

BOWERS V. HARDWICK DIMINISHED

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*The question that he frames in all but words
Is what to make of a diminished thing.*¹

How much constitutional authority does *Bowers v. Hardwick*² still have after *Romer v. Evans*?³

The Court in *Hardwick* had said that it was rational (hence constitutional) to treat private homosexual acts between consenting adults as crimes—this on the basis of “majority sentiments” unsupported by any argument.⁴ *Romer* said that it was irrational, hence unconstitutional, for a state to tie its hands against giving explicit antidiscrimination protection to gay men, lesbians, and bisexuals.⁵

It is hard to square those two positions, as Justice Scalia said so loud and clear in his *Romer* dissent.⁶ Scalia’s dissent made even louder the silence at the heart of the *Romer* majority opinion—its failure so much as to mention *Hardwick*. Given the power of the dissent on this point, the Court’s choice was obvi-

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1. ROBERT FROST, *The Oven Bird*, in COLLECTED POEMS, PROSE, & PLAYS 116 (Richard Poirier & Mark Richardson eds., 1995).

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

3. 116 S. Ct. 1620 (1996).

4. See *Hardwick*, 478 U.S. at 196.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. 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. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Id.

5. See *Romer*, 116 S. Ct. 1620 (1996).

6. See *id.* at 1631 (Scalia, J. dissenting) (“If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.”).

ously deliberate. I think that Justice Scalia was right—the two decisions are inconsistent on this point, and as a result not much is left of *Hardwick*.⁷

The claim that the rationale of *Hardwick* blocked constitutional antidiscrimination protection for gays and lesbians was stated most memorably in one of the first important post-*Hardwick* decisions, the D.C. Circuit's opinion in *Padula v. Webster*.⁸ Plaintiff in *Padula* challenged discrimination against homosexuals in government employment as a violation of equal protection. The court said that *Hardwick* had disposed of this claim *a fortiori* by approving the sodomy laws as applied to consenting adult homosexual acts.⁹ Its decisive words have often been quoted: "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."¹⁰

The vivid phrase "the conduct that defines the class" has naturally been anathema to the gay rights bar, which has been forced to argue for the last decade that *Hardwick* had nothing to do with the constitutionality of discrimination based on sexual orientation.¹¹ But the memorable one-liner from *Padula* now has quite a different force. To the extent its logic holds, *Romer* is inconsistent with *Hardwick* and implicitly overrules it.

The *Romer* majority was fully aware of the point about "the conduct that defines the class." Justice Scalia quoted the *Padula* line in his dissent,¹² and elaborated on its message most effectively. And yet Justice Kennedy chose not to address this argument in the majority opinion at all! One can think of all kinds of practical reasons of the sort judges do not usually mention that might have led the majority to avoid the issue. Justices O'Connor and Stevens, both of whom joined the majority in *Romer*, had been on different sides in *Hardwick*, and Justice

7. Ronald Dworkin argues to the same effect. See Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. BOOKS, Aug. 8, 1996, at 44.

8. 822 F.2d 97 (D.C. Cir. 1987).

9. See *id.* at 103.

10. *Id.*

11. See, e.g., Chai Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 284-89 (1996); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 918-23, 948-49 (1989); see also LESBIANS, GAY MEN, AND THE LAW 341-42 (William B. Rubenstein ed., 1993) (discussing post-*Hardwick* litigation).

12. See *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting).

Kennedy might have found it difficult to find anything to say about *Hardwick* on which they both could agree. There were also more avowable reasons for silence. The lawyers challenging Amendment 2 had not asked the Court to overrule *Hardwick*,¹³ and at the same time the lawyers for the State had conspicuously avoided relying on it in their arguments.¹⁴ The four Justices in the majority who had joined the Court in the decade since the sodomy decision may not have wanted to have their first say on such an important issue without the aid of briefing and argument on both sides.¹⁵

Still, lawyers and judges concerned with future cases in which *Hardwick's* continued vitality is an issue can't duck the question simply by observing that the *Romer* Court was having a bad day, or even just a very prudent day. Within the standard conventions of legal argument, if *Romer* does not silently overrule *Hardwick*, the two decisions must be reconciled.

