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A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process

E. Gary Spitko*

I try to tighten my heart into a knot, a snarl, I try to learn to live dead, just numb, but then I see someone I want, and it's like a nail, like a hot spike right through my chest, and I know I'm losing.'

I. INTRODUCTION AND OVERVIEW

In *Ben-Shalom v. Marsh*, the U.S. Court of Appeals for the Seventh Circuit reasoned that sexual orientation is a conduct-based classification, and, indeed, relates to conduct that the state may criminalize. For this reason, the court concluded, such a classification is not subject to heightened scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause.

* Associate, Paul, Hastings, Janofsky & Walker, Atlanta, Georgia; A.B., 1987, Cornell University; J.D., 1991, Duke University School of Law. I am grateful to Owen D. Jones for suggesting to me that I write about the implications of science for the law relating to sexual orientation. Also, I am thankful for the helpful comments of Paul T. Cappuccio, Christopher A. Crain, Ronald J. Krotoszynski, Jr., Stephen A. Miller and Charles A. Shanor on an earlier draft of this article. Finally, I conducted much of the research for this article while I was an associate at Covington & Burling in Washington, D.C. and am deeply indebted to that firm and especially to Carolyn F. Corwin for her assistance and support.


2 881 F.2d 454 (7th Cir. 1989).

3 Id. at 464-65.

* Id. The Equal Protection Clause of the Fourteenth Amendment is applicable to the federal government as part of the Fifth Amendment's Due Process Clause. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
Conversely, the district court in *Equality Foundation of Greater Cincinnati v. Cincinnati,*\(^5\) rejected the notion "that homosexuality is a status defined by conduct" and held that sexual orientation is a quasi-suspect classification.\(^6\) These cases are two of many in which a court's notion as to the nature and origin of homosexuality influenced the way the court applied the law to gay people.\(^7\)

This phenomenon echoes that which exists more generally in contemporary American society. It is often the case that a person's beliefs as to the nature and origin of homosexuality are a great influence on her position with respect to how she and society should interact with gay people.\(^8\)

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\(^6\) Id. at 436, 439-40. See also *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 909 F.2d 375, 380 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("It is an error of massive proportions to define the entire class of homosexuals by sodomy. . . . [H]omosexuality, like heterosexuality, is a status. . . . [O]ne is a homosexual or a heterosexual while playing bridge just as much as while engaging in sexual activity.").

\(^7\) See *J.L.P.(H.) v. D.J.P.,* 643 S.W.2d 865, 869-72 (Mo. Ct. App. 1982) (upholding restrictions on a gay father's visitations with his son based, *inter alia,* on the court's conclusion that the father's activities evidenced his desire to induce his son to become gay); *Jacobson v. Jacobson,* 314 N.W.2d 78, 81-82 (N.D. 1981) (reversing an award of custody to a lesbian mother on the grounds, *inter alia,* that her children might be more likely to become gay or lesbian if left in her custody); *Gaylord v. Tacoma Sch. Dist.,* 559 P.2d 1340, 1347 (Wash. 1977) (upholding the dismissal of a gay school teacher emphasizing the danger that the presence of an openly gay teacher might encourage imitation), *cert. denied,* 434 U.S. 879 (1977). See also *Baehr v. Lewin,* 74 Haw. 530, 584-87, 852 P.2d 44, 66-70 (1993) (Burns, J., concurring) (reasoning that whether sexual orientation is "biologically fated" is crucial to a determination of whether the Hawaii constitution should be read to proscribe the state from permitting opposite-sex marriages while not permitting same-sex marriages).

\(^8\) See, e.g., Neil L. Glazer, *Straight Talk About Homosexuality,* HARV. L. REC., March 5, 1993, at 15 ("[T]he very idea of equating homosexual 'rights' with those of African-Americans or women is absurd; for unlike the former, being black or a woman relates to personhood, and is non-behavioral in origin. I simply cannot accept the argument that homosexuality is an innate and unalterable characteristic, since I have seen too many testimonials from former homosexuals who have been 'cured,' either by psychological or spiritual healing."); Kim Painter, *Studying the Nature of Being Gay,* USA TODAY, March 8, 1993, at 1D (Dr. Simon LeVay, a neurobiologist whose research concerns the structure, function and development of the brain, positing that "[t]here are a lot of people who've been taught that homosexuality is wrong, but [who] can be persuaded (otherwise) by science"); Nancy E. Roman, *Civil Rights for Homosexuals Surfaces as Issue of the 90s,* WASH. TIMES, January 4, 1993, at A1 (legal scholar Bruce Fein stating that if it could be demonstrated that sexual orientation was determined
Some believe that homosexuality is defined by physical sexual activity and, thus, does not exist apart from such activity. For those who hold this belief there is no homosexual "orientation" only homosexual acts. Andrew Sullivan has labeled one political manifestation of this notion the "conservative politics of sexuality" the "fundamental assertion of which is that . . . [h]omosexual behavior is aberrant activity, either on the part of heterosexuals intent on subverting traditional society or by people who are prey to psychological, emotional or sexual dysfunction."9 "The politics that springs out of this view of homosexuality has two essential parts: with the depraved, it must punish: with the sick, it must cure."10

Antithetical to this "conservative politics of sexuality" is the idea that homosexuality is an enduring predisposition toward an erotic, affectional, and romantic attraction to individuals of one's own sex that exists independent of any physical sexual act.11 Sullivan argues

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10 Sullivan, supra note 9, at 25. Similarly, Janet Halley has described this position as "anti-gay constructivism" which "emphasizes the mutability of heterosexual orientation, arguing that heterosexuality must be shored up by anti-gay discrimination, or [which] points to the mutability of homosexual orientation, arguing that discrimination should be designed to convert gay men and lesbians to heterosexuality." Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 Stan. L. Rev. 503, 517 (1994).

11 See Gregory M. Herek, Sexual Orientation, in 1 Women's Studies Encyclopedia

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that "as long as . . . part of the population is involuntarily gay, then the entire conservative politics of homosexuality rests on an unstable footing. It becomes simply a politics of denial or repression . . . [which] offends against fundamental notions of decency and civility . . . [and is] not simply cruel but politically impossible in a civil order."12

In recent years scientists—sociologists, psychologists, physiologists, and geneticists—have begun to inform this debate.13 They have produced the first evidence that the brains of gay men are physiologically different than those of non-gay men and the first direct evidence that homosexuality is genetically influenced.

This article surveys these recent discoveries and discusses their importance for the development of the law related to sexual orientation in two areas of federal constitutional law. Specifically, this article posits that these findings speak to the reality of an irreducible essentialist14 definition of what it means to be gay, the sole essential element of which is a predominant same-sex erotic, affectional, and romantic attraction, thereby dispelling the notion that a gay sexual orientation does not exist apart from gay sexual conduct and, thus, refuting the most frequently cited rationale for denying heightened scrutiny under the Equal Protection Clause to classifications on the basis of sexual orientation. Moreover, these findings speak also to the involuntary nature of a gay sexual orientation and, thus, lend support to an

344-46 (H. Tierney ed., 1989) (defining sexual orientation); Equality Found. of Greater Cincinnati v. Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (citing psychologist Dr. John Gonsiorek's testimony that sexual orientation is "a predisposition toward erotic, sexual, affectional, or affection relationships toward one's own and/or the other gender."), rev'd, 54 F.3d 261 (6th Cir. 1995); Richard C. Friedman & Jennifer I. Downey, Homosexuality, N. ENGL. J. MED. 331:923 (1994) (defining sexual orientation as "a person's potential to respond with sexual excitement to persons of the same sex, the opposite sex, or both")

12 Sullivan, supra note 9, at 25-26. See also U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("Equal Protection of the laws . . . must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.")

13 See generally Chandler Burr, Homosexuality and Biology, The Atlantic, March 1993, at 47 (reviewing biological research into the nature of homosexuality).

14 See Daniel R. Ortiz, Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity, 79 VA. L. REV. 1833, 1836 (1993) ("Essentialists in general define gay people as those who experience same-sex desire, believe that there have always been gay people everywhere, and hold that it makes sense to speak of people who experience same-sex desire as a single group regardless of where and when they lived.")
argument that the Due Process Clauses of the Fifth and Fourteenth Amendments, as interpreted by the Supreme Court, should protect a fundamental right to engage in homosexual erotic activity other than sodomy.15

15 While the discussion in this article is limited to the implications of the scientific findings discussed infra to federal constitutional law, these findings, and much of discussion in this article, have relevance also to equal protection and privacy analysis under many state constitutions. For example, in Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992), the Supreme Court of Kentucky cited to expert medical and social science testimony that sexual orientation is deeply rooted and not freely chosen in holding that the state's restriction on same-sex sodomy violated the guarantee of equal protection provided for in the Kentucky constitution. Id. at 489, 500.

Moreover, such findings, to the extent they support the view that sexual orientation is innate and/or immutable, undermine the stated premise of those who seek to use the law to discourage, prevent and protect people from becoming gay. See, e.g., Evans v. Romer, 882 P.2d 1335, 1347 (Colo. 1994) (noting the State of Colorado’s argument that “laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will ‘choose’ to ‘become homosexual’ if discrimination against homosexuals is prohibited.”); Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987) (New Hampshire law forbidding “homosexuals”—defined as persons who engage in certain sex acts—from adopting children is rationally related to the interest in providing appropriate role models to children in light of “the reasonable possibility of environmental influences” affecting a child’s future sexual orientation). See also supra note 7.

A misguided foray in the law into this area of science is seen in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993). In Baehr, the Supreme Court of Hawaii held that sex is a “suspect category” under the Hawaii constitution for purposes of equal protection analysis and, thus, a statute that allowed opposite-sex marriages but not same-sex marriages would be unconstitutional unless the state could demonstrate that the statute is narrowly drawn to further a compelling interest. Id. at 579-80, 852 P.2d at 66. The supreme court remanded the case for a trial, presently scheduled for September 1996, on whether the statute could survive such heightened scrutiny. See id. at 583, 852 P.2d at 68. In a concurring opinion that was necessary for the decision, a judge sitting by designation concluded that the issue of whether sexual orientation is innate is a question of fact that must be determined before the court can adjudicate the statute's constitutionality. Id. at 584, 852 P.2d at 68 (Burns, J., concurring). The concurring judge reasoned that if sexual orientation is innate, then a person's sex would include his sexual orientation and the Hawaii constitution's proscription of invidious sex discrimination would also proscribe invidious discrimination on the basis of sexual orientation. Id. at 584-87, 852 P.2d at 68-70 (Burns, J., concurring). The concurring opinion failed to explain, however, how other innate traits, such as eye color, can be distinguished meaningfully from sexual orientation for the purpose of determining which innate traits should be included in a person's sex. Moreover, as the plurality in Baehr correctly pointed out, if, as the findings discussed infra suggest, sexual orientation relates merely to erotic, affectional and romantic desire, then a
A familiarity with these recent scientific findings is prerequisite to fully understanding the constitutional arguments set forth in this article. Part II, below, therefore, sets forth a layman’s description of the relevant recent findings in neurophysiology, genealogy and genetics, that give new insight into the nature and origins of homosexuality.

II. THE ORIGINS AND NATURE OF HOMOSEXUALITY

A. Hypothalamic Dimorphism

Simon LeVay, a neurobiologist who studies the structure, function and development of the brain, has in recent years turned his attention to studying the physiological basis of sexual orientation. LeVay has focused his attention particularly on the hypothalamus. The hypothalamus is a group of brain nuclei, about a teaspoonful of tissue, that play a key role in sex. Each nucleus in the hypothalamus can be identified by its distinct size, shape, position, chemical constituents, and pattern of synaptic connections with other nuclei.

LeVay theorizes that “male-typical” and “female-typical” sexual feelings and behavior originate in separate centers in the hypothalamus. Ablation studies, in which small regions of the brain are deliberately destroyed, and stimulation experiments, in which an electrical stimulus is applied to a part of the brain, support his theory.

In many animal species, the male will mount females less readily, or not at all, after the medial preoptic area (which contains several nuclei)
of the hypothalamus is destroyed. Male rats and ferrets even show increased female typical behavior, such as lordosis, after suffering lesions in the medial preoptic area. Conversely, electrical stimulation of the medial preoptic area increases male copulatory behavior in these animals. Also, experiments recording the natural electrical activity of individual neurons in the hypothalamus of male monkeys have demonstrated that many neurons in the medial preoptic area increase electrical activity during sexual arousal. From these observations, LeVay concludes that the medial preoptic area plays a key role in male-typical sexual behavior.

Further support for LeVay's theory comes from the fact that the medial preoptic region, in rodents as well as in humans, is sexually dimorphic in that at least one nucleus in the region is larger, on average, in males than in females. In humans, this nucleus is called the INAH-3 (short for third interstitial nuclei of the anterior hypothalamus) and is two to three times larger in males than in females.

Most significantly, LeVay has found that the INAH-3 in the brains of gay men is, on average, the same size as in women and two to three times smaller than in non-gay men. From this, LeVay concludes that gay men differ from non-gay men "in the central neuronal mechanisms that regulate [male] sexual behavior."

