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ARTICLES

HOMOSEXUAL RIGHTS AND CITIZEN INITIATIVES: IS CONSTITUTIONALISM UNCONSTITUTIONAL?

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I. INTRODUCTION

Although the laws of at least 23 states continue to treat homosexual sodomy as a criminal offense,¹ a small but increasing number of states recently have begun to move in the opposite direction by enacting homosexual rights legislation. When Minnesota enacted what has been called America's "most compre-

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1. See ALA. CODE § 13A-6-65(a)(3) (1994); ARIZ. REV. STAT. ANN. §§ 13-1411 to 13-1412 (1989); ARK. CODE ANN. § 5-14-122 (Michie 1993); FLA. STAT. § 800.02 (West 1992 & Supp. 1994); GA. CODE ANN. § 16-6-2 (1992); IDAHO CODE § 18-6605 (1987 & Supp. 1994); KAN. STAT. ANN. § 21-3505 (1988 & Supp. 1994); LA. REV. STAT. ANN. § 14:89 (West 1986 & Supp. 1994); MD. ANN. CODE. Art. 27, §§ 553-554 (1992 & Supp. 1993); MICH. COMP. LAWS ANN. §§ 750.158, 750.338 - 750.338(b) (West 1991); MINN. STAT. § 609.293 (1988); MISS. CODE ANN. § 97-29-59 (1972 & 1994 Replacement Volume); MO. ANN. STAT. § 566.090 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. §§ 45-2-101(20), 45-5-505 (1993); NEV. REV. STAT. ANN. § 201.190 (Michie 1992 & Supp. 1993); N.C. GEN. STAT. § 14-177 (1993); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981 & Supp. 1993); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985 & Supp. 1993); TENN. CODE ANN. § 39-13-510 (1994); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (West 1989 & Supp. 1994); UTAH CODE ANN. § 76-5-403 (1990 & Supp. 1994); VA. CODE ANN. § 18-2-361 (Michie 1988 & Supp. 1994). The Kentucky statute criminalizing sodomy, see KY. REV. STAT. ANN. § 510.100 (Baldwin 1994), was declared unconstitutional in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). The Massachusetts statute prohibiting "the abominable and detestable crime against nature," see MASS. ANN. LAWS ch. 272, § 34 (Law Co-op. 1993), was arguably invalidated as applied to private consensual conduct by *Commonwealth v. Balthazar*, 366 Mass. 298, 302, 318 N.E.2d 478, 481 (1974). See also EDITORS OF HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 9-10, n.2 (1990).

hensive gay rights law² in early 1993, it became the eighth state to pass antidiscrimination laws protecting sexual inclinations and behavior.³ A number of cities and counties also have passed similar restrictions on private employers and landlords.⁴

However, a libertarian counter-trend may be developing. Congress has consistently rejected efforts to amend title VII of the 1964 Civil Rights Act to cover sexual orientation as a protected characteristic.⁵ Moreover, in a statewide initiative in Colorado, and in a number of local initiatives across the country, the people have acted to protect themselves against restrictive homosexual rights laws.⁶ The success of citizen initiatives rejecting special rights for homosexuals⁷ has led homosexual

2. *The Minnesota Model*, THE ECONOMIST, Apr. 24, 1993, at 26.

3. See CAL. CIVIL CODE § 51.7 (West Supp. 1994); CAL. LABOR CODE § 1102.1 (West 1989 & Supp. 1994); CONN. GEN. STAT. ANN. § 46a-81a - 46a-81r (West 1986 & Supp. 1994); HAW. REV. STAT. §§ 378-1, 378-3 (1994); MASS. ANN. LAWS. ch. 151B, §§ 3, 4 (Law Co-op. 1989 & Supp. 1994); MINN. STAT. ANN. § 363 (West 1991 & Supp. 1994); N.J. STAT. ANN. §§ 10:5-5, 10:5-12 (West 1993 & Supp. 1994) VT. STAT. ANN. tit. 1, § 143 (Supp. 1993), tit. 9, §§ 4503-4504 (1993), tit. 21, § 495 (Supp. 1993); WIS. STAT. ANN. §§ 101.22, 111.32 (West 1988 & Supp. 1993). See also D.C. CODE ANN. §§ 1-2501 to 1-2533 (1981 & Cum. Supp. 1994).

4. A recent student Note reports that at least 139 jurisdictions have adopted some form of homosexual rights legislation. Note, *Constitutional Limits On Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1905 (1993). For a list of these jurisdictions, see *id.* at 1923-25.

5. See EDITORS OF HARVARD LAW REVIEW, *supra* note 1, at 68-69.

6. Voters in Cincinnati, Ohio; Lewiston, Maine; Portsmouth, New Hampshire; and several communities in Oregon have recently voted to reject special rights for homosexuals. See Timothy Egan, *Voters in Oregon Back Local Anti-Gay Rules*, N.Y. TIMES, July 1, 1993, at A10; Timothy Egan, *Propositions: Ballot Measures on Term Limits and Crime Draw Wide Support*, N.Y. TIMES, Nov. 4, 1993, at A24. Similar grass roots campaigns to protect civil liberties against restrictive homosexual rights laws are also being waged in Arizona, Missouri, Oregon, Idaho, Michigan, Nevada, and Washington. See Bettina Boxall, *Anti-gay-rights Measures Ignite Aggressive Battles in 7 States*, L.A. TIMES, June 9, 1994, at A5. Although some of these initiative campaigns have failed to qualify for inclusion on 1994 ballots, the citizens of Oregon and Idaho will vote on the issue in November. See *Petitions Presented to Block Gay Rights*, WASH. TIMES, July 9, 1994, at A5; Marty Trillhaase, *Anti Gay Rights Debate Begins 4-Month Run*, IDAHO FALLS POST REGISTER, July 7, 1994, at A1, A3.