The difficulty, restated, is that *Romer* seemed to say that at least some discrimination against gays, lesbians, and bisexuals is invidiously irrational, and hence violates equal protection. But *Hardwick* had said that "homosexual sodomy" could be criminalized with no more support than the observation that it had been widely, and over some time, considered immoral—in this context, an apparent validation of a widespread and persistent prejudice. In the teeth of the Georgia statute, the Court placed much emphasis on the "homosexual" aspect of the sodomitical acts in question in justifying the constitutionality of laws making them criminal.¹⁶ As Justice Scalia said (citing *Padula*),

13. See Transcript of Oral Argument at 53, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039); see also *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting) (noting that "[r]espondents' briefs did not urge overruling *Bowers*, and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling").

14. The petitioners' brief cites *Hardwick* only as support for their argument that the right to political participation, which was recognized by the Colorado Supreme Court as fundamental, is inconsistent with the Court's "accepted methodology for identifying fundamental rights." Petitioners' Brief at 28-29, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039) (quoting the Court's discussion in *Hardwick* of fundamental rights as those "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition"). At oral argument, the counsel for petitioners neither relied on nor answered questions concerning *Hardwick*, see Transcript of Oral Argument at 3-30, 57-59, *Romer* (No. 94-1039), and expressly disavowed the argument from *Padula*, see *id.* at 9-11.

15. The four "new" members of the majority were Justices Kennedy, Souter, Ginsburg, and Breyer.

16. The Georgia sodomy statute was of the old-fashioned kind that had nothing

criminalizing the behavior that defines a class is the most palpable discrimination against that class—and yet *Romer* held an apparently less invidious form of the same kind of discrimination unconstitutional because it was not rationally justified.

I want to consider three possible arguments for escaping the *Padula* logic and thereby reconciling *Hardwick* with *Romer*. First, homosexual *status* may be very different from, and more protected than, sodomitical *conduct*. Second, constitutional equal protection may be a sufficiently different kind of doctrine from constitutional liberty or privacy as to negate the apparent implication of *Romer* for *Hardwick*. Third, *Padula's* "greater includes the lesser" logic may not be relevant to Amendment 2 because the Colorado provision was invalidated on grounds that have nothing special to do with sex or sexual orientation.

The conduct versus status line of argument was the basis for some of the big wins by the gay rights bar in the post-*Hardwick* era, the *Watkins*¹⁷ and *Steffan*¹⁸ panel decisions in the Ninth and D.C. Circuits. The argument is based on the weak relation between homosexual status, or identity, and the forms of same-sex conduct prohibited by sodomy statutes.

A simple form of the argument takes the line that one may be a "homosexual" by self-affirmation or identification and yet not engage in the prohibited acts. In *Steffan*, the D.C. Circuit panel actually said that it was irrational to infer from a person's being a self-avowed homosexual that he was more likely to have same-sex intercourse, noting that some people would have the self-discipline to refrain from the forbidden acts.¹⁹

Of course such persons might exist, but this is irrelevant if all the government has to show is a rational basis. To affirm oneself

to do with homosexuality as such; it prohibited sexual contact between sexual organs of one person and the mouth or anus of another, with no restriction as to the sex or marital status of the parties. See GA. CODE ANN. § 16-6-2 (1984). The claim of a heterosexual married couple who challenged the statute as applied to married persons was dismissed for lack of standing by the district court. The Eleventh Circuit affirmed the dismissal, and the couple did not challenge that holding in the Supreme Court. See *Hardwick*, 478 U.S. at 188 n.2. The Court took advantage of the procedural posture of the case to emphasize that what it was rejecting was a claim of constitutional protection for "homosexual sodomy." See *id.* at 188 n.2, 190-91.