This same pattern of sexual and orientational dimorphism is seen with respect to the anterior commissure, which is an axonal connection between the left and right hemispheres of the cerebral cortex. The anterior commissure is larger, on average, in women than in men.

23 Id. at 72.
24 Id. at 47-48. Lordosis, a term most frequently applied to rodent behavior, is the flexing of the back in a "U" shape so as to expose the genital area for intromission by a male.
25 Id. at 72.
26 Id.
27 Id. at 73.
28 Id.
29 See L.S. Allen et al., Two Sexually Dimorphic Cell Groups In the Human Brain, J. Neuroscience 9:497-506 (1989); LeVay, supra note 16, at 75. Scientists also have found that the shape and position of synapses and the distribution of several neurotransmitters in the medial preoptic area of rats are sexually dimorphic. Id. at 77.
32 See LeVay, supra note 16, at 121.
33 Id. at 123.
Recently, researchers have determined that the anterior commissure of gay men, on average, is also larger than in non-gay men and is even larger than in women.\(^3\)

These neuroanatomical studies do not prove that sexual orientation is caused by the physiological dimorphism they uncovered. It may be, for example, that the difference in the size of the INAH-3 does not cause homosexuality, but rather, gay sex causes the INAH-3 to shrink.\(^3\)\(^5\) LeVay points to the difference in the sizes of the anterior commissures of gay men and non-gay men, however, and argues that since this region of the brain is not known to have any function related to the regulation of sexual behavior, it is unlikely that disparate sexual behavior among gay men and non-gay men is responsible for the difference in size.\(^3\)\(^6\) More likely, LeVay argues, the differentiation comes about during the prenatal differentiation of the brain, possibly because of the influence of hormone levels.\(^3\)\(^7\)

Unfortunately, the INAH-3 is too small to image in living subjects with available equipment and techniques.\(^3\)\(^8\) Thus, LeVay’s studies were performed using brains from cadavers. The anterior commissure, however, is large enough to be seen, although not clearly, in contemporary magnetic resonance images ("MRI scans").\(^3\)\(^9\) With modest improvements in technique, scientists should be able to measure accurately this region of the brain in living subjects.\(^4\)\(^0\) Thus, it soon should be possible to study subjects longitudinally beginning in preadolescence (before sexual behavior) to determine if differentiation precedes sexual behavior. A finding that orientational dimorphism precedes sexual behavior

\(^3\) L.S. Allen & R.A. Gorski, Sexual Orientation and the Size of the Anterior Commissure in the Human Brain, PROC. NAT’L ACADEM. SCI., 89:7199 (1992); LeVay, supra note 16, at 123. As a percentage of total brain size, the anterior commissure of gay men is about equal the size of the anterior commissure of women. Id.

\(^5\) Dean Hamer & Peter Copeland, The Science of Desire: The Search for the Gay Gene and the Biology of Behavior 163 (1994). See also LeVay, supra note 16, at 122 (one cannot conclude from LeVay’s observations whether the structural differences are innate and cause men to become gay or whether the sexual behavior of gay men leads to the structural differences).

\(^6\) LeVay, supra note 16, at 123. See also J. Hall & D. Kimura, Dermatoglyphic Assymetry & Sexual Orientation in Men, BEHAVIORAL NEUROSCIENCE 108:1203 (1994) (gay men are more likely than non-gay men to have a greater number of ridges on the fingerprints of their left hand than on the fingerprints of their right hand).

\(^7\) LeVay, supra note 16, at 123.

\(^8\) Id. at 122.

\(^9\) Id. at 124.

\(^10\) Id.
would provide compelling evidence that sexual orientation is not a chosen or freely mutable trait.

B. A Genetic Link to Male Homosexuality

Dean Hamer, chief of the Section on Gene Structure and Regulation at the National Cancer Institute, already has provided compelling evidence on this point. Hamer has demonstrated a link between male homosexuality and "DNA markers" on the X chromosome. Thus, he has provided the most convincing evidence to date that sexual orientation is genetically influenced.

Hamer began his work in this area by trying to determine whether homosexuality runs in families. To do so, he charted the pedigrees or

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4 See D.H. Hamer et al., A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, SCIENCE 261: 321-27 (1993). Hamer describes his study in detail, including why and how he performed the study, in Hamer & Copeland, supra note 35.

42 Hamer & Copeland, supra note 35, at 20. There are numerous hypotheses for how a gene for male homosexuality, which would seem to be disadvantageous for reproduction, could survive in the gene pool. Hamer theorizes that the gene could increase the reproductive rates of women who carry it, id. at 183, or, even if it has no selective advantage, could stay in the gene pool as a result of a high rate of mutation. Id. at 185.

Earlier evidence that heredity is at least partly causally related to male homosexuality comes from twin studies. Because identical (monozygotic) twins share 100 percent of their genes, while fraternal (dizygotic) twins share only 50 percent of their genes, a trait that is genetically influenced should be shared more often by identical twins than by fraternal twins. Id. at 28. Twin studies indicate that 50%-65% of the monozygotic twins of gay men are themselves gay, while only 25%-30% of the dizygotic twins of gay men are gay. See J.M. Bailey & R.C. Pillard, A Genetic Study of Male Sexual Orientation, ARCHIVES GEN. PSYCHIATRY 40:1089, 1093 (1991); F. L. Whitam, M. Diamond, J. Martin, Homosexual Orientation in Twins: A Report of 61 Pairs and Three Triplet Sets, ARCHIVES SEX. BEHAV. 22:187 (1993). See also LeVay, supra note 16, at 112; Hamer & Copeland, supra note 35, at 28.

That environmental factors also influence sexual orientation (as is evidenced from the fact that some identical twins are discordant for sexual orientation) does not necessarily mean that family upbringing has any influence on sexual orientation. As Hamer explains: "[U]ndergoing prenatal development in a womb swimming with male hormones is as much an environmental factor as growing up in a devoutly religious household." Id. at 82. See also LeVay, supra note 16, at 113 ("[N]ongenetic factors can operate before birth as well as after birth . . . . Even identical twins do not share an identical prenatal environment: the blood supply of one twin may be better than the other’s, for example, and this in turn may lead to a difference in the twin’s birth weights.").
lineages of a random sample of gay males, noting the presence of gay male relatives (uncles, brothers, cousins, etc.). Hamer interviewed both the gay men who volunteered to be in his study and, whenever possible, their family members. He did not rely on the self-identification (as gay or non-gay) of the men in his study. Rather, Hamer’s assessment of the subjects’ sexuality was based on a one- to two-hour structured interview covering the etiology of the subjects’ sexual, emotional and romantic attractions, fantasies and activities. In total, Hamer collected the histories of seventy-six families by interviewing more than a thousand relatives of seventy-six gay subjects.

Hamer hoped to find significantly elevated rates of homosexuality in the relatives of his gay male subjects as compared to a “background rate of male homosexuality” computed from a survey of the families of lesbians conducted by a colleague at the National Institutes of Health. Hamer did find this, but he also made an unexpected and more telling discovery.

Upon looking at “family trees” resulting from his interviews, Hamer noticed that gay males had far more gay male relatives on their mother’s side of the family than on their father’s side of the family. Further, Hamer found that the male maternal cousins through aunts of gay

\[\text{HAMER & COPELAND, supra note 35, at 47-48, 78. The sample was “random” with respect to whether the gay males had gay relatives. Id. at 47. The sample of gay men was assembled from patients at the HIV Clinic of the National Institute of Allergy and Infectious Disease, visitors to the Whitman-Walker Clinic in Washington D.C., clients of the Triangle Club, an organization that offers addiction counseling for gay men and lesbians, and members of “Emergence,” an organization formed by gay and lesbian Christian Scientists. Id. at 48.}\]

\[\text{Id. at 20.}\]
\[\text{Id. at 85.}\]
\[\text{Id. at 54-55. Hamer found that almost all of the men that he interviewed could be classified as “definitely gay” or “definitely straight.” Only three percent of the men interviewed scored in the “bisexual” range on two or more of the four “Kinsey” scales used (self-identification, fantasy, attraction, and behavior). Id. at 66-67. Hamer also found that the “sexual direction” of the gay participants was evident long before puberty evidencing “that sexual orientation is a deeply ingrained component of a person’s psychological makeup, which . . . is consistent with a genetic predisposition.” Id. at 73. Moreover, Hamer found that most of the men he interviewed had always had the same sexual orientation and expected that it would never change. Id. at 65.}\]
\[\text{Id. at 89, 91.}\]
\[\text{Id. at 98-100. Hamer assumed that male and female homosexuality are largely etiologically independent of each other.}\]
\[\text{Id. at 101-02.}\]
\[\text{Id. at 20, 93.}\]
men were more likely to be gay than were the male maternal cousins through uncles of gay men or than were paternal cousins (through either paternal aunts or paternal uncles).  

This "sex-linked" pattern suggested to Hamer that a gene on the X chromosome influences male homosexuality. Fathers always transmit only their single Y chromosome to their sons (and only their single X chromosome to their daughters) and mothers always transmit one of their two X chromosomes to their sons (as well as to their daughters), thus, X-linked traits inherited by males always are passed to those males through the mother's side of the family. Thus, a "gay gene" on the X chromosome would result in more gay men on the mother's side of the family of a gay man. Also, a "gay gene" on the X chromosome would result in more gay male cousins through maternal aunts than through maternal uncles because there is no father to son (uncle to male cousin) transmission of the X chromosome; thus, even maternal uncles with the "gay gene" could not pass it on to their sons.

Although Hamer's family trees hinted at a "gay gene" on the X chromosome, family environmental influences, in theory, also could have caused the patterns he saw. To prove that genes do play a role in homosexuality, Hamer next looked directly at the DNA of gay men. To maximize the possibility that he would uncover a "gay gene," Hamer utilized "genetic loading"—the notion that the best place to search for a gene influencing a certain trait is in persons from families in which the trait is clustered. Thus, Hamer used forty pairs of gay

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51 Id. at 95-96.
52 Id. at 20.
53 Id. at 79.
54 Id. at 95. Two well-known examples of recessive X-linked inheritance are color-blindness and hemophilia. Id.
55 See id. at 95.
56 Id. at 96. Of the eight types of males relatives Hamer considered (fathers, brothers, maternal uncles, paternal uncles, maternal cousins through an aunt, maternal cousins through an uncle, paternal cousins through an aunt, and paternal cousins through an uncle), only brothers, maternal uncles, and maternal cousins through an aunt had significantly elevated rates of homosexuality. Id. at 102. This suggests X chromosome linkage as the mode of inheritance. Id. at 104. An X linked gay gene would account for gay men having non-gay sons in the same proportion as non-gay men. A father would never pass the "gay gene" to his son. Rather, a son's sexual orientation would be determined by the X chromosome inherited from his mother.
57 Id. at 106.
58 Id. at 107.
brothers in this phase of his search for the "gay gene."\textsuperscript{59} "[G]ay brothers served as signposts that their families were likely to have the gene for homosexuality, if such a gene existed."\textsuperscript{60}

The method Hamer used to locate the "gay gene" is called "linkage analysis."\textsuperscript{61} Linkage analysis works because genes found close to one another on a chromosome are usually inherited together (because strands of DNA only rarely break in two and so genes close to each other on a certain piece of DNA are likely to travel together into the germ cells that make up a human zygote).\textsuperscript{62} Thus, persons who share a gene are likely also to share a piece of DNA that is close to that gene.\textsuperscript{63} This principle enabled Hamer to go fishing for the location of the "gay gene" using numerous "DNA markers" the locations of which on the X chromosome have become known through the "Human Genome Project."\textsuperscript{64} To be clear, a successful marker does not cause the trait in question, it merely is inherited along with the gene for the trait.\textsuperscript{65}

It is important that the DNA markers Hamer used to go fishing for the "gay gene" all came in two versions, called "alleles."\textsuperscript{66} If both brothers have inherited the same allele of the marker, they are concordant for the marker. If the brothers have inherited different alleles of the marker, they are discordant.\textsuperscript{67} Hamer theorized that if a "gay gene" exists, there would be markers close to it for which more than half of the pairs of gay brothers were concordant (chance alone would result in half of the pairs of gay brothers being concordant for any DNA marker not linked to homosexuality).\textsuperscript{68}

\textsuperscript{59} Id. at 107, 110-11. Thirty-eight of these sibling pairs were found through advertisements placed in gay-focused newspapers in Baltimore and Washington, D.C.; two of the pairs were located through Hamer's initial survey of the families of gay men. Id. at 49-50, 111. Upon surveying the families of these forty sibling pairs, Hamer found the same pattern he had observed in his initial survey: the highest rates of male homosexuality were found among maternal uncles and cousins through a maternal aunt. Id.

\textsuperscript{60} Id. at 107.

\textsuperscript{61} Id. at 112.

\textsuperscript{62} Id. at 113.

\textsuperscript{63} Id. at 113.