7. We use the term "special rights" advisedly. When proponents of homosexual rights legislation argue that they are seeking nothing more for homosexuals than the same civil rights everyone else has, they are wrong for two reasons. First, homosexuals already have the same rights everyone else has — the right to be protected against discrimination on the basis of their race, gender, religion, age, and disability. Second, since the general rule continues to be one of mutual consent and free choice in matters of housing and employment, homosexuality is merely one of countless activities left unprotected by antidiscrimination laws. See Richard F. Duncan, *Who Wants To*

rights advocates to turn to the courts to reverse the will of the people.⁸

Gay rights supporters have viewed the Equal Protection Clause of the Fourteenth Amendment as their last best hope for constitutional protection of homosexuality since *Bowers v. Hardwick*⁹ was decided in 1986. In *Hardwick*, the Court conclusively held that there is no fundamental right under the Due Process Clause to engage in consensual homosexual sodomy. However, as noted by many commentators, *Hardwick* did not address whether the Equal Protection Clause provided the constitutional resources to protect homosexuals from governmental discrimination. In one response to *Hardwick*, Professor Cass Sunstein argues that the structural distinctions between the Due Process Clause and the Equal Protection Clause are also substantive: *i.e.* the Equal Protection Clause will bear some fundamental rights which do not exist under the Due Process Clause.¹⁰ Homosexual rights advocates have insisted that the right to be free from discrimination based upon one's homosexuality is located in one of these rights.¹¹

Sunstein accepts *Hardwick's* holding that rights under the Due Process Clause are limited to those grounded historically as "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."¹² On the other hand, the Equal Protection Clause, Sunstein muses, "is a self-conscious repudiation of history and tradition as defining constitutional principles."¹³ Where the Due Process Clause is backward looking, the Equal Protection Clause is forward looking. "Analysis of an equal protection claim therefore proceeds along an entirely

Stop The Church: Homosexual Rights Legislation, Public Policy, And Religious Freedom, 69 NOTRE DAME L. REV. 393, 399-401 (1994).

8. See *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (en banc) (Colorado's Amendment Two initiative); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994) (Cincinnati charter amendment).

9. 478 U.S. 186 (1986).

10. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

11. See, e.g., Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

12. See Sunstein, *supra* note 10, at 1168. We do not mean to suggest that Sunstein agrees with the holding of *Hardwick*. He clearly does not. *Id.* at 1173-74.

13. *Id.* at 1168. But see *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67 (1872) (noting that the historical setting of the Civil War Amendments "cannot fail to have an important bearing on any question of doubt concerning their true meaning.").

distinct track," and as such, "a class that includes people who engage in acts substantively unprotected by the Due Process Clause can be entitled to judicial protection against official discrimination."¹⁴ Thus, Sunstein concludes — in a bit of sage: "constitutional protection against discrimination on the basis of sexual orientation will ultimately take place under the Equal Protection Clause. It should be unsurprising if such developments occur even in the wake of *Bowers v. Hardwick*."¹⁵

Given these high expectations, it is hard not to sympathize with the Colorado Supreme Court when faced with *Evans v. Romer*,¹⁶ the recent challenge to Colorado's now famous Amendment Two. Amendment Two is the Colorado voter initiative to amend Colorado's state constitution to proscribe the enactment of legislation which would grant special rights to homosexuals.¹⁷ Specifically, Amendment Two forbids government action which recognizes homosexuality or bisexuality as grounds for "minority status [or] quota preferences," as support for designation as a protected class, or as the basis for a claim of discrimination.¹⁸

Whatever its constitutional viability, Amendment Two has provoked a sharp — often hysterical — response in certain powerful segments of society.¹⁹ Various gay rights groups and mem-

14. Sunstein, *supra* note 10, at 1168.

15. *Id.* at 1179. See also Halley, *supra* note 11.

16. 854 P.2d 1270 (Colo. 1993) (en banc). Following the court's decision in *Evans*, the case was remanded to the trial court and once again came before the Colorado Supreme Court. See *Evans v. Romer*, Nos. 94SA48, 94SA128, 1994 Colo. LEXIS 779 (Colo. Oct. 11, 1994) (hereinafter cited as "*Evans II*"). The court refused to reconsider the constitutional principles it had articulated in the original *Evans* decision. *Id.* at *11.

17. See *supra* note 7.

18. If *Evans* had lifted the preliminary injunction, Amendment Two would have been COLO. CONST. Art. II, § 30b:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

19. We use the term "hysterical" advisedly. Opponents of Amendment Two have denounced proponents of the measure as bigots, homophobes, and haters. One man, already dying of AIDS, even committed suicide and left a note blaming Amendment Two for his decision to take his own life. See, e.g., Gary Lee, *More Groups Join Boycott of Colorado; Protest Grows Against Anti-Gay Rights Law*, WASH. POST, Dec. 23, 1992, at A13; Mark Shaffer, *Colorado Battling Boycott*

bers of the entertainment industry have been particularly hostile to the Colorado voters, denouncing them as "homophobic" and advocating boycotts of Colorado's tourism market until the amendment's repeal. Not surprisingly, these appeals of political activists are more emotional rhetoric and *ad hominem* than sophisticated legal or moral arguments that homosexuality deserves governmental endorsement. Nevertheless, even those in the legal community who have discussed Amendment Two have been unable to resist engaging in reductionistic hyperbole regarding Colorado and its citizens.²⁰

Presumably, simple political outrage does not jurisprudence make. Two things would have made the court's job much easier as it faced this politically volatile amendment. First, of course, the Colorado voters could have simply had a different will and rejected the initiative. However, Amendment Two was a substantial success in the voting booth: 813,966 (53.4%) voted for the amendment, while 710,151 (46.6%) voted against it.²¹ In a state the size of Colorado, 100,000 votes is a substantial margin.

Second, Amendment Two could also have been dispensed with more readily if homosexuals were considered a "suspect class," thereby provoking strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. This solution was ruled out as well, however, because it is well established that homosexuals are not a "suspect class."²²

Thus, the only colorable option²³ that remained if the court were to rule against the constitutionality of Amendment Two was

Over Anti-Gay Law, NEW ORLEANS TIMES-PICAYUNE, Jan. 10, 1993, at A3. Regrettably, this irrational fervor has even spread to the pages of prestigious law reviews. For example, a student note critical of Amendment Two repeatedly railed against "right-wing, fundamentalist Christian groups," the "homophobic right," and other demons of the author's own imagining. See Note, *Constitutional Limits On Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1909, 1910 (1993). A law professor went so far as to compare supporters of Amendment Two with the Ku Klux Klan. Charlene L. Smith, *Undo Two: An Essay Regarding Colorado's Anti-Lesbian and Gay Amendment 2*, 32 WASHBURN L.J. 367 (1993).