17. *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

18. *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *rev'd*, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

19. See *Steffan*, 8 F.3d at 65-67.

as gay, lesbian, or bisexual in post-Stonewall America is almost certainly to affirm not only some form of same-sex erotic orientation but also the belief that there is nothing intrinsically wrong with homosexual intercourse. And a person affirming these things is surely more likely than others to engage in the forbidden same-sex conduct. That alone satisfies the rational basis test, which is all that was required in these military employment cases. The government was not trying to convict Watkins or Steffan of sodomy, just trying to discharge them from military service, a decision subject to the greatest deference and the lowest degree of scrutiny.²⁰

The point would be more clear if the acts to be avoided were not victimless and harmless acts of intercourse between consenting adults, but rather sexual conduct that most people think of as having real victims—adult “consensual” sex, whether homosexual or heterosexual, with very young adolescents, girls and boys who have just reached puberty. My point in invoking this potentially unhappy analogy²¹ is to emphasize that because adults having sex with children *is* rationally thought harmful, though a few people sincerely disagree, a school district could surely rationally disqualify as a teacher someone who had asserted (1) sexual desire (whether homosexual or heterosexual) for young adolescents, and (2) a belief that relations of this sort could be genuinely consensual, and indeed legitimate and beneficial.²² No status-

20. The language in both *Watkins* and *Steffan* invoked traditions of due process law relating to proof of criminal acts to reach the conclusion that it would be “irrational” to infer homosexual acts from homosexual status. See *Steffan*, 8 F.3d at 65-66 (relying on criminal cases that distinguished between status or propensity and conduct in situations of entrapment and prosecutions for treason and subversive activities); *Watkins*, 847 F.3d at 1340, 1346 (relying on the Supreme Court’s decision in *Robinson v. California*, 370 U.S. 660 (1962), which held criminalizing the status of drug addiction unconstitutional). But of course under procedural due process, criminal guilt must be proved beyond a reasonable doubt, not inferred on a merely rational basis. Otherwise arrest upon probable cause would suffice to justify criminal punishment.

21. “Potentially unhappy” because in this context it risks summoning up the nasty innuendo that gay men and lesbians, needing “recruits” to their unnatural lifestyle, are more likely than other adults to be sexual predators on the young. My analogy, by contrast, is to adult sexual relations with young adolescents, whether homosexual or heterosexual.

22. As apparently supported, for example, by the North American Man-Boy Love Association, or by defenders of the very low ages of consent that have traditionally been set for girls in some of our states and still exist in many countries, whom we may imagine assembled into a “Lolita League.” See Wes Allison, *Probe into Group Yields Indictments, Sexual Abuse in Stafford Is Charged*, RICH. TIMES-

conduct distinction would protect such a teacher, though no acts had been proven against him.

A more complex variation on the status versus conduct argument has been pressed in sophisticated scholarship on sexual identity, including some remarkable articles by Janet Halley.²³ This scholarship rejects any simple status-conduct distinction, pointing out that not only do people who are labeled homosexual do all sorts of different things sexually, but that our conventions don't condemn as "homosexual conduct" even all acts of same-sex intercourse. For example, the Army excuses from its ban on homosexuals the "queen for a day"—the man who has intercourse with another man once or a few times, but repents these acts as inconsistent with his true sexual orientation.²⁴ The point is that our prevailing sexual ideology does not simply define "status" by conduct ("the conduct that defines the class"), but rather sees conduct as interacting in complex ways with desire, self-description, and public self-presentation in supporting our ascriptions of identity.

This scholarship casts some fascinating light on the often unnoticed complexities in our conventional categories of sexual orientation, but I don't think it really casts any doubt on the government's legal case that it can (at least sometimes) constitutionally discriminate against gays in employment. Suppose that conventional morality unambiguously condemns (as "homosexual sodomy"—*Hardwick's* term) only those acts of same-sex intercourse that are committed by people who also self-identify as homosexual. Surely it is still more likely that people who describe themselves as gay or lesbian, like Watkins and Steffan, will engage in homosexual acts. If the acts were truly bad, and yet difficult to detect because typically done in private, it would

DISPATCH, Sept. 4, 1996, at B4 (describing NAMBLA as "a support and advocacy group for men who advocate consensual sexual and emotional relationships with boys"). Brazilian law makes 14 the age of consent for girls, and Brazilian courts have recently reversed rape convictions on the grounds that the 12- and 13-year-old alleged victims consented. See Michael Christie, *Brazil May Lower Age of Consent to 12 Years*, SEATTLE TIMES, May 29, 1996, at A14.

23. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Halley, *supra* note 11; see also Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429 (1997).

24. See Steffan, 8 F.3d at 64-65; Watkins, 847 F.3d at 1338-39; see also Halley, *supra* note 11, at 951-53.

be rational for an employer to use an imperfect correlate like homosexual self-identification as a proxy for them.

Those of us who see nothing wrong with homosexual acts as such have trouble grasping the force of this argument. But again, this just shows that we cannot really get our minds around *Hardwick*. Remember, the premise of that decision was that it is rational to find harm or evil in consensual adult "homosexual sodomy"—enough harm or evil to justify criminal punishment. In his concurring opinion, Chief Justice Burger tried to help us understand this by quoting Blackstone to the effect that sodomy was more malignant than rape.²⁵ If (like me) you contemplate such sentiments with blank incomprehension, you may (also like me) need to imagine away Michael Hardwick, the model soldier Perry Watkins, and the model midshipman Joseph Steffan. Then you may need to replace them in your imagination with an otherwise capable schoolteacher who is a professed "man-girl-lover" or "man-boy-lover," whom authorities refuse to hire to teach in a middle school on that ground, without further proof that he has actually tried to have sex with a young adolescent. Surely no argument based on a distinction between status and conduct could render that employment decision irrational.²⁶

Now let me turn to the point that privacy and equal protection are different, which has been pressed by Cass Sunstein,²⁷ and which showed up as part of the court's rationale in *Watkins*.²⁸ *Hardwick* says sodomy laws don't violate privacy or substantive due process, but, Professor Sunstein argues, that doesn't mean that governmental anti-gay employment discrimination is consistent with equal protection. After all, that a law does not authorize uncompensated takings or unreasonable searches and seizures doesn't mean that it is consistent with freedom of speech.

25. See *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J., concurring).

26. Of course, there may be employments for which (even given *Hardwick*) it would be entirely irrational to make homosexuality a disqualification, but, with respect to these, disqualification on the basis of the proven commission of homosexual acts would presumably be likewise unconstitutional—so again the status-conduct distinction would cut no ice. The ban on gays in the military should, in my opinion, be struck down on this basis.

27. See Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994) [hereinafter Sunstein, *Homosexuality and the Constitution*]; 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 (1988).

28. See *Watkins v. United States Army*, 847 F.2d 1329, 1339-45 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

And in particular, privacy and substantive due process are constitutional doctrines primarily focused on protecting liberties sanctified by tradition, while equal protection is a transformative and forward-looking body of doctrine. Sodomy laws may survive privacy challenge, because consistent with our traditions, while official anti-gay discrimination violates equal protection, because inconsistent with our aspirations.

There is some support for this argument in the stress placed by Justice White in *Hardwick* on the Court's *special* reluctance to recognize new rights under substantive due process or privacy.²⁹ The Court has not shown similar reluctance, for example, to extend heightened scrutiny under the Equal Protection Clause to gender discrimination, a move clearly inconsistent with the original understanding and with long-standing traditions.³⁰ However, no hint of any distinction between equal protection and privacy appears in the majority's *Romer* opinion, which does not address *Hardwick* at all. And of course some very untraditional rights have been protected under privacy: most notably abortion choice, but also access to contraceptives by the unmarried and even by minors.³¹

But the main problem with this argument is its failure to confront the way in which equal protection and substantive due process are linked together in the gay rights context by the rational basis test. If a law doesn't use a suspect classification, the distinction it makes needs only to be rationally related to a permissible objective to pass equal protection review. Similarly, if a law doesn't violate a fundamental liberty, its infringement of personal freedom needs only to be rationally related to a permissible objective to pass under substantive due process. Tradition may hold the Court back in designating fundamental liberties, and aspirations may push it to designate more classifications as suspect. But as Professor Sunstein himself admits, a Court that maintains *Hardwick* is very unlikely to mandate heightened scrutiny for anti-gay discrimination;³² whatever others may think, the Justices in the *Hardwick* majority surely believe that "there

29. See *Hardwick*, 478 U.S. at 191-95.

30. See *Craig v. Boren*, 429 U.S. 190 (1976).

31. See *Carey v. Population Serv. Int'l.*, 431 U.S. 678 (1977) (minors' access to contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried couples' access to contraceptives).