\textsuperscript{64} See id. at 113-14. In 1990, the U.S. government began the "Human Genome Project." The goal of the project is to map the entire human genome. Id. at 36.

\textsuperscript{65} Id. at 114.

\textsuperscript{66} See id. at 116.

\textsuperscript{67} Id. at 116.

\textsuperscript{68} Id. at 116, 138.
Hamer tested the DNA of the forty pairs of gay brothers for twenty-two different markers found at different points on the X chromosome. Hamer found that thirty-three out of the forty pairs of gay brothers were concordant for a series of five markers in a region of the X chromosome known as "Xq28." The odds that this many pairs of the gay brothers would be concordant for those DNA markers by chance are one in ten thousand.

Thus, while Hamer did not isolate a "gay gene" itself, he detected the presence of at least one such gene and he narrowed the search for that gene to a small region of the X chromosome—Xq28. That area is big enough to contain approximately 200 genes. Researchers in this area expect that within the next five to fifteen years the Human Genome Project will catalog each of them. Thus, Hamer is confident that the "gay gene" will be found.

In light of LeVay’s findings of orientational dimorphism at the INAH-3, Hamer hypothesizes that a "gay gene" could encode for a protein that influences the growth or death of neurons in the INAH-

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69 Id. at 138.
70 Id. at 21, 138. Hamer also found that sexual orientation was not linked to any other region of the X chromosome. Id. at 139.
71 Id. at 137, 138. Shortly before this article went to publication, Hamer and his co-researchers confirmed and extended the results of the study finding a link between male homosexuality and Xq28. See Stella Hu et al., Linkage Between Sexual Orientation and Chromosome Xq28 in Males But Not in Females, Nature Genetics 11: 248-256 (1995). The 1995 study replicated in a new group of gay brothers the earlier finding that linked male homosexuality to markers on Xq28. Id. at 249. Moreover, concordant gay male sibling pairs were discordant with their non-gay brothers for Xq28 markers. Id. at 249. Finally, Hamer and his research team also analyzed 36 families in which there were two lesbian sisters. They found no linkage between Xq28 DNA markers and female homosexuality. Id. at 251-252. Thus, Hamer and his team theorize "that a locus at Xq28 influences sexual orientation in men but not in women." Id. at 253.
72 Hamer estimates that the gene in Xq28 influences the sexual orientation of at most 67 percent of gay men. Hamer & Copland, supra note 35, at 145. Other genes or environmental factors could influence the sexual orientation of the remaining gay men.
73 Id. at 133, 147.
74 Id. at 147.
75 Id. at 148. For those who doubt that a single gene could influence something as complex as sexual orientation, Hamer points out that out of the 100,000 or so genes in every human, one, a gene that codes for the testis determining factor ("TDF"), accounts for virtually all of the biological differences between men and women. Id. at 151. For a description of how this one gene controls the biological differentiation of the sexes during prenatal development, see id. at 151-55.
3 or that regulates the region by hormones. LeVay himself has theorized that the receptors in the brain that respond to hormones may differ between gay men and non-gay men.

III. THE FUNDAMENTAL LIBERTY INTEREST IN HOMOSEXUAL EROTIC ACTIVITY

The physiology and genetics findings relating to the nature of homosexuality discussed supra, at a minimum, are compelling evidence that sexual orientation is not a freely chosen or easily mutable trait. We do not choose our genes. And, to date, no one has even suggested a means for altering the relevant brain structures that are implicated in sexual orientation.

There is reason to be optimistic (or anxious) that at least by early in the next century science will have progressed to the point that we will know with some certainty which genes influence sexual orientation and how they do so. This knowledge is likely to alter profoundly the dynamics of the ongoing discourse within American society on the role—whether that of pariah or of moral and/or social equivalent—that gay people should play in our society. It should be expected then, that this knowledge also will affect the way that society and the courts apply the law to gay people.

Although the connection is not immediately obvious, a careful analysis of the Supreme Court’s substantive due process jurisprudence reveals that the notion that a gay sexual orientation is involuntarily determined and not easily mutable should impact on the scope of protection afforded by the Due Process Clause to the physical expression of that sexual orientation. The Due Process Clause of the Fourteenth Amendment provides that no State shall “deprive any person of life,

76 Id. at 163. See also LEVAY, supra note 16, at 140 (speculating that the “gay gene” could be a gene regulating the development of the hypothalamus).
77 LEVAY, supra note 16, at 126.
78 HAMER & COPELAND, supra note 35, at 148, 218 (noting the rapid development of DNA sequencing technology and expressing optimism that a “gay gene” will be found, if necessary, by looking at every coding sequence in Xq28); LEVAY, supra note 16, at 140 (asserting that “the significance of [Hamer’s genetic] finding[s] to our understanding of sexual orientation can hardly be overestimated. Although the gene itself has not yet been isolated and sequenced, it probably will be within a few years. When this happens, it will be possible to ask how and when the gene works.”).
79 See supra notes 8-12 and accompanying text.
liberty, or property, without due process of law.' The quest to define the scope of the "liberty" in the Due Process Clause has generated a controversy every bit as heated as the controversy over the nature of homosexuality.

On its face, the Due Process Clause relates only to the procedures that a state must use before depriving a person of life, liberty, or property. Therefore, a sound textual argument can be made that the Due Process Clause, although commanding that the state must provide certain processes, provides no substantive rights against the state. Such a Due Process Clause would allow one injured by state action to argue that the process by which he was injured was flawed, but would not allow a challenge under the Due Process Clause to the substance of the legislation at issue.

For over a century, however, the Supreme Court has held that the Due Process Clause contains also a substantive component which provides that the infringement of certain liberties is outside the scope of the government's authority to legislate, regardless of the procedure involved. A first subset of such impermissible legislation relates to state action that is irrational. Thus, the Due Process Clause provides for a liberty interest in being free from irrational legislation.

A second subset of impermissible state action relates to limitations that infringe a fundamental liberty interest without sufficient justification. The state may infringe such a fundamental liberty interest, but only when necessary to further a compelling state interest.

Given that the Supreme Court has recognized a substantive component to the Due Process Clause, the question arises, what interests are fundamental liberty interests? In Bowers v. Hardwick, a gay man argued that Georgia's sodomy law violated his due process rights by

80 U.S. CONST. amend XIV, § 1. Similarly, the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Discussion herein of "the Due Process Clause" is intended to reference the Due Process Clauses of both the Fifth and Fourteenth Amendments.


84 478 U.S. 186 (1986).
infringing upon his fundamental liberty interest in engaging in consensual sodomy. The Court rejected this claim.

The Court reasoned that none of the privacy interests previously pronounced to be fundamental liberty interests "bore any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." Specifically, the Court characterized its previously recognized fundamental privacy liberty interests as relating to "family, marriage, or procreation" and yet "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other had been demonstrated."

The Court expressed belated awareness that it undermines its own legitimacy when it announces new substantive rights against the state not grounded in the history or text of the Constitution. The Court noted that

[In str]iving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 151, 152 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description

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85 *Id.* at 188. Although the challenged law criminalized sodomy irrespective of the genders of those engaging in the activity, see *id.* at 188 n.1, the Court framed "[t]he issue presented [a]s whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. The Court expressly noted that the respondent did not challenge the sodomy statute "based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment." *Id.* at 196 n.8.


87 *Bowers*, 478 U.S. at 190-191.

88 *Id.* at 194-95 ("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. . . . There should be, therefore, great resistance to expand the substantive reach of the Due Process Clauses of the Fifth and Fourteenth Amendments, 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.")
of fundamental liberties appeared in Moore v. East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 1937 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."89

Finally, pointing to historical proscriptions against sodomy, the Court concluded "[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."90

The Bowers Court decided only the issue of whether the Due Process Clause gives rise to a fundamental liberty interest to engage in consensual sodomy.91 Despite the broad language of Bowers, the issue of whether the Due Process Clause would preclude a state from proscribing all same-sex erotic activity, such as kissing, massage, etc., remains an open one.92 Arguably, this is particularly so in light of the Bowers Court's seeming reliance on the historical prohibitions against sodomy as controlling the issue before it because no state proscribes same-sex kissing, hand-holding or caressing.93 Only Missouri expressly outlaws same-sex mutual masturbation.94

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89 Id. at 191-92.
90 Id. at 191-194.
91 The sodomy statute at issue in Bowers, Georgia Code Annotated § 16-6-2 (1984), provided in pertinent part, as follows: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . ." Bowers, 478 U.S. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)).
92 See High Tech Gays v. Defense Industrial Sec. Clearance Office, 909 F.2d 375, 380 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("[I]t is not proper to assume generally that 'homosexual conduct . . . can be criminalized.' There are many varieties of conduct that might be characterized as homosexual, from hand-holding to sodomy. Hardwick establishes only that the latter may be criminalized.") (citation omitted)); High Tech Gays v. Defense Industrial Sec. Clearance Office, 668 F. Supp. 1361, 1370 (N.D. Cal. 1987) ("The Supreme Court in Hardwick simply did not address the issue of all homosexual activity."). rev'd, 895 F.2d 563, 571 (9th Cir. 1990).
93 See High Tech Gays, 668 F. Supp. at 1371-72; State v. Walsh, 713 S.W.2d 508, 514 (Mo. 1986) (Blackmar, J. dissenting) (rationale of Bowers does not extend to same-sex sexual activity that has not traditionally been proscribed). See also EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 15 (1989) ("[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 historical prohibitions.").
The instant discussion relating to whether the Due Process Clause should today be found to protect a fundamental right to engage in at least some same-sex erotic activity starts from the premise that, as an original matter, those decisions that have ascribed a substantive component to the Due Process Clause are in error.\textsuperscript{95} The text of the Constitution says nothing of substantive due process rights, and the histories of the Fifth and Fourteenth Amendments provide no clear support for the proposition that the framers intended for the Due Process Clause to afford any substantive protections, let alone provide guidance as to which substantive protections it should afford.

Nevertheless, the Supreme Court is not likely anytime soon to retreat from the view that certain due process liberty interests are fundamental.\textsuperscript{96} In \textit{Planned Parenthood of S.E. Pennsylvania v. Casey},\textsuperscript{97} the Supreme Court reexamined the holding of \textit{Roe v. Wade},\textsuperscript{98} which recognized a substantive due process right to have an abortion. Without ever stating that \textit{Roe} was correctly decided as an original matter, the Court reaffirmed "the essential holding" of \textit{Roe}.\textsuperscript{99}

The Court explained that "when [it] reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."\textsuperscript{100} The

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\textsuperscript{95} See \textit{Calder v. Bull}, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring) ("If ... the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and purest of men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."); \textit{TXO Production Corp. v. Alliance Resources Corp.}, 113 S. Ct. 2711, 2727 (1993) (Scalia, J., concurring) (rejecting the proposition that the due process clause "is the secret repository of all sorts of ... unenumerated [substantive] rights."). See also Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 Ind. L. J. 1, 8-11 (1971).

\textsuperscript{96} See \textit{Planned Parenthood of S.E. Pennsylvania v. Casey}, 505 U.S. 833 (1992) (reaffirming, largely on stare decisis grounds, a woman's fundamental liberty interest in aborting her fetus without undue interference from the state).

\textsuperscript{97} 505 U.S. 833 (1992).

\textsuperscript{98} 410 U.S. 113 (1973).

\textsuperscript{99} See \textit{Casey}, 505 U.S. at 845-46.

\textsuperscript{100} Id. at 854.
Court found the "cost" of overruling *Roe* to be too high. The Court concluded that overruling a constitutional interpretation such as that in *Roe* in reliance upon which "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society," especially in light of the "political pressure" to overrule *Roe*'s holding, would do "both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." This stare decisis analysis applies a fortiori to substantive due process in general.

Thus, the question remains—what interests are fundamental liberty interests? *Bowers* suggests that only those privacy interests "that are deeply rooted in this Nation's history and tradition" can be fundamental liberty interests. *Bowers* is sharply at odds, however, with the cases that preceded it.

Because the text and the history of the Due Process Clause can provide little guidance to courts on how to give meaning to the term "liberty," the Supreme Court has used tradition as a guide for its decisions and to limit the discretion of the judiciary. Tradition, however, is not an element of liberty. Rather, because society is likely to have protected those interests that are fundamental, tradition is a signpost for liberty. In other words, tradition correlates (imperfectly) with liberty.

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100 Id. at 856, 869. See also Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2116 (1995) ("Casey explained how considerations of stare decisis inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for 'the ideal of the rule of law.'") (citation omitted).
103 See 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, 1171 (1988) ("Tradition has not been and should not be the exclusive focus of the Court's due process jurisprudence.").
104 See Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 40 (1991) (Kennedy, J., concurring) (with respect to procedural due process, "[h]istorical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair").
Support for this thesis is found in the seminal privacy cases that do not mention tradition as a required element of liberty. Further, one of the earliest in-depth discussions of tradition in the privacy area indicates that tradition was meant only as a limitation on judicial discretion. In *Griswold v. Connecticut*, the Court held that a law forbidding the use of contraceptives intruded upon the right of marital privacy. In response to the dissent’s expressed fear that, lacking any textual limitations, Justices would use their private notions of right and wrong in deciding cases in this area, Justice Goldberg, concurring, wrote that the Justices must look for guidance to the “traditions and (collective) conscience of our people” to determine if an interest is fundamental. Similarly, Justice Harlan, concurring, stated that respect for the teachings of history and the values that underlie our society will keep “judges from roaming at large in the constitutional field.”