20. See *supra* note 19. The citizens of Colorado, however, seem unfazed by the hysteria brought about by their democratic choices. Indeed, popular support for Amendment Two has increased in the months following its passage. See WASH. POST, Jan. 4, 1993, at A9.

21. See *Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993).

22. See *infra* notes 29-64 and accompanying text.

23. The plaintiffs in the case also presented several other challenges to Amendment Two. For example, they argued that Amendment Two: violates the plaintiffs' rights to free association and expression; violates the plaintiffs' First Amendment right to petition government for a redress of grievances; is unconstitutionally vague; violates the guarantee to have a republican form of

the second prong of equal protection jurisprudence, which engages strict scrutiny if a court finds that a "fundamental right" is infringed by a legislative classification. Thus, the challenge of *Evans* was to find a fundamental right that Amendment Two restricts. Given that initiatives and legislation similar to Amendment Two are being considered in a number of jurisdictions, *Evans* is either the equal protection grail so desperately sought by those who seek to undermine voter initiatives like Amendment Two, or it is a signal of the strength of similar amendments against equal protection challenges. As we will see, litigants whose sensibilities are offended by similar voter initiatives face a difficult constitutional challenge, and *Evans'* attempt at a solution is unsuccessful.

II. STRICT SCRUTINY AND AMENDMENT TWO

Legislation — or in this case, a state constitutional amendment — challenged on equal protection grounds generally is presumed to be valid if the classification involved in the legislation is "rationally related to a legitimate state interest."²⁴ Therefore, "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."²⁵ However, legislative classifications are subject to review by more exacting standards in some cases. Legislation is subject to "strict scrutiny" if it fits in one of two descriptive categories: 1) the legislation makes a classification involving members of traditionally "suspect classes;"²⁶ or 2) the law creates a classification which infringes on a "fundamental constitutional right."²⁷ Laws that fit in these categories will survive strict scrutiny only if they are necessary to effectuate a compelling state interest and are narrowly drawn to achieve that interest in the least restrictive manner possible.²⁸

government under Art. IV, § 4 of the United States Constitution; violates Colorado's constitutional limits on the power of initiatives; and violates the Supremacy Clause, the Due Process Clause of the Fourteenth Amendment, and the access to courts clause of the Colorado Constitution. See Plaintiffs' Amended Complaint at 6-12, *Evans* (No. 93SA17). Neither the trial court nor the Colorado Supreme Court addressed these arguments, preferring instead to rely on the equal protection issues involved. *Evans*, 854 P.2d at 1274.

24. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). See *F.C.C. v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993).

25. *Cleburne*, 473 U.S. at 440 (citations omitted).

26. *Id.*

27. *Id.*

28. *Id.* See also *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

A. *Suspect Classes and Equal Protection*

It is well established in the federal circuit courts that homosexuals do not constitute a "suspect" or a "quasi-suspect" class under the Equal Protection Clause.²⁹ Although a full-scale defense of these cases is beyond the scope of this Article, the following discussion will briefly outline the reasons why it is unlikely that the Supreme Court will soon expand its suspect class doctrine to include homosexuals.

Typically, courts have "based their analyses of suspect or quasi-suspect classes on the model of race, the only criterion that uncontestedly entails a suspect classification."³⁰ Groups seeking suspect status must have characteristics that "resemble race to some largely unelucidated [sic] degree."³¹ One problematic test,³² which is nevertheless useful for present purposes, states that to qualify as "suspect" or "quasi-suspect," a class of persons must meet three requirements. Members of the class must: 1) exhibit a trait that is immutable and highly visible and "which automatically consigns an individual to a general category (such as race or gender), often implying the inferiority of the person so categorized;"³³ 2) have suffered under a history of pervasive discrimination or been subjected "to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities;"³⁴ and, 3) have been "relegated to such a position of polit-

29. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. U.S.*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 102-103 (D.C. Cir. 1987); *National Gay Task Force v. Board of Education*, 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd, 470 U.S. 903 (1985). But see *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 436 (S.D. Ohio 1994) (homosexuals treated as a "quasi-suspect" class).

30. Note, *The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification*, 98 HARV. L. REV. 1285, 1298 (1985).

31. *Id.*

32. One commentator notes that "[w]hat judicial elucidation there is has developed sporadically in the context of particular cases, and has given rise to an ambiguous catalogue of characteristics of suspectness that yields no obvious or coherent theory of suspect classifications." *Id.*

33. Kenneth L. Karst, *The Supreme Court 1976 Term, Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 23 (1977). See also *High Tech Gays*, 895 F.2d at 573 (homosexuals do not constitute a suspect or quasi-suspect class).

34. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). In *Murgia*, the Court held that the elderly are not a suspect class and proceeded to apply the rational basis test in upholding a Massachusetts law prescribing mandatory retirement for state police officers at age 50.

ical powerlessness as to command extraordinary protection from the majoritarian political process.”³⁵

The Ninth Circuit’s recent analysis of whether homosexuals constitute a suspect class is typical. In *High Tech Gays v. Defense Industry Security Clearance Office*,³⁶ the court considered whether the Department of Defense’s policy of subjecting all homosexual applicants for security clearances to extended background checks violated their right to equal protection. In a thoughtfully reasoned opinion, the court concluded that homosexuals do not constitute a suspect or quasi-suspect class under the tripartite test.

The court conceded — perhaps too quickly — that homosexuals have suffered a history of discrimination.³⁷ However, homosexuals did not satisfy the two remaining criteria. The court found that homosexuality was behavioral and was not immutable. It differed from suspect classes — such as race — because unlike homosexuality “[t]he behavior or conduct of such already recognized classes is irrelevant to their identification.”³⁸ Also, the court found that homosexuals, far from being politi-

35. *Id.*

36. 895 F.2d 563 (9th Cir. 1990).