32. See Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 9.

can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."³³

So we are left with rationality review. And the case law makes pretty clear that the rational basis test is essentially the same under both substantive due process and equal protection.³⁴ The Court in *Hardwick* said that sodomy laws passed the due process rationality test without requiring or offering any reasoned argument; it was enough to make casual reference to conventional moral condemnation of homosexual acts. But, again, it is certainly rational to fear that more such acts will be committed by those who profess homosexual identity.

That brings me to the third ground for saying that *Hardwick* has nothing to do with *Romer*—the claim that the “greater includes the lesser” inference from *Hardwick* fails because *Romer* was not decided as a gay rights case at all. One version of this argument was accepted by the Colorado Supreme Court, which invalidated Amendment 2 on the ground that it placed unusual barriers against any identifiable group’s pursuit of its interests through the electoral process, treating access to that process as a fundamental interest.³⁵ A second and more plausible version was supplied to the Court in the elegant amicus brief submitted by law professors Laurence Tribe, John Ely, Gerald Gunther, the late Philip Kurland, and Kathleen Sullivan.³⁶

The professorial amici used the unprecedentedly sweeping character of Amendment 2 to make an end-run around the logic of *Padula*. Amendment 2 prohibited any branch of state or local government in Colorado from making or enforcing any law or policy that treated homosexual “orientation, conduct, practices or relationships” as “the basis of” any “claim of discrimination.”³⁷ To invalidate this, the amicus argument goes, the Court did not have

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

34. See, e.g., *Heller v. Doe*, 509 U.S. 312 (1993) (equal protection rational basis); *Reno v. Flores*, 507 U.S. 292, 306, 311 (1993) (substantive due process rational basis).

35. See *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994); *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993). Respondents made this argument to the Supreme Court, and the majority evidently chose not to adopt it. See Respondents’ Brief at 15-35, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039). If accepted, the argument would presumably have opened up too many normal state allocations of decision-making level (state vs. local, constitutional vs. statutory) to heightened scrutiny.

36. Brief of Laurence H. Tribe et al., as Amici Curiae in Support of Respondents, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039) [hereinafter Tribe Brief].

37. COLO. CONST. art. II, § 30b.

to reach the question of heightened scrutiny for discrimination against gays—or even apply the rational basis test. Rather, Amendment 2 was a “per se violation”³⁸ of the Equal Protection Clause—a partial outlawing of gays, lesbians, and bisexuals in Colorado—in that it disabled persons in this class from making any legal claim based on discrimination against them as such, *however* arbitrary that discrimination might be in its context.³⁹

The amicus argument had the virtue of being completely general, and hence making no special reference to discrimination on the basis of sexual orientation. An amendment with the breadth of Amendment 2 but directed at gamblers would be just as unconstitutional as the actual one directed at homosexuals—though no constitutional liberty or privacy right stands in the way of punishing gambling as a crime. For this reason, adoption of the amicus argument could indeed have allowed the Court to insulate *Hardwick* from *Romer*. Privacy and liberty aside, equal protection prevents gamblers, practitioners of homosexual sodomy, and indeed all other classes of persons from being placed outside the protection of the law, in whole or in part. Criminalization of “the conduct that defines the class” is not a more palpable discrimination than actual *outlawry* of that class.⁴⁰

The *Romer* Court did incorporate important elements of the amicus argument in its opinion. In reaching its conclusion that Amendment 2 flunked the rational basis test, the Court stressed the sweeping nature of the Amendment’s denial of antidiscrimination protection, and did not play up the aspects of gay and lesbian identity (a history of discrimination and the like) that might justify heightened scrutiny. But where the amici urged that the blanket withholding of this form of legal redress actually *constituted* a denial of equal protection of the laws, the Court made a crucial shift in rationale, instead treating the sweeping character of Amendment 2 as evidence that no permissi-

38. Tribe Brief, *supra* note 36, at 1-3.

39. Imagine a power company that refused electrical service to a lesbian couple and a convicted mass-murderer in a state with a statute that prohibited “arbitrary” refusals of service by public utilities; in such a state, Amendment 2 would prevent the lesbians from claiming that their sexual orientation was an “arbitrary” basis for refusal of utility service, while the murderer could make that claim with respect to his felon status and, in the context of a denial of this kind of service, he might well prevail on it.