Moreover, in practice, the Court has recognized a fundamental right to do certain things that society not only has not protected, but has criminalized. In *Loving v. Virginia*, the Court struck down a Virginia prohibition on interracial marriage as violative of the fundamental right to marry. This despite the Court’s expressed awareness of the fact that miscegenation had been banned in Virginia since colonial times. At the time of the *Loving* decision, sixteen states banned interracial marriage. Fourteen other states had only recently repealed their prohibitions within the preceding fifteen years. In *Eisenstadt v. Baird*,

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106 *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (the right of an instructor to teach a foreign language, and the right of a parent to engage the teacher to so instruct his child, are within the liberty of the fourteenth amendment); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (statute requiring child’s attendance at public school—thus, not allowing child’s attendance at private school—deprived parents of their right to direct the upbringing of their children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (sterilization of certain habitual criminals violated their “right to have offspring,” which was “among the basic civil rights of man”).

107 381 U.S. 479 (1965).

108 Id. at 485-86.

109 Id. at 493 (Goldberg, J., concurring) (citation omitted).

110 Id. at 501-02 (Harlan, J., concurring).

111 388 U.S. 1 (1967).

112 Id. at 12.

113 Id. at 6.

114 Id.

115 Id. at 6 n.5.

the Court held that a prohibition on the distribution of contraceptives violated the right of privacy. Many states, however, traditionally had banned the distribution of contraceptives. Finally, in Roe v. Wade, the Court held that a law prohibiting abortions at any stage of a woman's pregnancy violated the right to privacy. As Justice Rehnquist correctly pointed out in dissent, however, a majority of the states had placed restrictions on abortion for more than a century. In light of these cases, tradition cannot be properly regarded as an element of liberty. Rather, tradition is merely an asserted limitation on discretion.

Yet Bowers, in which arguably tradition alone controlled the Court's decision on whether the Due Process Clause provides a fundamental right to engage in sodomy, speaks loudest to the issue of whether that clause provides a fundamental right to engage in at least some same-sex erotic activity because of the great similarity of the nature of the interests at issue. To the extent that Bowers does hold that a tradition of protection is a prerequisite to recognition of a fundamental liberty interest in this area, Bowers should be followed only if it is "intrinsically sounder" than those privacy cases that have not found tradition to be a controlling factor lest the Court "compound [its] recent error and... make [an] unjustified break from previously established doctrine complete."
The Bowers Court trumpeted tradition as a restraint on the judiciary, lest judges be tempted to impose their own values on the state and federal governments when defining "liberty." Thus, whether, for the purposes of the instant discussion, Bowers is "intrinsically sounder" than the privacy cases that came before it, is a function of the merits of tradition as a judicial restraint. In practice, reference to tradition in defining liberty is unworkable; thus, its use will not lead to predictable or reproducible results. Any claimed judicial restraint through the use of tradition, therefore, is illusory, and tradition fails on the very grounds that supposedly justify its use.

First, the use of tradition does not allow a court to evade the original question—"what is liberty?" It cannot be asserted seriously that "liberty" includes all interests that society traditionally has protected. For example, the government has in recent years "protected" the right of home owners to deduct the interest on their mortgage. Yet, the Supreme Court is not likely to hold that the home mortgage interest deduction is a fundamental liberty interest. Indeed, since the 1930's, the Supreme Court has refused to recognize fundamental rights in the economic sphere. Thus, after determining that an asserted interest is one that society traditionally has protected, a court still must ask whether the factual underpinning has changed or has "come to be seen differently, as to have robbed the old rule of . . . justification." Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 855 (1992). As discussed infra the physiology and genetics findings discussed in part I, supra, call into question the factual underpinning of Bowers that "[n]o connection [exists] between family, marriage, or procreation on the one hand and homosexual activity on the other." Bowers v. Hardwick 478 U.S. 186, 191 (1986). This provides a second arguable justification for not following Bowers in this area, and, indeed, for overruling Bowers.

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126 See generally id., at 1348-52.
127 See Nebbia v. New York, 291 U.S 502, 537 (1934) ("So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397-98 (1937); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) ("[W]e emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'") (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955)).
interest is fundamental without reference to tradition. Tradition only limits the set of possible "liberties."

But does it? Arguably, "tradition" is no less illusory a concept than "liberty." To agree on a common workable definition of "tradition" is no mean feat. *Bowers* itself illustrates well that giving meaning to "tradition" necessarily involves subjective, value-laden decisions. In *Bowers*, Justice White's opinion for the Court cited to the common law prohibition on sodomy, the fact that at one time all fifty states outlawed sodomy, and that, as he wrote his opinion in 1986, twenty-four states and the District of Columbia continued to outlaw at least same-sex sodomy, as evidence of a societal tradition disapproving same-sex sodomy. By 1986, however, twenty-three states had repealed their prohibitions on sodomy and the high courts of New York and Pennsylvania had struck down sodomy restrictions as violative of the right to privacy and equal protection respectively. How is a judge to decide whether this evidences a new tradition respecting a liberty to engage in sodomy? At what point does modern protection of an interest take precedence over historical proscriptions?

Justice Burger's concurring opinion in *Bowers* raises the converse of this question. Justice Burger cited, *inter alia*, to the fact that "[h]omosexual sodomy was a capital crime under Roman law," specifically the Justinian Code, to support his conclusion that participation

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128 *Bowers*, 478 U.S. at 192-94.

Since 1986, Nevada, the District of Columbia, and Pennsylvania have repealed their restrictions on sodomy. Also, the Supreme Court of Kentucky has held that Kentucky's prohibition of sodomy violated the right to privacy and the guarantee of equal protection provided for in the Kentucky constitution. Commonwealth v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992).

131 See Michael H. v. Gerald D., 491 U.S. 110, 138 (1989) (Brennan, J., dissenting) (criticizing the plurality's overreliance on tradition in defining "liberty" by noting that such an approach assumed the Court's ability "to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer").
in sodomy was not a fundamental liberty interest.\textsuperscript{132} Gay sex was not proscribed, however, during the Roman Republic nor during the early days of the Roman Empire.\textsuperscript{133} Should such a pre-Justinian “tradition” of respect for the individual’s right to practice homosexual sodomy enter into a court’s liberty calculus? If so, what weight should it be given?

Moving on, and assuming \textit{arguendo} that jurists could settle on a reproducible working definition of tradition, even greater uncertainty arises when one tries to understand the traditions of past societies and apply that understanding to contemporary cases. This uncertainty arises from the fact that the content of a tradition cannot be understood apart from the societal context in which it arose.\textsuperscript{134} Justice Scalia’s plurality opinion in \textit{Michael H. v. Gerald D.}\textsuperscript{135} demonstrates this difficulty.

In \textit{Michael H.}, a putative biological father, Michael H., asserted a substantive liberty interest in continuing his relationship with his putative daughter who had been conceived and born while her mother was married to another man.\textsuperscript{136} Justice Scalia focused on the common law presumption of legitimacy—providing that a newborn child is presumed to be the biological child of the mother’s husband—and concluded that “our traditions have protected the marital family ([the mother, her husband], and the child they acknowledge to be theirs) against the” claims of adulterous fathers.\textsuperscript{137}

The presumption of legitimacy, however, could be rebutted at common law by proof that the husband was impotent, sterile, or had no access to his wife during the period of the child’s conception.\textsuperscript{138} Arguably, this allowance for rebuttal of the presumption evinces a “tradition” allowing for an adulterous father to prove his paternity whenever there existed compelling evidence that the husband was not the child’s

\textsuperscript{132} \textit{Bowers,} 478 U.S. at 196 (Burger, C.J., concurring).
\textsuperscript{133} \textit{John Boswell, Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century,} 68-71 (1980) (the first Roman legal restrictions “against homosexual behavior can be dated precisely to the third century A.D.” Moreover, homosexual relations were not categorically prohibited by Roman law until the sixth century.).
\textsuperscript{135} 491 U.S. 110 (1999).
\textsuperscript{136} \textit{Id.} at 113-14, 121.
\textsuperscript{137} \textit{Id.} at 124.
\textsuperscript{138} \textit{Id.}
father. Thus, the question arises—what would the society that gave rise to the presumption of legitimacy, a society which did not know blood tests, have done in the face of a blood test showing a 98.07% certainty that Michael H. was the father of the child he claimed as his own?139

The presumption of legitimacy might not reflect a tradition preferring the marital family over the parental relationship, but might merely be a recognition that a child born to a marriage is most often a child of the marriage. We cannot know with certainty. Moreover, to ask the question itself seems to be an unnecessary distraction from the original issue—whether the interest Michael H. has in the continuation of his relationship with his putative daughter is an interest for which the Due Process Clause should provide substantive protection—because the answer tells us nothing about the nature of the relationship between Michael H. and his daughter.140

Thus, because judges remain free to choose their own definition of “tradition” and because we are sure to disagree as to the meanings that our forebears attached to their actions, tradition is an unsuitable guide for defining liberty and an unworkable judicial restraint. The Bowers rationale is intrinsically unsound, therefore, and should not be followed. Moreover, we need no longer fear that “judges [will be left] roaming at large in the constitutional field”141 even were courts to abandon reference to tradition in substantive due process adjudication altogether. Having set forth in the last sixty years an ample body of case law giving meaning to “liberty” within the privacy sphere of the Due Process Clause, the Supreme Court is better able to distill directly from those cases the principles that speak to the definition of liberty.

139 A test of Michael H.’s blood indicated a 98.07% probability that he was the biological father of his putative daughter. Id. at 114. See Sunstein, supra note 104, at 1173 (“[T]radition cannot by itself be controlling in close cases, and the constitutional question must be answered instead by an inescapably normative inquiry into how the relevant tradition is best characterized.”). See also Michael H., 491 U.S. at 140 (Brennan, J., dissenting) (noting that the blood test to determine paternity was not available at the time that the presumption of legitimacy arose).

140 Whether or not society traditionally has protected an asserted liberty speaks not to the nature of the asserted liberty, but rather to the interest society has in infringing that asserted liberty. Thus, tradition analysis conflates the question—is there a liberty interest—with the question—what is the state’s interest in infringing the liberty interest. See id. at 146-47 (Brennan, J., dissenting).

This is particularly so in light of the previously stated premise of the instant discussion—that as an original matter all substantive due process adjudication is illegitimate, and its continued application is justified only by prudential concerns grounded in stare decisis.

The recent joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of S.E. Pennsylvania v. Casey*\(^4\) elucidated well enough these principles that speak to the definition of liberty.

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.\(^1\)

The Court would do well to abandon its pretense that substantive due process is somehow legitimated through the use of tradition as a limitation on the personal predilections of the judiciary and instead be guided by these principles derived from the privacy case law.

Application of these principles to the issue at hand gives rise to the question whether same-sex erotic activity relates to family relationships or "involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." The physiology and genetics findings set forth *supra* in Part II, at a minimum, militate in favor of an affirmative answer to both of these unavoidably subjective questions.\(^1\)

The science is pertinent because it informs the voluntarism/determinism debate. Determinists believe that by some means, whether nature or the environment, sexual orientation is given to an individual and cannot be changed. Voluntarists argue that an individual is free to voluntarily choose his sexual orientation or can choose to change it without difficulty.\(^1\) The science evinces that gay people do not choose


\(^1\) *Id.* at 852. *See also id.* at 852 (stating that a woman's suffering in giving birth to a child "is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture").

\(^1\) Whether decisions relating to marriage, procreation, contraception, [non-gay] family relationships, child-rearing, and education are "central to personal dignity and autonomy" is no less subjective a question.