37. *Id.* at 573. Although many homosexuals, like almost everyone else, undoubtedly have been discriminated against in employment and housing on occasion, the available evidence indicates that the discrimination is neither pervasive nor economically devastating. In fact, according to data gathered in the 1990 U.S. Census and several other studies, male homosexual households ranked at the top in terms of average annual household income. See Duncan, *supra* note 7, at 407-09. A recent study advocating the amendment of antidiscrimination laws to include sexual orientation as a protected category attempts to justify this position by establishing that homosexuals earn less than similarly-situated heterosexuals. See M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, Industrial & Labor Relations Review (forthcoming). This study, however, has many serious methodological flaws. For example, the study is limited to a sample of only 34 lesbian or bisexual women and only 47 gay or bisexual men. And even these small samples are inflated because the study defined a lesbian/gay/bisexual as anyone having reported “at least one same-sex sexual partner since the age of 18.” *Id.* (Manuscript Table 2). Although the study controls for a number of factors related to earnings, such as education, occupation, marital status, and experience, it fails to control for health despite evidence that homosexuals (particularly homosexual men) experience many health problems not shared by heterosexuals. See *infra* note 54. Given that absenteeism and other health-related problems may affect job performance (and, therefore, compensation), this omission is problematic. Moreover, the study lacked a variable measuring the extent of workplace disclosure of homosexuality or bisexuality, a serious omission since, as Prof. Badgett admits, “disclosure is necessary for direct discrimination.” Badgett, *supra*. Finally, the study’s results concerning an earnings disparity for lesbian and bisexual women were not statistically significant. See *id.*

38. *High Tech Gays*, 895 F.2d at 573-74.

cally powerless, have both the resources and the ability to attract the attention of lawmakers throughout the nation.³⁹ Because homosexuals did not meet these two elements, they did not qualify as a suspect or quasi-suspect class.⁴⁰

The Ninth Circuit's conclusion in *High Tech Gays* is clearly correct. The Equal Protection Clause was designed primarily to eliminate racial discrimination⁴¹ and "only those classifications that are 'like race' in some relevant sense can responsibly be accorded similar treatment."⁴² As Justice Rehnquist once put it, the problem presented by the Equal Protection Clause is one of sorting through mounds of perfectly legitimate legislative distinctions in order to isolate and invalidate those few "which involve invidiously unequal treatment."⁴³

To date, the Supreme Court has identified only three classes (race, ethnicity, and, at least sometimes, alienage) as suspect and only two (gender and illegitimacy) as quasi-suspect.⁴⁴ When

39. *Id.* at 574. As Judge Richard Posner observes in his recent analysis of sex and public policy, homosexuals "have become a political force to be reckoned with." RICHARD A. POSNER, *SEX AND REASON* 292 (1992). See also Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES, Oct. 11, 1992, § 6 (Magazine), at 21 ("it is clear that homosexuals have crossed a threshold, becoming an integral part of American political life"). The political power of homosexuals is not surprising, because small, special interest groups "are exactly the groups that are likely to obtain disproportionately large benefits from the political process." Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 428.

40. *High Tech Gays*, 895 F.2d at 574.

41. As Justice Miller observed more than 100 years ago, the Civil War Amendments share one pervading purpose — "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872). Specifically with respect to the Equal Protection Clause, the *Slaughter-House* Court found that state laws which discriminated with gross injustice against the newly-emancipated African-Americans were "the evil to be remedied by this clause, and by it such laws are forbidden." *Id.* at 81. See also *Strauder v. West Virginia*, 100 U.S. 303 (1880). For a scholarly analysis of the original understanding of the Fourteenth Amendment, see Alexander M. Bickel, *The Original Understanding And The Segregation Decision*, 69 HARV. L. REV. 1 (1955).

42. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 149 (1980).

43. *Trimble v. Gordon*, 430 U.S. 762, 779 (1977) (Rehnquist, J., dissenting).

44. See Craig C. Burke, Note, *Fencing Out Politically Unpopular Groups from the Normal Political Processes: The Equal Protection Concerns of Colorado Amendment Two*, 69 IND. L. J. 275, 278-79 (1993). See, e.g. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-95 (1989) (race); *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (ethnicity); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage);

these classes are broken down to basic elements, they share a common denominator — a history of discrimination on the basis of a morally neutral, non-behavioral characteristic. Classifications drawn along these lines serve no respectable purpose and instead “are frequently the reflection of historic prejudices rather than legislative rationality.”⁴⁵ In other words, “the doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake — to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members.”⁴⁶ Under this concept of suspectness, are classifications that disadvantage homosexuals similar to racial classifications?

A consensus has developed in our society around the central insight of the civil rights movement, Dr. Martin Luther King’s perception that racial discrimination is invidious because people should be judged by the content of their character, not by the color of their skin.⁴⁷ Racial classifications are improper, therefore, not because race is immutable and inherent,⁴⁸ but rather

Mississippi University for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy).

45. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) (Marshall J., dissenting). See ELY, *supra* note 42, at 152.

46. ELY, *supra* note 42, at 153. See City of Cleburne v. Cleburne Living Center Inc., 473 U.S. 432, 440 (1985) (race, alienage, and national origin “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy”).

47. “I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” MARTIN LUTHER KING, JR., *I Have a Dream Address at the Lincoln Memorial*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 219 (J. Washington ed., 1991). Dr. King delivered this historic address at the Lincoln Memorial on August 28, 1963. *Id.* at 217. Dr. King’s insight suggests that people should be judged on the basis of what they do, and not on the basis of their race or color. Similarly, in *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), Justice Brennan argued that gender classifications should be treated as suspect because they “violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .’” *Id.* at 686 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)). See also *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (“Classifications treated as suspect tend to be irrelevant to any proper legislative goal”).

48. Immutability is neither necessary nor sufficient for suspect classification. See ELY, *supra* note 42, at 150; Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 SO. CAL. L. REV. 797, 813 (1984). For example, even if blacks could take a safe, inexpensive pill and become Caucasian, no one would argue seriously that discrimination against blacks who declined the drug and chose to remain black was any less invidious. Since race is irrelevant to character and abilities, racial

because race is a morally neutral characteristic. Race tells nothing about an individual's character or abilities.⁴⁹

In contrast, legal distinctions drawn on the basis of socially undesirable conduct, such as those disadvantaging burglars or drug users, are clearly legitimate.⁵⁰ These classifications are not invidious, because they further legitimate societal goals by discouraging inappropriate or immoral behavior.⁵¹ Laws prohibiting homosexual sodomy seem to fall in this category, because they are the product of a sincere and reasonable societal objection to conduct deemed immoral,⁵² unnatural,⁵³ or unhealthy.⁵⁴

discrimination is invidious even if race is a choice. See Duncan, *supra* note 7, at 402. On the other hand, classifications based on physical abilities and intelligence are generally regarded as legitimate even though these characteristics are immutable. See ELY, *supra* note 42, at 150; Note, *supra*, at 813.

