so will, to many,[426] often sound like basic, cruel indifference. On either side, then, there are risks which, properly considered, remind us of the importance of "practice with paradox."

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424. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 567–83 (1997); *id.* at 563–66 n.12–13 (collecting sources); *id.* at 585–644; *see also* Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 61–68 (1994) (discussing ways to think about the existence of a core lesbian experience shared by each individual); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1853–55 (1994) (examining the difficulties and problems associated with having a unified "voice" for an outsider group); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 547 (1994) (examining the differences between essentialism and constructivism with respect to sexual orientation); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 297 (1994) (noting that assuming every member of a protected civil rights group has a single experience that stands for the multiple experiences of its members may discount the "vertical" differences within the group); Kendall Thomas, *"Ain't Nothin' Like the Real Thing:" Black Masculinity, Gay Sexuality and the Jargon of Authenticity*, *in* REPRESENTING BLACK MEN 55, 66 (Marcellus Blount & George Cunningham eds., 1996) (explaining that the search for an independent and autonomous sexual identity is ill-advised).

For related thoughts in the gender identity context, see generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–99 (1993) (analyzing the doctrine of intersectionality and its application to women of color); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 581–616 (1990) (arguing that feminist legal theory, or a certain important strand of it, is "essentialist" and has largely silenced the "voice" of black women). For an especially well-written and thoughtful account of the equally ugly "Dahmer" case that builds on related insights into the social (and legal) construction of identity, see Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280–90 (1997). For additional commentary touching on the relationship between identity and law, see Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation*, 48 HASTINGS L.J. 1293, 1335–40 (1997), as well as many of Valdes's numerous other publications.

425. *See* Thomas, *Beyond the Privacy Principle*, *supra* note 14, at 1502 n.249 ("I do not believe that 'we' can simply 'give up' the idea of homosexual identity. [It] is certainly correct to say that the idea of a 'homosexual' identity is an ideological category and thus false; it by no means follows from this observation, however, that 'homosexual' identity is therefore not real.").

426. *See, e.g.*, Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687 (2000); Martha C. Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 22, 1999, at 37, 45 (criticizing Butler's work for its indifference to material conditions of women's (and others') subordination).

Something Martha Minow has said about the paradoxes of identities bears repeating here. It may also serve as a near-final thought on the constitutional compromise I have offered for initial consideration:

> Identity politics ties us in knots. Yet even without unity in the sense of a single, shared American identity, the peoples of this nation can recognize and deepen ties, sufficient to enhance self-governance. Those ties are enlivened by the paradoxes of our shared experiences as unique individuals with varieties of affiliations. We have all made differences matter; we all must sense freedoms for self-invention would help. Promoting daily contact across lines of differences in schools, jobs, and communities would strengthen the kind of ties that permit a solidarity sufficient for sustaining debates over the future. The important question is not just what to do, but when.[427]

This year, we mark the fifteenth anniversary of the Supreme Court's decision in *Bowers v. Hardwick*. For fifteen years, as the Court's understanding of the Constitution, *Hardwick* has ruled the land. But as an interpretation of the words and principles that bind us together as peoples, it has also done something more. *Hardwick* has helped define who we think we are.

Still, anniversaries being moments to remember, we should not forget. It is something that fifteen years should enable us better to see. We play a part in defining *Hardwick*, and we can play a part in redefining it, and like *Hardwick*—indeed, through it—ourselves. Recognizing this may enable us not only to apprehend the seriousness and the import of the business the Supreme Court left unfinished in *Hardwick*, but also to find creative ways of finishing it and, in doing so, finally to move on.

Anniversaries prompt reflection—on the future, as well as on the past. *Hardwick*'s fifteenth this year thus invites us, with Minow, to pose the question Hillel is famed for having asked: If not now, when?

427. MINOW, *supra* note 374, at 157–58.