\(^1\) *See Ortiz,* *supra,* note 14, at 1837 (defining the nature/nurture and determinism/voluntarism debates and distinguishing the two).
their sexual desires. It evinces that same-sex erotic activity is not merely "aberrant activity, either on the part of heterosexuals intent on subverting traditional society or by people who are prey to psychological, emotional or sexual dysfunction"146 but, rather, is the "natural"147 expression of a genetically influenced organization of the brain resulting in an enduring predisposition toward an erotic, affectional, and romantic attraction to individuals of one's own sex that exists independent of any physical sexual act.148

Given that a gay person cannot choose to be non-gay—to redirect his erotic, affectional and romantic desires—but can only choose whether or not to act on those desires, then the decision to engage in same-sex erotic activity would surely seem to be among "the most intimate and personal choices a person may make in a lifetime."149 The decision to express a same-sex attraction, to remain celibate, or to have an "intimate" opposite-sex relationship without the possibility of satisfying intimacy profoundly impacts the decision-maker's self-identity, happiness, "personal dignity and autonomy" and is commensurate with such other deeply personal, and constitutionally protected, decisions relating to family, marriage, and procreation. Thus, the Due Process Clause, as the Supreme Court has given it substance, should protect this choice.150

146 Sullivan, supra note 9, at 24.
147 The notion that homosexual sex is "unnatural" frequently is cited as a justification for discrimination against gay people. See Debbie Howlett, Lesbian Ruling Stirs Fury, Praise, USA Today, Sept. 9, 1993, at 3A (quoting Anne Kincaid, of the Family Foundation, asserting that gay "sexual behaviors . . . are against the laws of nature" and applauding a Virginia court's removal of a two year old boy from his lesbian mother's custody on the ground that she was in a lesbian relationship).
148 See Herek, supra note 11; Equality Foundation of Greater Cincinnati v. Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (citing psychologist Dr. John Gonsiorek's testimony that sexual orientation is "a predisposition toward erotic, sexual, affiliation or affection relationship towards one's own and/or the other gender"), rev'd, 54 F.3d 261 (6th Cir. 1995).
149 See also Laurence H. Tribe, American Constitutional Law 943 (1st ed. 1978) (arguing that same-sex sodomy is "central to the personalities of those singled out by" prohibitions on such activity).
150 See High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1370, 1372 (holding that the Due Process Clause protects the right of gay people to engage in at least some same-sex erotic activity "because this aspect of life occupies such an important part of all human beings' lives") (N.D. Cal. 1987), rev'd, 895 F.2d 563, 571 (9th Cir. 1990).
IV. HEIGHTENED SCRUTINY FOR CLASSIFICATIONS BASED ON SEXUAL ORIENTATION

The physiology and genetics research relating to homosexuality also has implications for equal protection analysis of sexual orientation classifications. When Hamer published his study linking Xq28 to male homosexuality, some gay legal activists theorized that Hamer’s finding would lead to heightened judicial scrutiny of sexual orientation classifications because it advanced the argument that sexual orientation is immutable. A careful analysis of the Supreme Court’s equal protection jurisprudence reveals, however, that immutability of a characteristic is neither a prerequisite to nor a sufficient condition for heightened scrutiny of a classification relating to that characteristic. The science is still pertinent, however, not for what is says about the immutability of a gay sexual orientation, but simply because it evinces that a gay sexual orientation necessarily connotes nothing more than a same-sex desire and, thus, it undermines the notion that homosexuality cannot exist apart from homosexual sexual conduct—a notion that repeatedly has precluded heightened scrutiny for classifications that discriminate against gay people as gay people.

A court reviewing the constitutionality of a governmental classification applies one of three levels of scrutiny: “strict,” “intermediate,” or “rational basis.” A classification that infringes upon a fundamental right or that is “suspect” is reviewed with strict scrutiny to determine if it is narrowly tailored to serve a compelling governmental interest. A classification that is “quasi-suspect” is reviewed with intermediate scrutiny and is constitutional only if it is substantially related to an important governmental interest. Finally, a court reviews for a rational basis a government classification that is neither suspect nor quasi-suspect and that does not infringe upon a fundamental right. Under the “rational basis” test, a classification will be found constitutional if it is rationally related to a legitimate governmental purpose.

The judiciary’s expressed justification for subjecting some legislative classifications, but not others, to “heightened scrutiny” derives from

151 See, e.g., HAMER & COPELAND supra note 35, at 22, 210-11.  
153 See id. at 429-30.  
154 See id. at 430.  
155 See id. at 440.  
156 See id.
the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. Thus, classifications based upon race and national origin, which the Supreme Court in this context has treated as interchangeable with race, are "suspect" and deserving of heightened scrutiny by the courts.

In addition to race and national origin, the Supreme Court has recognized alienage as a suspect classification, except for when such a classification differentiates between aliens and citizens with respect to "government functions." Also, the Supreme Court has recognized gender as a quasi-suspect classification. Finally, the Supreme Court has subjected classifications that discriminate on the basis of illegitimacy to a "somewhat heightened" standard of scrutiny.

157 McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
158 See Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely on the basis of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classifications . . . based on race alone ha[ve] often been held to be a denial of equal protection." (citing to two cases that addressed classifications that discriminated against persons of Chinese descent and one case that addressed a classification that discriminated against black people)); Korematsu v. United States, 323 U.S. 214, 216 (1944) (noting with respect to a classification that placed limitations upon persons because of their Japanese ancestry that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").
159 See Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate."). Compare with Ambach v. Norwich, 441 U.S. 68, 72-75 (1979) (explicating a "governmental functions" exception to the general standard of heightened scrutiny applicable to classifications based on alienage).
161 See Mathews v. Lucas, 427 U.S. 495, 505 (1976) (illegitimacy is not a suspect classification); Trimble v. Gordon, 430 U.S. 762, 767 (1977) ("As we recognized in Lucas, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations. . . . We nevertheless concluded that the analogy was not sufficient to require 'our most exacting scrutiny.' . . . Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' . . . Lucas also establishes that the scrutiny 'is not a toothless one.'").
In arriving at these ends, however, the Supreme Court has failed to articulate cogently its means for determining whether a classification other than race or national origin deserves heightened scrutiny.\textsuperscript{162} At various times, the Supreme Court, in adjudicating this issue, has expressly mentioned each of the following factors as potentially relevant:

1. whether the classification historically has been used to discriminate against a group classified thereunder;\textsuperscript{163}
2. whether the classification is informative as to any given individual’s intrinsic ability to participate in or contribute to society\textsuperscript{164} and similarly whether the classification has been used to “saddle[ ] with disabilities” on the basis of prejudice or inaccurate stereotypes members of a group classified thereunder;\textsuperscript{165}
3. whether the classification relates to a characteristic that is immutable,\textsuperscript{166} or similarly relates to a characteristic that is not within an individual’s control;\textsuperscript{167} and
4. whether members of a group classified under such a classification have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”\textsuperscript{168} The Supreme Court, however, has never required all of these factors for a classification to be suspect.\textsuperscript{169}

One can view the Supreme Court’s jurisprudence in this area of the law as an attempt to determine whether asserted suspect classifications

\textsuperscript{162} See Trimble, 430 U.S. at 777 (Rehnquist, J., dissenting) (‘‘Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or national origin, the first cousin of race—the Court’s decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.’’); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (‘‘Several formulations might explain our treatment of certain classifications as ‘suspect.’’’).


\textsuperscript{164} Cleburne, 473 U.S. at 441-444; Frontiero, 411 U.S. at 686; Mathews v. Lucas, 427 U.S. 495, 505 (1976); Murgia, 427 U.S. at 310-11, 315.

\textsuperscript{165} Rodriguez, 411 U.S. at 28 (1973); see also Frontiero, 411 U.S. at 684-85; Murgia, 427 U.S. at 313.

\textsuperscript{166} See Frontiero, 411 U.S. at 686; see also Cleburne, 473 U.S. at 441-42; Plyler, 457 U.S. at 220.

\textsuperscript{167} See Frontiero, 411 U.S. at 686; Cleburne, 473 U.S. at 441; Plyler, 457 U.S. at 217 n.14 (‘‘Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.’’).

\textsuperscript{168} Rodriguez, 411 U.S. at 28; see also Plyler, 457 U.S. at 216-17 n.14.

\textsuperscript{169} See, e.g., Plyler, 457 U.S. at 216-17 & n.14.
are sufficiently similar to race and national origin to merit heightened scrutiny under the Equal Protection Clause.\footnote{See Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023, 1065 (1979)} More particularly, the cases can be read to support the thesis that the Supreme Court has merely generalized the rationale of McLaughlin: a classification, like race, that historically has been used to saddle certain people with disabilities on the basis of a characteristic that otherwise would be irrelevant to an individual’s ability to contribute to society is inherently suspect as more likely to have been the product of irrational prejudice, and thus, is deserving of heightened equal protection scrutiny.\footnote{See McLaughlin v. Florida, 379 U.S. 184 (1964).} Seen in this light, the cases reveal that the criteria relating to “immutability” and “political powerlessness” are neither necessary nor even significant factors in the suspect classification analysis.\footnote{See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985) (“[W]hat differentiates [a suspect classification] from a nonsuspect [classification] . . . is that the [suspect classification] frequently bears no relation to ability to perform or contribute to society.”); Plyler, 457 U.S. at 216 n. 14 (“[S]uch classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.” (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)). See also Cleburne, 473 U.S. at 440 (classifications grounded “on factors . . . so seldom relevant to the achievement of any legitimate state interest that [they are] deemed to reflect prejudice and antipathy . . . [toward] the burdened class,” are suspect).}

That a classification relates to an immutable characteristic over which an individual has no control does not alone merit heightened scrutiny of that classification.\footnote{Compare Equality Found. of Greater Cincinnati, Inc. v. Cincinnati, 860 F. Supp. 417, 434-35 (S.D. Ohio 1994) (“Evidently, the most decisive factors the Supreme Court has considered . . . are whether the group’s defining characteristic is at all related to its members’ ability to participate in or contribute to society . . . and whether the characteristic is beyond the individual’s control”) (citations omitted), rev’d, 54 F.3d 261 (6th Cir. 1995).} Nor is a relationship to such a characteristic a prerequisite for heightened scrutiny.\footnote{See Cleburne, 473 U.S. at 442 (holding that the mentally challenged are not a suspect class); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (stating that the elderly are not a suspect class).} The Supreme Court repeatedly
has omitted immutability in setting forth the characteristics of a suspect classification. Further, the Court has held that classifications relating to alienage are suspect even though alienage is a condition that is both voluntarily assumed and mutable. Thus, whether sexual orientation is innate and immutable or voluntarily chosen should not control the issue of heightened scrutiny for classifications that discriminate on the basis of sexual orientation.

immutability simply is not a prerequisite for suspect classification.\textsuperscript{176} See Cleburne, 473 U.S. at 440-41; Murgia, 427 U.S. at 313; San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

\textsuperscript{177} See Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

\textsuperscript{178} See also Stephen B. Pershing, "Entreat Me Not to Leave Thee": Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents, 3 WILLIAM & MARY BILL OF RIGHTS JOURNAL 289, 311 n.81 (1994) (arguing that even if gays and lesbians could readily change their sexual orientation, courts should not "apply an immutability theory to preclude suspect class status for sexual orientation" since "persons of minority sexual orientation have significant social or cultural bonds to one another that derive affirmatively, not just as a matter of defensive necessity, from their defining characteristic"); thus, denial of suspect class status premised on an immutability theory would implicate important intimate and expressive associational interests. But see High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571, 573-74 (9th Cir. 1990) (finding that "[h]omosexuality is not an immutable characteristic" and holding that homosexuality is not a suspect classification); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).

The physiology and genetics research discussed in Part II, supra, speaks, although not conclusively, to the immutability criterion. That a region of the brain that plays a key role in sex is orientationally dimorphic strongly suggests that sexual orientation is fixed as the brain develops prenatally. See supra part II.A. Nevertheless, the possibility that such dimorphism results from rather than precedes certain sexual behavior cannot yet be excluded. See supra part II.A. Hamer's demonstration of a link between male homosexuality and DNA markers on the X chromosome is compelling evidence that sexual orientation is genetically influenced but also shows that sexual orientation is not wholly determined by genetics. See supra part II.B. See also HAMER & COPELAND, supra note 35, at 211.

Both Hamer and LeVay have testified with respect to the nature and origins of sexual orientation in litigation in which the appropriate level of scrutiny for sexual orientation classifications was at issue. See id. at 210-11 (discussing Hamer's testimony
“Political powerlessness” is central to “process” theories of equal protection which see heightened scrutiny as a means of protecting those who cannot fend for themselves in the political process. A critique of the merits of such theories is beyond the scope of the present discussion. It should suffice to note that the recognition of gender as a classification meriting heightened scrutiny suggests that this criterion is either an inclusive one, rather than an exclusive one, or else the criterion is so broad as to be almost meaningless. Regardless, if women, who constitute a majority of the voting-age population in our democracy, fit under the umbrella of the “politically powerless” then that umbrella must be big enough to cover gay people also.

In Evans v. Romer, 92-CV-7223 (Colo. Dist. Ct. Dec. 14, 1993), that there is a greater than 99% probability that sexual orientation is genetically influenced in some men; Thomasson v. Perry, Civ. A. No. 95-252-A (E.D. Va. June 8, 1995) (plaintiff’s summary judgment brief, LeVay Decl. (exhibit O)) (LeVay testifying that “[g]enes alone are responsible for approximately one-half of the causation of a person’s orientation as homosexual, bisexual, or heterosexual,” LeVay Decl. at ¶ 42, and that to the extent that sexual orientation is not influenced by genes alone, it appears to be influenced “by biological processes occurring before birth and/or ‘within the first one or two years of life.’” LeVay Decl. at ¶ 7-8).