49. Gen. Colin Powell, former chairman of the Joint Chiefs of Staff, was criticized recently by Rep. Patricia Schroeder for his support of the military's ban on homosexuals. Rep. Schroeder complained that Powell's views were similar to those once used against desegregating the military. General Powell, who is black, informed Rep. Schroeder that he needed "no reminders concerning the history of African-Americans" in the military and went on to remind her of the difference between race and sexuality:

Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.

Elmo Zumwalt, Jr., *Guidance From Gen. Powell*, WASH. TIMES, June 4, 1992, at G3. See also *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 440 (1985) (race, alienage, and national origin are normally irrelevant to "the achievement of any legitimate state interest").

50. See ELY, *supra* note 42, at 154. "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has authority to implement, the courts have been very reluctant, as they should be in our federal system and with respect for the separation of powers, to closely scrutinize legislative choices [under the Equal Protection Clause]." *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 441-42 (1985) (mentally retarded are not a quasi-suspect class entitled to a more exacting standard of judicial review under the Equal Protection Clause).

51. See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 136 (1981) ("it is entirely proper for the legislature to prohibit burglary and any number of other behaviors for reasons that ultimately rest on their immorality"). For example, in *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (plurality opinion), a case in which the Supreme Court upheld a law denying biological fathers the right to sue for the wrongful death of their illegitimate children, Justice Stewart explained that under equal protection analysis it is "neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bounds of marriage.'"

52. In his concurring opinion in *Hardwick*, Chief Justice Burger summarized what he referred to as "millennia of moral teaching" about homosexuality:

[T]he proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been

subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian [sic] moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, *Homosexuality and the Western Christian Tradition* 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, *Commentaries* *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (emphasis in original).

Our society's three major religions — Judaism, Christianity, and Islam — historically have viewed homosexuality as immoral. See, e.g., The Jewish Torah (*Leviticus* 18:22, 20:13), the New Testament (*Romans* 1:26-28, I *Timothy* 1:9-10, I *Corinthians* 6:9-10) and the Koran (*The Heights* 7:80). Many reputable modern scholars also conclude that homosexuality is immoral. See, e.g., PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); HARRY V. JAFFA, *HOMOSEXUALITY AND THE NATURAL LAW* (1990); RAMSEY COLLOQUIUM, *The Homosexual Movement*, FIRST THINGS 15 (Mar. 1994); John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994); John M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 445-46 (1987). Finally, "[a]ll three of the greatest Greek philosophers, Socrates, Plato and Aristotle, regarded homosexual *conduct* as intrinsically shameful, immoral, and indeed depraved or depraving." Finnis, 69 NOTRE DAME L. REV., *supra*, at 1055 (emphasis in original). *But see* Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994) (responding to and disputing Professor Finnis' position).

53. See JAFFA, *supra* note 52. Plato observed that sexual pleasure was "granted by nature to male and female when conjoined for the work of procreation" and that "the crime of male with male, or female with female, is an outrage on nature and a capital surrender to lust of pleasure." PLATO, *LAWS* § 636, at 13 (A.E. Taylor trans. 1969). See also Finnis, 69 NOTRE DAME L. REV., *supra* note 52, at 1057.

54. See Warren Winkelstein, Jr., et al., *Sexual Practices and Risk of Infection by the Human Immunodeficiency Virus: The San Francisco Men's Health Study*, 257 JAMA 321 (1987). Dr. Winkelstein's findings "support the inference that sexual transmission of HIV infection in homosexual/bisexual men in San Francisco, during the current AIDS epidemic, has been largely a function of the numbers of sexual contacts and the practice of receptive anal/genital contact among them." *Id.* at 325. See also Lawrence A. Kingsley, et al., *Sexual Transmission Efficiency of Hepatitis B Virus and Human Immunodeficiency Virus Among Homosexual Men*, 264 JAMA 230 (1990). Another scientific study of homosexual men published in a leading medical journal found that "oral-anal sex with multiple male partners carries an extremely high risk of intestinal infection." Thomas C. Quinn, et al., *The Polymicrobial Origin of Intestinal Infections In Homosexual Men*, 309 NEW ENG. J. MED. 576, 582 (1983). Major Melissa Wells-Petry recently conducted an exhaustive study of the scope, nature, and consequences of

In this light, sodomy laws are no more suspicious than legislation outlawing burglary or drug use.

But suppose instead of criminal laws prohibiting burglary or sodomy a school district policy provides that anyone who admits to being either a burglar or a homosexual may not be employed as a teacher in any government school.⁵⁵ Although the state may have a legitimate interest in discouraging theft and sodomy, does this interest extend to the school district's policy?

Professor John Hart Ely believes the classification regarding burglars is legitimate because it will discourage burglaries.⁵⁶ Yet, he condemns the classification of homosexuals as invidious⁵⁷ without providing a rationale for the distinction.⁵⁸ However, neither classification is invidious because both are reasonable attempts to take into account the character of public school teachers. Neither burglars nor homosexuals merit suspect class status, and neither burglary nor homosexual behavior merits constitutional protection as a fundamental right. Therefore, both classifications should be upheld as reasonable means of furthering the state's legitimate interest in employing men and women of good character to serve as positive role models for students in government schools.⁵⁹

homosexual practices. MELISSA WELLS-PETRY, *EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE* (1993). She discovered that as a result of common homosexual practices — such as anal sodomy, “fisting” (anal-fist contact), and anilingus (oral-anal contact known as “rimming” in the homosexual community) — homosexual males are at high risk of contracting AIDS, hepatitis A, hepatitis B, anorectal venereal warts, and intestinal spirochetosis among other infections. *Id.* at 92-110. Physicians have even coined a term, the “gay bowel syndrome,” to aid in the diagnosis of anal infections and trauma experienced by many homosexual men. *Id.* at 107. David Richards' 1979 statement denying the immorality of homosexuality because “[t]here is no convincing evidence that homosexuality is either harmful to the homosexual or correlated with any form of mental or physical disease” seems completely inoperative in light of the medical evidence to the contrary. David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *HASTINGS L.J.* 957, 989 (1979).

55. See ELY, *supra* note 42, at 250 n.65.

56. *Id.*

57. *Id.* at 163, 255 n.92.