40. See Tribe Brief, *supra* note 36, at 10-11.

ble purpose or set of purposes motivated the Amendment.⁴¹ This in turn led the Court to its decisive conclusion that the Amendment had been animated by the impermissible purpose to harm a politically unpopular group.⁴² Amendment 2 was thus invalid on the Court's account (by contrast with the amicus argument) because it discriminated invidiously—a point that the Court deliberately chose to dramatize by beginning its opinion with an echo of the first Justice Harlan's dissent in *Plessy v. Ferguson*, decided exactly a century before.⁴³

41. See *Romer v. Evans*, 116 S. Ct. 1620, 1628-29 (1996).

Amendment 2 . . . in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. . . . [A] law must bear a rational relationship to a legitimate governmental purpose . . . and Amendment 2 does not.

Id. (citations omitted).

The logic of the amicus argument required that Amendment 2 be construed according to its terms, as negating any "claim of discrimination" based on homosexual identity—which would include a claim that such discrimination violated a general statute prohibiting arbitrary discrimination. The Colorado Supreme Court arguably construed Amendment 2 more narrowly, as precluding only laws, regulations, and policies *explicitly* directed against anti-gay discrimination—"special rights," in the language of the Amendment's proponents ("Equal rights, not special rights" was the bumper sticker). See *Evans v. Romer*, 882 P.2d 1335, 1346 n.9 (Colo. 1994). Justice Scalia insisted that Amendment 2 had been authoritatively so construed in his dissent; this, in his view, negated the force of the full-fledged amicus argument. See *Romer*, 116 S. Ct. at 1630-31 (Scalia, J., dissenting). The majority could not fully answer him on the point of state court construction. See *id.* at 1626-27. The barrier raised by the Colorado court's footnote may partly explain why the Court did not go all the way to accepting the amici's novel doctrinal formulation, but adapted it to support a more conventional holding that Amendment 2 was irrational and, hence, invidious.

42. See *Romer*, 116 S. Ct. at 1628.

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

Id. (emphasis omitted) (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

43. See *id.* at 1623.

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among its citizens." Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

Id. (citation omitted) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); see also David G. Savage, *Supreme Court Strikes Down Law Targeting Gays Discrimination: Justices Treat Gay Rights as Civil Rights for First*

This open condemnation of the motives of Colorado's popular majority could have been avoided by the adoption of the more formal logic and language proposed by the amici. The latter course, though, would have precluded the dramatic invocation of *Plessy*, and the reference to gays, lesbians, and bisexuals as "a politically unpopular group"—with all the overtones of "discrete and insular minority"⁴⁴ and the associated implications of heightened constitutional scrutiny that this phrase conveys.

The Court's choice of this more dramatic rationale over the low-key formalist line sketched by the amici was evidently deliberate, and hardly costless, as it opened the majority opinion to Justice Scalia's forceful rhetoric about mistaking a legitimate initiative in the culture war for a bigoted fit of pique.⁴⁵ The Court's adoption of the "invidious because irrational" approach likewise exposed it to what the amicus brief had been designed to forestall, the strong "greater includes the lesser" logic of Justice Scalia's invocation of *Hardwick* by way of *Padula*. What was the rationale for withholding all explicit antidiscrimination protection from gays and lesbians? It was precisely the same rationale that justified the sodomy law in *Hardwick*, so Justice Scalia said. There Georgia had used a criminal law to denounce conduct its people judged (for their own sufficient though never-articulated reasons) to be immoral. Here Colorado, which had repealed its sodomy law, simply wanted to make the same moral judgment in less harsh form—by withholding the public imprimatur on homosexual acts and relationships that was implied by explicit

Time, L.A. TIMES, May 21, 1996, at A1 (highlighting the *Plessy* reference as emphasizing the Court's intention "to make a landmark announcement").

44. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

45. See *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced . . . ; they have been specifically approved by the Congress of the United States and by this Court.

Id. (Scalia, J., dissenting). In characteristically in-your-face style, Justice Scalia put "culture war" in German, thus inevitably drawing to mind not so much Bismarck as Molly Ivins, who famously remarked of Pat Buchanan's "culture war" speech at the 1992 Republican convention that "it probably sounded better in the original German." See Molly Ivins, *Notes from Another Country: Republican Party Convention*, NATION, Sept. 14, 1992, at 229.

inclusion of sexual preference alongside race, religion, and gender in the official categories of prohibited forms of discrimination. If *Hardwick* was still good law, the argument goes, Amendment 2 survived *a fortiori* against the argument the Court had made.⁴⁶

Without the amicus rationale, which the Court deliberately chose to forgo, this argument seems unanswerable in its own terms, a conclusion that is fortified by the Court's failure to make any attempt to answer it. If no fallacy appears in the logic of the argument, the Court's silence seems implicitly to deny the premise—that *Hardwick* was still good law. The precise aspect of *Hardwick* in question was its contemptuously offhand holding that the sodomy law survived the rational basis test without the need for any rational argument to back it up.⁴⁷

Of course, there remains the fact that the Court was not yet willing to make explicit the rejection of *Hardwick*. That unwillingness can readily be explained, if not entirely excused, by the mixture of prudential factors (both conventionally judicial and more overtly political) that I have mentioned.⁴⁸ A court is generally supposed to say what it is doing and why, but we know that courts do not always live up to this ideal, and sometimes with good reason.⁴⁹ As a result, *Hardwick* remains formally on

46. See *Romer*, 116 S. Ct. at 1631-33 (Scalia, J., dissenting).

47. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The lawyers for Colorado implicitly recognized the inadequacy of *Hardwick* in this respect. In the litigation of *Romer*, they brought in as an expert witness the distinguished Roman Catholic natural law philosopher and theologian John Finnis to attempt to articulate a basis in natural reason, apart from biblical condemnation and Christian theology, why homosexual relations might be treated by the law as immoral and hence not to be sanctified by antidiscrimination protection. See Affidavit of John Mitchell Finnis, *Evans v. Romer*, No. 92 CV 7223, (Colo. Dist. Ct. Dec. 14, 1993). On Finnis's very striking account, the ground for condemning homosexual relations also renders immoral all orgasmic sexual expression that is not both sanctified by marriage and "open to" procreation—including masturbation and oral intercourse within marriage. Finnis attempts to explain how the marital relations of sterile couples escape condemnation under this principle, but I find his reasoning impossible to follow. Hence the "Finnis theory" renders most adult Americans persistent and unrepentant violators of the moral law in sexual matters. See John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994). The indefensibility of this accomplished philosopher's best effort to justify in secular terms the traditional condemnation of homosexuality surely strengthens the case against *Hardwick*. The argument that *Hardwick* should be overruled and much anti-gay discrimination invalidated under a minimal rational basis approach is well articulated in Toni Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. (forthcoming 1997).

48. See *supra* text accompanying notes 12-15.

49. The Court's failure to discuss *Hardwick* might be defended; less defensible is its failure to address the "non-*Hardwick*" alternative rational bases the State put

the books, "still good law" only in the sense that it is available to be cited as binding precedent in a lower court against anyone who actually attempts a direct privacy attack on a sodomy statute. But outside that specific and increasingly peripheral context, it appears that its rational basis holding has, without much ceremony, been ushered off the constitutional stage.

forward in its brief. See Petitioners' Brief at 41-43, 47-48, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039) (setting forth the conservation of resources for combating other forms of discrimination, and the benefits of achieving statewide uniformity and deterring factionalism, as rational bases for Amendment 2). These are the sorts of arguments that might prevail under true rational basis scrutiny, but might not do the trick under heightened review; hence the failure to rebut them suggests (as does the citation of *Plessy*) that the Court is tending in the direction of heightened scrutiny for discrimination based on sexual orientation.