In Evans v. Romer, the court, which referred to Hamer in its opinion as a “genetic explorer,” Evans, 92-CV-7223, slip op. at 13, cited to Hamer’s testimony in finding that “the preponderance of the credible evidence suggests that there is a biological or genetic “component” of sexual orientation . . . .” Id. slip op. at 14. Nevertheless, the court made no determination on the immutability issue. Id. Rather, the court held that no adequate showing had been made that gay people were “vulnerable or politically powerless and [thus,] in need of ‘extraordinary protection from the majoritarian political process’ in today’s society.” Id. slip op. at 14-15.

In Thomasson v. Perry, the district court rejected the argument of a gay naval lieutenant that sexual orientation classifications deserved heightened scrutiny. The Court concluded that “[b]ecause the government is free to criminalize homosexual conduct, . . . a group that is defined by reference to that conduct cannot constitute a ‘suspect class.’” Thomasson, Civ. A. No. 95-252-A, slip op. at 16 (quoting Steffan v. Perry, 41 F.3d 677, 684 (D.C. Cir. 1994)). This reasoning is critiqued extensively infra.

See Tribe, supra note 175, at 1073 (1980); Harris M. Miller II, Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. Cal. L. Rev. 797, 828-30 (1984) (arguing that homosexuality classifications merit heightened scrutiny because gay people “are a political minority and victims of the majoritarian system”).

See High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) (in comparison to black people who “are protected by three federal constitutional amendments, [seven extant] major federal Civil Rights Acts . . . , as well as antidiscrimination laws in 48
Far more controlling in the heightened scrutiny analysis is whether a classification is informative as to an individual’s intrinsic ability to contribute to society. A classification that is helpful in separating individuals as to their intrinsic ability to function in society will not merit heightened scrutiny.\footnote{See Sunstein, supra note 104, at 1177 (1988) (‘‘As the defining case of blacks reveals, the question whether a group deserves special solicitude under the Equal Protection Clause depends on an inescapably normative inquiry into the legitimacy of the reasons ordinarily used to disadvantage that group.’’)}\footnote{City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).} The Supreme Court has held that classifications with respect to the mentally challenged are not suspect or quasi-suspect, in part because the mentally challenged ‘‘have a reduced ability to cope with and function in the everyday world.’’\footnote{Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 310-11 (1976) (internal quotations omitted).} Similarly, the Court has refused to apply heightened scrutiny to classifications based on age, in part since ‘‘there is a general relationship between advancing age and decreasing physical ability.’’\footnote{See} Most telling is the

of the states, . . . and by absolute standards as well, homosexuals are politically powerless’’); Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988) (gay people lack the political power necessary to obtain redress for discrimination), vacated and aff’d on other grounds, 875 F.2d 1349 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990); Equality Foundation of Cincinnati v. Cincinnati, 860 F. Supp. 417, 437-39 (S.D. Ohio 1994) (citing to evidence that ‘‘of the total of 497,155 elected officials in the United States, a total of 73 are openly gay’’ and concluding that gay people ‘‘are sufficiently politically powerless’’), rev’d on other grounds, 54 F.3d 261 (6th Cir. 1995); Jantz v. Muci, 759 F. Supp. 1543, 1549-50 (D. Kansas 1991) (concluding that gay people are unable to protect their rights through the political process), rev’d on other grounds, 976 F.2d 623 (10th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987) (because of discrimination, gay people have been unable to secure a ‘‘politically viable voice’’), rev’d, 895 F.2d 563 (9th Cir. 1990). But see High Tech Gays, 895 F.2d at 574 (citing to the passage of anti-discrimination legislation and concluding that gay people ‘‘are not without political power’’); Ben-Shalom v. Marsh, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (citing only to a magazine report that ‘‘one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual’’ and to the fact that the mayor of Chicago had marched in a gay pride parade and concluding that ‘‘[h]omosexuals are not without political power’’); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991) (citing inter alia to the fact that the mayor of New York had marched with gay marchers in the St. Patrick’s Day Parade and concluding that gay people are not politically powerless); Evans, 92-CV-7223, slip op. at 14-15 (holding that no adequate showing had been made that homosexuals were ‘‘vulnerable or politically powerless and [thus,] in need of ‘extraordinary protection from the majoritarian political process’ in today’s society’’).
Court’s treatment of classifications based on alienage. The Court has held a classification based on alienage merits heightened scrutiny unless the classification relates to a governmental function. Such a classification relating to a governmental function is not inherently suspect because “[t]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times ... indicating that the status of citizenship was meant to have significance in the structure of our government.” It is this relevance to legitimate governmental functions that renders heightened scrutiny inappropriate for such classifications.

A number of courts have held that sexual orientation “bears no relationship whatsoever” to an individual’s ability to function in and contribute to society. Given that, as the physiology and genetics research discussed supra in Part II suggests, homosexuality is an enduring predisposition toward an erotic, affectional, and romantic attraction to individuals of one’s own sex, however, one cannot dismiss out of hand the argument that homosexuality does speak to a gay person’s ability to provide the most suitable home to a child—arguably one of the greatest contributions an individual can make to society. Lacking a romantic or erotic attraction to persons of the other sex, seemingly would handicap a gay person, relative to a non-gay person, in maintaining a long-term co-parenting relationship with a person of the other sex. Thus, to the extent that one believes that a child is best raised in one stable household with both a mother and a father, sexual orientation arguably is highly relevant to an individual’s ability to contribute to society.

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186 Id.
188 See Herek, supra note 11.
189 Recent findings in biopsychology point to other, less significant, indications that gay men, as a whole, are differently-abled than non-gay men. Non-gay men, as a
Finally, the Supreme Court has required a history of significant "purposeful unequal treatment" as a prerequisite to heightened scrutiny, most likely to ensure that the judiciary does not unnecessarily interfere with the right of the majority to legislate as it sees fit.\(^1\) In *Mathews v. Lucas*,\(^2\) the Court concluded that the status of illegitimacy, like race, is irrelevant to an individual's ability to contribute to society.\(^3\) The Court also noted that "the law has long placed the illegitimate child in an inferior position relative to the legitimate in certain circumstances."\(^4\) But because "this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and [black people]," the Court declined to afford strict scrutiny to such a classification.\(^5\) The Court, however, has examined classifications based on illegitimacy for more than just a rational basis.\(^6\) For the purposes of

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\(^1\) See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (rejecting heightened scrutiny for classifications based on age, in part because the elderly "have not experienced a 'history of purposeful unequal treatment'"); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (same with respect to classifications based on familial relatedness); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (same with respect to classifications based on wealth); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion noting a "long and unfortunate history of sex discrimination" and concluding that gender is a suspect classification); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985) (noting that legislators have recently been addressing the problems of the mentally challenged "in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary").


\(^3\) Id. at 505.

\(^4\) Id. at 505-06.

\(^5\) See *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' . . . *Lucas* also establishes that the scrutiny 'is not a toothless one.'\)).
the present discussion, the issue can be considered moot. Every federal
court that has considered the issue has concluded that gay people have
suffered a history of discrimination on account of their classification as
gay people.\textsuperscript{196}

Thus, in adjudicating whether a classification that discriminates on
the basis of sexual orientation is deserving of heightened scrutiny, a
court should look only at (1) whether gays and lesbians have suffered
a history of discrimination and (2) whether their sexual orientation
affects their ability to contribute to society.

For the federal courts of appeals that have considered the issue,
however, another factor has proven decisive. Seven of the thirteen
federal courts of appeals have considered the claims of gay people for
heightened scrutiny of classifications that discriminate against them as
gay people. All of these courts found that sexual orientation does not
constitute a suspect classification. The five courts of appeals that
provided an explanation for their decision\textsuperscript{197} all found that homosexuality,
unlike race or gender, is a conduct-based classification. Indeed,
these courts concluded that the conduct that defines the class of
homosexuals is conduct that, under \textit{Bowers}, the state may criminalize.
This conclusion led each court to further hold that classifications based
on sexual orientation are not suspect.\textsuperscript{198}


\textsuperscript{197} The United States Courts of Appeals for the Fifth Circuit and the Tenth Circuit
have held that classifications based on sexual orientation do not merit heightened
scrutiny but neither provided any discussion of a rationale for its decision. \textit{See} Baker
\textit{v.} Wade, 769 F.2d 289, 292 (5th Cir. 1985) ("[W]e refuse to hold that homosexuals
constitute a suspect or quasi-suspect classification . . . ."); Rich \textit{v.} Secretary of the
Army, 735 F.2d 1220, 1229 (10th Cir. 1984) ("A classification based on one's choice
of sexual partners is not suspect.").

\textsuperscript{198} \textit{See} Equality Found. of Greater Cincinnati \textit{v.} Cincinnati, 54 F.3d 261, 268 (6th
Cir. 1995) ("\textit{Bowers} \textit{v.} Hardwick and its progeny command that, as a matter of law,
gays, lesbians, and bisexuals cannot constitute either a 'suspect class' or a 'quasi-
suspect class.'"); Steffan \textit{v.} Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) ("If the
government can criminalize homosexual conduct, a group that is defined by reference
to that conduct cannot constitute a 'suspect class.'") (citing Padula \textit{v.} Webster, 822
The seminal case in this area is Padula v. Webster.\(^{199}\) In Padula the United States Court of Appeals for the District of Columbia Circuit adjudicated a lesbian's claim that the FBI had refused to employ her because she had been and currently was a "practicing homosexual."\(^{200}\) The court expressly noted that the case did not concern a classification based on "sexual orientation" and framed the issue before the court precisely as "only whether homosexuals, when defined as persons who engage in homosexual conduct, constitute a suspect or quasi-suspect classification."\(^{201}\)

The court ruled that the Supreme Court's holding in Bowers, that a Georgia law criminalizing sodomy did not offend the Due Process Clause, controlled the issue of whether a classification based on homosexual "conduct" should receive heightened protection under the Equal Protection Clause. "It would be quite anomalous, on its face, to declare status defined by conduct that states may criminalize as deserving of strict scrutiny under the equal protection clause."\(^{202}\)

The Padula court made two profound errors. First, the court failed to appreciate that the protections of the Equal Protection Clause are

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\(^{199}\) 822 F.2d 97 (D.C. Cir. 1987). ("If the Court [in Bowers v. Hardwick, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.").

\(^{200}\) Id. at 99. The opinion does not make clear what homosexual conduct the plaintiff practiced.

\(^{201}\) Id. at 102.

\(^{202}\) Id. at 103.
independent of those of the Due Process Clause.\textsuperscript{203} The Bowers Court itself noted that the case did not present the Court with an equal protection challenge.\textsuperscript{204} Cass Sunstein has pointed out:

The principal flaw in . . . Padula . . . is that [the court] read the Constitution as an undifferentiated unit, rather than as a set of entitlements and prohibitions that are targeted at quite discrete problems. Each constitutional provision must be taken on its own. [For example], the fact that the Fourth Amendment does not prevent the state from regulating all speech-related activities could not plausibly be a reason to immunize speech from special First Amendment scrutiny.\textsuperscript{205}

\textsuperscript{203} See High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) (noting that "there are two alternate routes to higher levels of scrutiny under the equal protection clause [infringement of a fundamental right or adoption of a suspect classification]" and criticizing the opinion of a prior panel which "seems to collapse the two separate routes into one"); Watkins v. United States Army, 847 F.2d 1329, 1339-42 (9th Cir. 1988) (rejecting the argument that Bowers precluded an equal protection challenge to regulations that discriminate on the basis of sexual orientation), vacated and aff'd on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990); Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991) ("The Bowers court only addressed the respondent's claim that the Georgia statute was a violation of due process; equal protection was not in issue."); Watson v. United States Army, 847 F.2d 1329, 1339-42 (9th Cir. 1988) (rejecting the argument that Bowers precluded an equal protection challenge to regulations that discriminate on the basis of sexual orientation), vacated and aff'd on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990); Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991) ("The Bowers court only addressed the respondent's claim that the Georgia statute was a violation of due process; equal protection was not in issue."); Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991) ("The Bowers court only addressed the respondent's claim that the Georgia statute was a violation of due process; equal protection was not in issue.");)

\textsuperscript{204} Bowers v. Hardwick, 478 U.S. 186, 196 n.8 (1986).

\textsuperscript{205} Sunstein, supra note 104, at 1164 (1988). Indeed, that sodomy may be and is criminalized has been held repeatedly to be insufficient justification to infringe First Amendment rights. \textit{See} Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317, 1328 (5th Cir. 1984) (rejecting state's interest in preventing speech likely to promote sodomy as justification for state university's refusal to officially recognize a gay student group); Gay Lib. v. Univ. of Missouri, 558 F.2d 848, 853-54 (8th Cir. 1977) (even accepting "at face value" testimony that "homosexual behavior is compulsive" and "wherever you have a convocation of homosexuals, . . . you are going to have increased . . . sodomy" a prior restraint on the First Amendment right of gays to associate is not
Thus, even if the Padula court had been presented with a challenge to an FBI practice of excluding sodomites from employment, Bowers would not have determined whether a classification discriminating against sodomites should receive heightened scrutiny under the Equal Protection Clause.