58. Professor Brest has the same difficulty with Ely's position: “If society can express its fear or moral condemnation of burglars by forbidding them certain jobs . . . why can't it do likewise with respect to homosexuals?” Brest, *supra* note 51, at 136. The distinction Ely makes is perhaps nothing more than a product of his subjective views on the comparative merits of burglary and homosexuality.

59. We also agree with Professor Sunstein's observation that “the question whether a group deserves special solicitude under the Equal Protection Clause depends on an inescapably normative inquiry into the

Moreover, the Supreme Court's decision in *Bowers v. Hardwick*⁶⁰ weighs heavily against a claim of suspect class status for homosexuals. Given that *Hardwick* held that the Constitution allows states to enforce laws obviously intended to discourage homosexuality, a decision that homosexuals deserve the status of a traditionally suspect class is highly unlikely, short of direct reversal of *Hardwick*.⁶¹ The D.C. Circuit Court of Appeals has made the import of *Hardwick* on the equal protection issue clear:

If the Court [in *Hardwick*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.⁶²

The lack of grounds for claiming suspect class status for homosexuals was obvious to both the plaintiffs and the court in *Evans*. The plaintiffs never raised a suspect class argument on appeal,⁶³ and the court only mentioned it in order to dismiss it.⁶⁴

legitimacy of the reasons ordinarily used to disadvantage that group." Sunstein, *supra* note 10, at 1177 n.79. Our disagreement with Professor Sunstein's conclusion that "constitutional protection against discrimination on the basis of sexual orientation will ultimately take place under the Equal Protection Clause" is the product of different traditions and different ways of understanding the relationship between character and sexuality. Cf. Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 73 (1991); Sunstein, *supra* note 10, at 1179. A federal trial court recently concluded that "sexual orientation, whether hetero-, homo- or bisexual, bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society." Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994). This court apparently believes that so long as one has the physical or intellectual abilities to perform a task, character is not a relevant factor. This is a repudiation of Dr. King's statement of the basic principle of civil rights law, which in turn is perhaps the reason why higher levels of judicial authority have held that homosexuals do not qualify as a suspect or quasi-suspect class. See *supra* note 29.

60. 478 U.S. 186 (1986).

61. Additionally, given the current Court's claims to defend its institutional integrity by honoring the doctrine of *stare decisis*, presumably the change in the Court's composition since *Hardwick* would have no more effect on the viability of *Hardwick* than say, that of *Roe v. Wade*, 410 U.S. 113 (1973). See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

62. *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1989). See also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). Sodomy is a crime in 23 states. See *supra* note 1.

63. See *Evans*, 854 P.2d at 1275.

64. *Id.*

B. *Fundamental Rights and Equal Protection*

Given that homosexuals do not constitute a suspect class, the Equal Protection Clause would otherwise command strict scrutiny only if Amendment Two created "inequalities bearing on fundamental rights."⁶⁵ The existence of such a right is a substantive matter requiring a "judicial determination that the text or structure of the federal Constitution evidences a value that should be taken from the control of the political branches of government."⁶⁶ Typically, a determination that a fundamental right exists depends upon whether the Court decides that a particular right is "implicit in the concept of ordered liberty,"⁶⁷ or "fundamental to the American scheme of justice."⁶⁸

III. *EVANS'* FORMULATION OF THE FUNDAMENTAL RIGHT

Remarkably, the Colorado Supreme Court made the curious discoveries that constitutionalism (*i.e.* the idea of protecting individual liberties against democratically-enacted restrictions) is unconstitutional and that our society's commitment to participatory democracy required the results of a voter initiative to be set aside. In order to reach these peculiar results, the court was required to stretch beyond recognition an important line of equal protection cases decided by the Supreme Court of the United States.

Initially, three groups of cases informed the court's approach to Amendment Two — the right to vote cases, the reapportionment cases, and the ballot access cases. Surveying these cases, the court found a basis for a fundamental right which would bring strict scrutiny to bear on Amendment Two.

The court noted that the Supreme Court has consistently invalidated legislation which restricted the right to vote, such as poll taxes and requirements that voters be civilians, own property, or have children, because these laws had the effect of "fencing out" certain classes of voters.⁶⁹ Borrowing from the

65. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-7, at 1454 (2d ed. 1988). See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

66. *Evans*, 854 P.2d at 1290 (Erickson, J., dissenting). See also *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (fundamental rights must be "explicitly or implicitly guaranteed by the Constitution").

67. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

68. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). See *Evans*, 854 P.2d at 1291 (Erickson, J., dissenting).

69. *Evans*, 854 P.2d at 1277; *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

reasoning of *Kramer v. Union Free School District*⁷⁰ that laws "granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives,"⁷¹ the *Evans* majority leaped to the conclusion that "to the extent that legislation impairs a group's *ability to effectively participate* (which is not to be confused with successful participation) in the process by which government operates, close judicial scrutiny is necessitated."⁷²

Evans also discovered an interest in protecting political participation in the reapportionment cases.⁷³ The court found these cases informative because they highlighted the Equal Protection Clause's protection of "participatory effectiveness, *i.e.*, the right to have one's vote be as meaningful as the votes of others."⁷⁴ The *Evans* majority further observed that these cases reflect the Supreme Court's judgment that

dilution in the effectiveness of certain voters' exercise of the franchise violates the guarantee of equal protection of the laws not simply because citizens are guaranteed the right to vote, but because that right must be preserved in a meaningful, effective manner. In short, equal protection requires that voters are able to exercise the right of franchise on an even footing with others.⁷⁵

Legislation which undermines one's vote — by diluting it in these cases — interferes with this qualitative aspect of the right to vote and thus deserves strict scrutiny.

Finally, the *Evans* court found a group of ballot access cases to be informative. In these cases, the Supreme Court reviewed a number of statutes, which regulated how parties or candidates are placed on the ballot, to determine whether they denied voters equal protection. For example, in *Williams v. Rhodes*,⁷⁶ the Supreme Court considered a series of Ohio election laws which "made it virtually impossible" for certain political parties to be placed on the ballot in presidential elections. The Court held that the restrictions violated the Equal Protection Clause because

70. 395 U.S. 621 (1969).

71. *Id.* at 626-27.

72. *Evans*, 854 P.2d at 1277 (emphasis added).

73. See, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

74. *Evans*, 854 P.2d at 1278.

75. *Id.* (citations omitted).