The classification at issue in Padula, however, was not based on participation in sodomy, but rather participation in "homosexual conduct."206 This points out the Padula court's second profound error. The Padula court equated "homosexual conduct" with sodomy.207 As noted supra in Part III, Bowers dealt only with a challenge to Georgia's law banning sodomy and did not hold that all types of gay erotic, romantic and affectional conduct could be criminalized.

The Court of Appeals for the District of Columbia Circuit compounded this error in Steffan v. Perry208 by equating homosexual orientation with sodomy. In Steffan, a former Naval Academy cadet challenged the Academy's regulation prohibiting those with a homosexual orientation from being enrolled at the Academy.209 The court rejected the argument that such a classification was suspect, reasoning that "as we explained in Padula, if the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'"210 Thus, for the purposes of its heightened scrutiny analysis, the court ignored the fact that the classification before it

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206 Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987).
207 Id. at 102-04.
208 41 F.3d 677 (D.C. Cir. 1994).
209 Steffan v. Perry, 41 F.3d 677, 682 (D.C. Cir. 1994). The court expressed uncertainty as to whether the Naval Academy had relied on Academy regulations or those of the Department of Defense in recommending that Steffan be separated from the academy in light of his statement that he was a homosexual. See id. at 684. Both the relevant Academy regulation and the relevant regulation of the Department of Defense provided for separation based on sexual orientation alone. See id. at 682-83; id. at 707 (Wald, J., dissenting).
210 Id. at 685 n.3 (emphasis added).
related to orientation, not conduct, and redefined gay people as those who engage in sodomy.

Having rejected the application of heightened scrutiny to the challenged regulation on this ground, the court conceded in subjecting the regulation to rational review that "it is conceivable that someone would describe himself as a homosexual based on his orientation . . . notwithstanding the absence of any ongoing conduct or the probability of engaging in such conduct. That there may be exceptions to the assumption on which the regulation is premised is irrelevant, however, so long as the classification . . . in the run of cases furthers its purpose, and we readily conclude that it does." Thus, the court concluded "'[T]he military may reasonably assume that when a member states that he is a homosexual, that member either engages or is likely to engage in homosexual conduct.'"

Remarkably, the other federal courts of appeals that have addressed the issue have mirrored the Court of Appeals for the District of Columbia Circuit in effectively equating a homosexual orientation with the practice of sodomy. Indeed, the Court of Appeals for the Seventh

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211 Id. at 686. The Steffan Court's reasoning is paradigmatic of what David Halperin has identified as the "discourses of homophobia" which "operate precisely by deploying a series of mutually contradictory premises in such a way that any one of them can be substituted for any other, as different circumstances may require, without changing the final outcome of the argument." DAVID M. HALPERIN, SAINT FOUCAULT: TOWARD A GAY HAGIOGRAPHY, 37-38 (1995). Had the Steffan Court conceded in addressing the heightened scrutiny argument that "it is conceivable that someone would describe himself as a homosexual based on his orientation . . . notwithstanding the absence of any ongoing conduct or the probability of engaging in such conduct," it could not logically have concluded that sexual orientation is defined by conduct.

212 Steffan, 41 F.3d at 686.

213 See Equality Found. of Greater Cincinnati v. Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995) ("[I]t is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct."); Meinhold v. U.S. Dep't of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994) (in adjudicating a challenge to a classification based on sexual orientation, citing to High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990), which held that a classification based on homosexual conduct was not suspect, for support of the proposition that "classifications having to do with homosexuality may survive challenge if there is any rational basis for them"); Ben-Shalom v. Marsh, 881 F.2d 454, 463-65 (7th Cir. 1989) ("'[T]he regulation [which classified plaintiff based upon her status as a lesbian] does not classify plaintiff merely based upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future.'");
Circuit was even more explicit when engaging in such circular reasoning in *Ben-Shalom v. Marsh.* In *Ben-Shalom* a sergeant in the Army Reserve challenged a regulation that barred her reenlistment because of her homosexual orientation. After noting that the regulation on its face discriminated against persons with a homosexual orientation “absent any allegations of sexual misconduct,” the Court of Appeals for the Seventh Circuit remarked:

In the present case, plaintiff is an avowed lesbian, there is no confusion about that. ... Plaintiff’s lesbian acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff merely based upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future.

The court then concluded that because homosexual “conduct” may constitutionally be criminalized, homosexuals do not constitute a suspect or quasi-suspect class.

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Woodward v. United States, 871 F.2d 1068, 1074 n.6 (Fed. Cir. 1989) (noting that the plaintiff had admitted that “he was attracted sexually to, or desired sexual activity with, members of his own sex, that since he knew of no gay officers he sought the company of gay enlisted men, that he [does], and will continue to associate with other homosexuals, and that he wanted to remain in the Navy as an honest, open, gay officer” and concluding “[w]hile acts of sodomy have not been expressly admitted by [plaintiff], ... in view of the above [non-sexual behavior] we need not address the factual situation where there is action based solely on status as a person with a homosexual orientation” (internal quotation marks omitted)), *cert. denied, 494 U.S. 1003 (1990).*

*See also generally* Hunter, *supra* note 203, at 533-43 (describing how courts have come to transform sodomy into a proxy for homosexuality).

214 881 F.2d 454 (7th Cir. 1989).

215 *Id.* at 457 n.3 (the regulation at issue disqualified from service any homosexual and defined a homosexual as “an individual ... who desires bodily contact between persons of the same sex ... with the intent of obtaining or giving sexual gratification” even if there is no evidence that the individual has engaged in homosexual acts) (emphasis added).

216 *Id.* at 463.

217 *Id.* at 464.

218 *Id.* at 464-65.
otherwise be rationally applied, lest an unjustified and indefensible inconsistency result.\textsuperscript{1219}

\textit{Ben-Shalom} and \textit{Steffan} suffer from two fatal errors, one of legal reasoning and the other factual. The reasoning is flawed analytically because the courts failed to address the classification before them. No classification can be suspect under such an analysis.

Assume, for example, an equal protection challenge to a law that bans men from military service because men are statistically more likely to commit rape than are women. Under the explicit reasoning of \textit{Ben-Shalom}, and the implicit reasoning of \textit{Steffan}, "[p]laintiff's [male-ness], if not an admission of [rape], at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to [commit rape]. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in [rape]. To this extent, therefore, the regulation does not classify plaintiff merely based upon his status as a [man], but upon reasonable inferences about his probable conduct in the past and in the future."\textsuperscript{220}

In transforming sexual orientation—the classification before it—into a classification based on presumed group sexual conduct, and then deciding the heightened scrutiny issue by reference to the latter classification, the \textit{Ben-Shalom} court went astray of "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups."\textsuperscript{221} For the purposes of equal protection jurisprudence, there are no "suspect classes" per se, only suspect classifications.\textsuperscript{222} Thus, the focus of the court should be on the classification before it as it relates to the individual plaintiff.

\textsuperscript{1219} Id.

\textsuperscript{220} Id. at 464. \textit{See also} Dahl v. Secretary of the Navy, 830 F. Supp. 1319, 1334-35 n.17 (E.D. Cal. 1993) (military’s homosexual exclusion policy "is indistinguishable from a patently unconstitutional hypothetical policy ‘‘is indistinguishable from a patently unconstitutional hypothetical policy providing that ethnic minorities must be excluded from military service because they have a ‘propensity’ to engage in theft, although non-minority service members are not excluded unless and until they engage in theft’").

\textsuperscript{221} \textit{See Adarand Constructors, Inc. v. Pena}, 115 S. Ct. 2097 (1995). \textit{See also} id. at 2118 (Scalia, J., concurring) ("[U]nder our constitution there can be no such thing as a creditor or debtor race. That concept is alien to the Constitution’s focus upon the individual.").

\textsuperscript{222} Thus, a ruling that sexual orientation is a suspect classification would confer no "special rights" upon gay people, since non-gay people also have a sexual orientation. Indeed, heightened scrutiny of such classifications would render state affirmative action
The sexual behavior of gay people as a class remains relevant to this analysis only to the extent that it informs as to the meaning the government intended for its classification. The factual error that Steffan and Ben-Shalom have in common is the equation of a gay sexual orientation with sodomy. This equation pervades the law.223

In reality, while the majority of non-gay people engage in sodomy,224 many gay people do not.225 Indeed, no sexual behavior is common to
all gay people. The physiology and genetics research discussed supra in Part II speaks directly to this issue because it evidences that sexual orientation is only a genetically influenced and physiologically based predisposition toward an erotic, affectional and romantic attraction to individuals of one’s own sex.226 Such evidence speaks to the reality of an irreducible essentialist conception of homosexuality—connoting only same-sex desire. Thus, such evidence debunks the factual premise—that homosexuality is a status defined by conduct, specifically, gay sexual conduct—that undergirds in part the decisions denying heightened scrutiny to classifications based on sexual orientation.227

sample of American adults between the ages of 18 and 60, conducted by the National Opinion Research Center at the University of Chicago, found that approximately 70% of non-gay respondents had engaged in oral sex and that nearly 20% of the non-gay female respondents had engaged in oral sex during their most recent sexual experience; see also, PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 236 (1983) (finding that 90% of non-gay couples have engaged in fellatio and 93% in cunnilingus and that same-sex couples engaged in oral sex only slightly more frequently than opposite sex couples), cited in EDITORS OF THE HARVARD LAW REVIEW, supra note 93, at 130 n.85; S. HITE, THE HITE REPORT ON MALE SEXUALITY 1121 (1981) (approximately 96% of the male survey respondents had performed cunnilingus on a female partner); C. TARVIS & S. SADD, THE REDBOOK REPORT ON FEMALE SEXUALITY 163 (1977) (85% of female survey respondents performed fellatio on their husbands at least “occasionally” and 20.3% of the female survey respondents had engaged in anal intercourse with their husbands more than once); S.N. Seidman and R.O. Reider, A Review of Sexual Behavior in the United States, AM. J. PSYCHIATRY 151: 330 (1994) (anal intercourse is practiced by 10% of non-gay couples at least occasionally).

225 See, e.g., PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 236 (1983) (finding that 23% of lesbians rarely or never engage in oral sex and that mutual masturbation is the most common practice among gay male couples), cited in EDITORS OF THE HARVARD LAW REVIEW, supra note 93, at 59 n.99; Sister Marla, Gay and Celibate at Sixty-Five, in LESBIAN NUNS 133 (R. Curb & N. Manahan eds. 1985 (lesbian nun declaring her celibacy), cited in EDITORS OF THE HARVARD LAW REVIEW, supra note 93, at 59 n.100. See also D.E. KANOUSE ET AL., RESPONSE TO THE AIDS EPIDEMIC: A SURVEY OF HOMOSEXUAL AND BISEXUAL MEN IN LOS ANGELES COUNTY (RAND, 1991) (13% of gay and bisexual men reporting that they had no sexual partner in the previous year); ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITY 109 (1978) (finding manual stimulation to be the sexual technique most commonly employed in lesbian sex).

226 See Herek, supra note 11.

227 Compare Halley, supra note 10, at 517. Halley recognizes the importance of distinguishing between status and conduct for equal protection analysis of sexual orientation classifications. She argues, however, that “[t]he constructivist view that sexual orientation is mutable because of slippages and rearrangements of desire, fantasy, behavior, private identity, and public identity is possibly the strongest refutation of a
Even though a gay sexual orientation provides sound information about which sexual conduct an individual may prefer, it exists independent of that conduct. The common essential element that defines all gay people as gay people is only a same-sex desire. One can be gay even if one also is celibate or even if one practices exclusively heterosexual sex.\(^{228}\)

Thus, unless a classification expressly defines gay people as persons who engage in same-sex sodomy,\(^{229}\) a court should treat a classification definition of homosexuality that makes sodomy its essence . . . by emphasizing the variety of gay, lesbian, bisexual, and queer identities.\(^{\text{Id. at 564.}}\) Although Halley concedes that most contemporary attempts at justification for anti-gay discrimination derive from the view that sexual orientation is mutable, \(\text{id. at 518,}\) she nevertheless argues against making pro-gay arguments premised on a biological etiology of sexual orientation because such a premise leaves unchallenged the arguments that gay sex is immoral or disrupts the civil order and, therefore, may validate the premises of anti-gay eugenics. \(\text{Id. at 506, 521, 523.}\) This argument is divorced from reality. Even when a gene that influences sexual orientation is isolated, it will not be possible to determine definitively based upon whether a person carries that gene if that person is gay or will grow up to be gay. \(\text{See Hamer & Copeland, supra note 35, at 218 (drawing this conclusion from studies that indicate that the identical twin of a gay man has only a roughly 50% chance of being gay).}\) Moreover, it is unlikely, to say the least, that an expectant mother who knows that her fetus carries a "gay gene" and who does not wish to have a gay child will be induced to abort her fetus because gay litigants have advanced the "nature" argument in court or will be deterred from aborting her fetus because queer theorists have argued against recognition and use of medical reality.

Halley further argues against making equal protection arguments premised on any theory that sexual orientation is immutable (regardless of whether its original cause is biological or environmental) because people who suffer anti-gay discrimination differ with respect to their position as to the immutability of their sexual orientation, and, thus, such a premise excludes from protection a subset of those on whose behalf it is articulated. Halley, \(\text{supra note 10, at 528, 556, 564.}\) What is significant for equal protection purposes about the physiology and genetics research, however, is not that it supports the immutability argument (which is does), but that it suggests that sexual orientation exists apart from any sexual conduct. Even those with a same-sex desire who believe that their sexual orientation is "constructed" and mutable would share in the protection likely to derive from judicial recognition of this status/conduct distinction. Further, to the extent that those who have constructed their "gay, lesbian, bisexual, and queer identities" (or who have had those identities constructed for them) do not even possess a same-sex desire necessary to fall within the essentialist definition of "gay" set forth in my argument above, it is difficult to see how they can be classified as gay without respect to their conduct.

\(^{228}\) Further, that an individual is gay does not necessarily say anything about how that individual experiences his sexuality. For example, one can be gay and at the same time reject gay sex as immoral.

based on homosexuality or sexual orientation as one independent of any conduct. Indeed, courts have begun to recognize that homosexual orientation exists apart from any sexual conduct.

The latest federal appeals court to address the issue of whether sexual orientation is a suspect classification, the Court of Appeals for the Sixth Circuit, however, has not only repeated the errors of Padula and Ben-Shalom, but has added a novel error to this line of cases, grounded in part in its misunderstanding of the natures of both sexual orientation and equal protection. In Equality Foundation of Cincinnati v. Cincinnati, the Court of Appeals for the Sixth Circuit reviewed the holding of the district court that sexual orientation is a quasi-suspect classification,

any "homosexual" from adopting children and defining "homosexual" as "any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender").

See High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("It is not enough to say that the category is 'behavioral.' One can make behavioral classes out of persons who go to church on Saturdays, persons who speak Spanish, or persons who walk with crutches. The question is what causes the behavior? Does it arise from the kind of a characteristic that belongs peculiarly to a group that the equal protection clause should especially protect?").

See, e.g., Meinhold v. U.S. Dep't of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994) (referring to a navy regulation that, as applied, assumed that persons who say they are gay will engage in certain prohibited sexual conduct, the court remarked "at least a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not"); Cammermeyer v. Aspin, 850 F. Supp. 910, 919, 925 (W.D. Wash. 1994) (citing to "substantial uncontroverted evidence that a distinction between homosexual orientation and homosexual conduct is well grounded in fact" and, therefore, holding that "to the extent that the Government's policy [of expelling gay service members from the military] is based on the unfounded presumption that service members with a homosexual orientation will engage in proscribed homosexual conduct, the policy is not rationally based"); Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994) ("While it is true that such a law [prohibiting homosexual sodomy] could be passed and found constitutional under the United States' constitution, it does not follow from that fact that denying the right of an identifiable group [homosexuals] (who may or may not engage in homosexual sodomy) to participate in the political process is also constitutionally permissible."); Donovan v. Fiumara, 442 S.E.2d 572, 575, 577 (N.C. 1994) (holding that "the label of 'gay' or 'bisexual' does not carry with it an automatic reference to any particular sexual activity," and thus, rejecting plaintiff's argument that defendant's claim that plaintiffs were gay or bisexual imputes to them commission of the crime of sodomy under North Carolina law).

54 F.3d 261 (6th Cir. 1995).
which was premised in part on the district court’s findings “that there
is a broad distinction between sexual orientation, and sexual conduct”
and that sexual orientation is an immutable and involuntary trait.233

The Court of Appeals for the Sixth Circuit provided dual rationales
for overruling the district court. In accordance with Ben-Shalom, the
court found that “it is virtually impossible to distinguish or separate
individuals of a particular orientation which predisposes them toward
a particular sexual conduct from those who actually engage in that
particular type of sexual conduct.”234 Thus, in accordance with Padula,
the court concluded: “Bowers v. Hardwick and its progeny command
that, as a matter of law, gays, lesbians, and bisexuals cannot constitute
either a ‘suspect class’ or a ‘quasi-suspect class.’”235

The Equality court also provided a novel rationale for its holding
that sexual orientation is not a classification deserving of heightened
scrutiny. Accepting, for the sake of argument only, the trial court’s
characterization of the nature of sexual orientation,236 the court con-
ccluded that “no law can successfully be drafted that is calculated to
burden or penalize, or to benefit or protect, an unidentifiable group
or class of individuals whose identity is defined by subjective and

(S.D. Ohio 1994) (citing to testimony that “sexual orientation” is a “predisposition
toward erotic, sexual, affiliation or affection relationship toward one’s own and/or the
other gender”), rev’d, 54 F.3d 261 (6th Cir. 1995). The Equality Foundation of
Cincinnati filed this law suit to challenge the constitutionality of a voter-enacted
amendment to the Charter of the City of Cincinnati which provided in part:

The City of Cincinnati and its various Boards and Commissions may not enact,
adopt, enforce or administer any ordinance, regulation, rule, or policy which
provides that homosexual, lesbian, or bisexual orientation, status, conduct, or
relationship constitutes, entitles, or otherwise provides a person with the basis
to have any claim of minority or protected status, quota preference or other
preferential treatment.

Id. at 422.

234 Id. at 267. The court cited specifically only to testimony that “most people either
engage in sexual behavior which is consistent with their sexual orientation or engage
in no sexual behavior at all.” Id. Such testimony expressly contradicts the court’s
holding that sexual orientation is indistinguishable from sexual behavior, unless one
interprets the testimony to mean that those who engage in no sexual behavior have
no sexual orientation.

235 Id. at 268.

236 Id. at 267.
unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual 'orientation' simply do not, as such, comprise an identifiable class.\textsuperscript{237} Noting that "[m]any homosexuals successfully conceal their orientation," the court further reasoned that gay people, therefore, could only be identified through conduct "such as public displays of homosexual affection or self-proclamation of homosexual tendencies" and, thus, could only be discriminated against on the basis of such conduct.\textsuperscript{238}

The court's truncated reasoning leaves the reader seeking an explanation for its unstated conclusion. The court does not explain why it believes that discrimination that is actualized only as a result of self-identification does not offend the constitution.\textsuperscript{239} More precisely, in light of the settled law that a state is not free to discriminate, for

\textsuperscript{237} \textit{Id.}

\textsuperscript{238} \textit{Id.} at 267. People who have negative attitudes toward gay people are less likely to have had personal contact with a person whom they know to be gay. Gregory M. Herek, \textit{Assessing Heterosexuals' Attitudes Toward Lesbians and Gay Men: A Review of Empirical Research With the ATLG Scale}, in \textit{Lesbian and Gay Psychology: Theory, Research, and Clinical Applications} 206, 219 (Beverly Greene & Gregory M. Herek eds., 1994); Gregory M. Herek & Eric K. Glunt, \textit{Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey} J. Sex Res. 30:239-44 (1993) ("Heterosexual men and women who report knowing someone who is gay express generally more positive attitudes toward lesbians and gay men than do heterosexuals who lack contact experiences."); Gregory M. Herek, \textit{Stigma, Prejudice and Violence Against Lesbians and Gay Men}, in \textit{Homosexuality: Research Implications for Public Policy} (John C. Gonsiorek & James D. Weinrich eds., 1991) (summarizing the research). This suggests that much hostility toward gay people is based on popular stereotypes rather than first-hand information.

Thus, even if an individual gay person may decrease his chances of suffering discrimination aimed at him personally by "successfully conceal[ing his] sexual orientation," his decision to remain closeted about his sexual orientation might also tend to perpetuate discrimination against gay people in the aggregate. See Jonathan Rauch, \textit{Homosexuals and Victimology: Beyond Oppression}, New Republic, May 10, 1993, at 18, 23 (arguing that social progress for gays will come, not through an "oppression model" of politics that seeks enactment of anti-discrimination legislation, but through "personal action" whereby openly gay people change anti-gay attitudes through honesty and moral example); Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979) ("[O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' acknowledge their sexual preferences, and to associate with others in working for equal rights.").

\textsuperscript{239} The explanation that discrimination that is actualized only upon self-identification is somehow inherently less invidious must be rejected. Taken to its logical extreme, such reasoning would justify even Nazi Germany's extermination of those Jews who identified themselves as Jewish.
example, against Americans of Irish descent merely because an Irish-American could pass as an American of English descent, the court does not explain why the "closet" exception to the Equal Protection Clause is applicable to classifications based on sexual orientation but not to classifications based on national origin.

Further, the court's conclusion that no law can be drafted to successfully discriminate against a closeted gay person is also fallacious. Leaving aside the issue of discrimination based on perceived sexual orientation and the question of whether sexual orientation is, as the Court of Appeals for the Sixth Circuit suggests, always concealable, a law that, for example, bans a gay person from adopting a child undeniably discriminates against the gay person who wants to adopt a child. He must either break the law or forego adopting a child.

Moreover, such a law also discriminates profoundly against every gay person, regardless of whether or not he or she has any interest in adopting a child, because of the stigma such a law attaches to a gay sexual orientation. "To separate [gay people] from others of similar qualifications solely because of their [sexual orientation] generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Indeed, "[b]ecause the stigma [against homosexuality] is attached not simply to an obviously random characteristic, such as skin pigmentation, but to the deepest desires of the human heart, . . . it can eat away at a person's sense of his own dignity with peculiar ferocity."

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240 See Fla. Stat. Ann. § 63.042(2)(3)(d) (West 1985) ("No person eligible to adopt under this statute may adopt if that person is homosexual.").

241 See Ellen Goodman, Gay Policy Won't Work, The Dallas Morning News, July 16, 1993, at 23A ("[T]he primary symbol of gay repression hasn't been the ghetto or a list of segregation laws. It's been the much more psychologically complex image of the closet: the dark place where cultural hate meets, and makes, self-hate . . . "). See also Employment Discrimination Against Gay Men, in Homosexuality in International Perspective 27, 28 (J. Harry & M. Das eds. 1980) (closeted gays may hurt their chances for career advancement by intentionally limiting their job related social interactions).

242 See Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954). See also Miller, supra note 179, at 1290 (arguing that "[r]egulating sexuality to the private sphere revives an element of the old 'separate but equal' doctrine—the belief that the separation of one group from the world of more general social interaction is neither unequal nor stigmatizing").

243 Sullivan, supra note 9, at 24, 35 (arguing that discrimination on the basis of sexual orientation differs from that based on race in that the former "attacks the very heart of what makes a human being human: her ability to love and be loved").
V. Conclusion

Classifications, like race, that historically have been used to saddle certain people with disabilities on the basis of a characteristic that otherwise would be irrelevant to an individual's ability to contribute to society are inherently suspect as more likely to have been the product of irrational prejudice and, thus, are deserving of heightened equal protection scrutiny. Thus, in adjudicating whether a sexual orientation classification is deserving of heightened equal protection scrutiny, a court should ask only whether gay people have suffered a history of discrimination and whether their sexual orientation says anything about their ability to contribute to society.

The federal courts of appeals that have adjudicated the constitutionality of such sexual orientation classifications have avoided answering these questions, however, by holding that homosexuality, unlike race, is a classification based on conduct that falls outside the scope of protections afforded by the "liberty" of the Due Process Clause. These courts have not only failed to appreciate that the protections of the Equal Protection Clause are independent of those of the Due Process Clause, but have also profoundly erred in equating a gay sexual orientation with participation in homosexual sex. Further, in concluding, if only implicitly, that a state may constitutionally proscribe all same-sex erotic activity, these courts also have failed to recognize that the decision of a gay person to participate in such same-sex erotic activity is among "the most intimate and personal choices a person may make in a lifetime, [is] central to personal dignity and autonomy, [and, thus, is] central to the liberty protected by the Fourteenth Amendment."

The physiology and genetics research discussed supra in Part II should inform both the equal protection and the due process analyses at issue. This research evidences that sexual orientation is only a genetically influenced and physiologically based predisposition toward an erotic, affectional and romantic attraction to individuals of one's own sex and exists independent of any physical sexual conduct. Thus, such evidence speaks to the reality of an irreducible essentialist conception of homosexuality—connoting only same-sex desire—which undermines the factual premise—that homosexuality is a status defined

\footnote{See Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).}
by conduct—of the equation of a gay sexual orientation with gay sex. Further, this research evidences that sexual orientation, unlike sexual conduct, involves no volition. We cannot choose to redirect our sexual orientation. For this reason, the decision to engage in same-sex erotic activity, or to abstain from doing so, is qualitatively commensurate with such other deeply personal, and constitutionally protected, decisions relating to family, marriage, and procreation and should be commensurate in constitutional status under the Due Process Clause.

Finally, we can be confident that science will speak even louder to these issues in the near future. While geneticists to date have only detected the presence of a "gay gene," that gene and others that influence sexual orientation are almost certain to be isolated in the very near future. Then it will be possible to determine both how and when these genes influence sexual orientation. This knowledge is likely to impact not only the constitutional analyses relating to laws that repress gay people but also many of the homophobic conceptions that manifest themselves in the enactment of such laws.