76. 393 U.S. 23, 24 (1968).

they unjustifiably burdened the "right of qualified voters, regardless of their political persuasion, to cast their votes effectively."⁷⁷

Evans granted that the right to vote cases, the reapportionment cases, and the ballot access cases are "not dispositive of, or directly controlling on, our decision here" and that they "addressed entirely distinct questions and constitutional problems from those presented" by Amendment Two.⁷⁸ Nevertheless, the court asserted that there was a "common thread" between these cases and Amendment Two — "the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process."⁷⁹ Under this analysis, the right to participate equally in the political process is a fundamental right which triggers strict scrutiny under the Equal Protection Clause.⁸⁰ "[T]hus, any attempt to infringe on that right . . . can be held constitutionally valid only if supported by a compelling state interest."⁸¹

A. Amendment Two and the Right to Vote

Although the Colorado Supreme Court claims to have found a "common thread" which connects the right-to-vote cases with litigation seeking to nullify the popular adoption of initiatives such as Amendment Two, its reasoning in *Evans* is unpersuasive and seems little more than a fig leaf designed to cover the court's results-oriented jurisprudence. The right-to-vote cases all relate directly to the process of electing representatives. They involve either direct restrictions on the right to vote — such as denial of the franchise or of the right to cast a vote for the candidate of one's choice — or dilution of the weight of one's vote through the process of assigning voters to unequal districts. None of these cases even remotely involves the issue in *Evans* — whether groups of fully and equally empowered voters have a constitutional right to be free of constitutional restrictions on their substantive political agendas. In other words, the plaintiffs in *Evans* seek not the vote, but the right to regulate the lives and property of others free of constitutional limitations designed to protect the liberties of those whom they seek to regulate.⁸²

77. *Id.* at 30. See *Evans*, 854 P.2d at 1278. The *Evans* dissent noted that strict scrutiny no longer applies to ballot access cases. *Id.* at 1296 (Erickson, J., dissenting). See, e.g., *Burdick v. Takushi*, 112 S. Ct. 2059 (1992) (applying balancing test); *Anderson v. Celebreeze*, 460 U.S. 780 (1983).

78. *Evans*, 854 P.2d at 1278.

79. *Id.* at 1279.

80. *Id.*

81. *Id.*

82. See *infra* Section IV.

The most elementary right-to-vote cases involved legislation which required citizens to meet various prerequisites before they were allowed to vote. The prerequisites might have included a poll tax, a test on the substance of the Constitution, or even a demonstration of property ownership. If a person failed to meet these tests, they were denied the franchise. The Supreme Court has consistently struck down these tests as unconstitutional violations of the fundamental right to vote.⁸³

The reapportionment cases also involved factual issues which are markedly different from the issues concerning Amendment Two. In the leading reapportionment case, *Reynolds v. Sims*,⁸⁴ the Court was asked to review laws which diluted the force of a person's vote. The reapportionment law at issue in *Reynolds* organized legislative districts geographically such that the voting districts in the state had widely disparate numbers of voters, even though each district elected the same number of legislators.

The Court rejected these laws because they undermined the "substantial equality" of the value of a person's vote with respect to others in the same state. *Reynolds* stressed the practical goal of this principle: "[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."⁸⁵

Although the Court in *Evans* correctly analyzed the egalitarian purpose for rejecting the flawed reapportionment laws, it failed to discern the context and focus of the decision in *Reynolds*. The *Reynolds* Court clearly stated that strict scrutiny is called for because the unequal effects of reapportionment laws impinge on a particular fundamental right, the right to vote:

[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.⁸⁶

Finally, the ballot access cases also directly implicate the fundamental right to vote.⁸⁷ For example, in *Rhodes*, Ohio election

83. See *Evans*, 854 P.2d at 1277.

84. 377 U.S. 533 (1964).

85. *Id.* at 579.

86. *Id.* at 568.

87. It should be noted that while the ballot access cases are a species of the fundamental right to vote, they are not equal to it. The Supreme Court has

laws severely restricted access of new or small parties to the ballot. The *Evans* majority was correct to note that the effect of these ballot access restrictions was to deny certain groups equal access to the electoral process. Again, however, the equal protection challenge in *Rhodes* was grounded on a direct and elementary claim to political participation — the right to vote for the candidates and parties of one's choice. The *Rhodes* Court applied strict scrutiny because the Ohio laws imposed "substantially unequal burdens on both the right to vote and the right to associate."⁸⁸

In each of the voting rights cases relied upon by the court in *Evans*, the basis for strict scrutiny was the fact that these laws impinged directly on the established and fundamental right to vote. In each case, the Supreme Court did not intimate reliance on any right independent of the right to vote. None of these cases invokes or implies the principle which controlled the results in *Evans* — a vague right of political participation that extends beyond the voting booth to invalidate constitutional limitations on substantive legislative agendas. To be sure, these cases do demonstrate that the Court recognizes the importance of equality in assuring citizens an equal vote for the candidates of their choice. However, this is only to recognize that the equality of participation interests discussed in *Evans* are best understood as encapsulated in the right to vote. The court in *Evans* ignored this context and improperly read the right-to-vote cases as supporting a seemingly unlimited right to have a political agenda insulated against the constitutional liberties of others.⁸⁹

B. *Exposition of the Right to Equal Participation in the Political Process by the U.S. Supreme Court*

The *Evans* court found the "most explicit, and nuanced, articulation" of its new fundamental right in yet another category of Supreme Court equal protection cases, a series of decisions in which the Court reviewed "legislation which prevented the nor-

found that the ballot access right is not fundamental and deserves only "heightened scrutiny," as opposed to "strict scrutiny." See *Burdick v. Takushi*, 112 S. Ct. 2059 (1992).

88. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). See also *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

89. The speculative nature of the enterprise of finding "fundamental rights" is witnessed by the fact that whereas fundamental rights are rarely and not lightly found by the Supreme Court, here *both* reviewing courts have formulated two new, entirely different fundamental rights. The trial court found the right to be "the right not to have the State endorse and give effect to private biases." *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993) (en banc).

mal political institutions and processes from enacting particular legislation desired by an identifiable group of voters."⁹⁰ The *Evans* majority relied most heavily on a leading equal protection case, *Hunter v. Erickson*.⁹¹ In *Hunter*, the Court considered whether an amendment to the Akron city charter violated the Equal Protection Clause. The amendment prohibited the City Council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters in a regular or general election.⁹²

When Nellie Hunter, a black woman, attempted to buy a house in Akron, Ohio, she met resistance from a real estate firm. After preparing a list of houses for sale to show Mrs. Hunter, the real estate agent refused to take Hunter to see the properties when Hunter showed up for her appointment. The agent explained that "all of the owners had specified they did not wish their houses shown to negroes."⁹³

Hunter sued seeking enforcement of an Akron ordinance prohibiting racial discrimination in the housing market, and the trial court held that the fair housing law was rendered unenforceable by the charter amendment described above. The Supreme Court of Ohio affirmed and held that the charter amendment did not violate the Equal Protection Clause of the Fourteenth Amendment. The U.S. Supreme Court reversed and held that the Akron charter amendment "constitutes a real, substantial, and invidious denial of the equal protection of the laws."⁹⁴

Although the *Evans* majority acknowledged that the charter amendment in *Hunter* had been "aimed at minority racial groups" and therefore was suspect under the Equal Protection Clause, the court read *Hunter* to speak to "concerns which are broader than the repugnancy of racial discrimination alone."⁹⁵ *Evans* emphasized Justice White's connection of the Equal Protection Clause in *Hunter* with the protection of a person's funda-

90. *Id.* at 1279.

91. 393 U.S. 385 (1969).

92. *Id.* at 387.

93. *Id.*

94. *Id.* at 393.

95. *Evans v. Romer*, 854 P.2d 1270, 1279 (Colo. 1993) (en banc). The classification in *Hunter* was *not* a racial classification in the sense that it expressly discriminated between whites and blacks or other racial or ethnic groups. Its defect was that "the law's impact" disproportionately burdened racial and ethnic minority groups. *Hunter*, 393 U.S. at 390-91. We believe this idea of disparate impact on political participation by suspect (or quasi-suspect) groups is the key to understanding the meaning — and the limits — of the Supreme Court's political participation cases. See *infra* notes 112-41 and accompanying text.

mental right to vote: "Justice White . . . concluded that Akron could 'no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.'"⁹⁶

Thus, the court in *Evans* read *Hunter* broadly to suggest that making it more difficult to enact legislation on one group's behalf than another's is a violation of a fundamental right on a par with the right to vote. Since all constitutional rights make it "more difficult" for groups who favor unconstitutional legislation to enact their political agendas, this broad reading of *Hunter* appears to use constitutional law to invalidate the very concept of constitutionalism — of majority rule tempered by the constitutional rights of individuals.

The Colorado Supreme Court found further support for this new insight in its extraordinary reading of *Washington v. Seattle School District No. 1*.⁹⁷ In *Washington*, voters had passed a statewide referendum issue known as Initiative 350. Initiative 350 stipulated that no local school board could require any student to attend a school other than the one located nearest or next nearest to the child's residence. The initiative was facially neutral regarding race — it applied irrespective of race — but included a large number of exceptions to the rule, which led the Court to conclude that the initiative was enacted " 'because of' not merely 'in spite of' its adverse effects upon' busing for racial integration."⁹⁸

In a remarkable example of revisionist jurisprudence, the *Evans* court read *Washington* to support the extension of *Hunter* outside the context of race-based discrimination. *Evans* noted that *Washington* had relied on a "neutral principles" formulation from Justice Harlan's concurring opinion in *Hunter*. The court's take on this principle is that laws must meet the test of "neutrality" including not simply *racial* neutrality, but more generally, *political* neutrality; Initiative 350 received strict scrutiny because it was a type of political structure which "distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."⁹⁹ *Evans*

96. *Evans*, 854 P.2d at 1279 (quoting *Hunter*, 393 U.S. at 393 (emphasis added)). The reference to "any particular group" in the quote from *Hunter*, when read in context, clearly refers to any particular racial or ethnic minority group. Clearly, the charter amendment in *Hunter* was invalidated because it "discriminates against minorities." *Hunter*, 393 U.S. at 393.

97. 458 U.S. 457 (1982).

98. *Id.* at 471.

99. *Evans*, 854 P.2d at 1280 (quoting *Washington*, 458 U.S. at 467).

asserted that *Hunter* and *Washington* envision an application of the neutrality doctrine beyond matters of race.¹⁰⁰

Thus, under the court's inspired reading of *Hunter* and *Washington*, it was not the racial character of the classifications that required their invalidation in those cases. Rather, it was their impact on the ability of any political group to participate in the political process which made the laws suspect under the Equal Protection Clause. The court's chimerical interpretation of *Hunter* and *Washington* calls to mind Charles Fried's observation that "some arguments are so flawed that the only way to present them is to wrap them up in fuzz and throw them over the wall when no one is looking."¹⁰¹

The *Evans* majority next read *Gordon v. Lance*¹⁰² as having "made clear" that the principle articulated in *Hunter* and *Washington* "is not one that can logically be limited to the 'race' context alone."¹⁰³ In *Gordon*, the Supreme Court addressed West Virginia constitutional and statutory provisions which proscribed the state's political subdivisions from incurring bonded indebtedness or raising taxes without the prior approval of 60% of the voters in a referendum. The West Virginia Supreme Court had ruled that these provisions unconstitutionally diluted the votes of those who support revenue-producing measures by requiring that they get more than 50% of the vote to win approval. The U.S. Supreme Court distinguished *Hunter*¹⁰⁴ and reversed.

100. *Evans*, 854 P.2d at 1281. This analysis is not supported by any of the judicial opinions on which it relies. The majority opinion in *Hunter* explicitly stated that it was concerned with laws which place "special burdens on racial minorities within the governmental process." *Hunter*, 393 U.S. at 391. Justice Harlan's concurring opinion found neutrality lacking only because the Akron charter amendment "has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395 (Harlan, J., concurring). The Court in *Washington* explicitly and repeatedly stated that the equal protection principle it was enforcing guaranteed "racial minorities the right to full participation in the political life of the community." *Washington*, 458 U.S. at 467. *See also id.* at 467-70 (repeatedly stressing the "racial nature" of the law under review and its unique burdens on "racial minorities.").

101. Charles Fried, Address at Brigham Young University Law School Graduation (April 22, 1988), discussed in James D. Gordon III, *Law Review And The Modern Mind*, 33 ARIZ. L. REV. 265, 269 (1991). Both *Hunter* and *Washington* clearly and explicitly turn on the racial aspect of the challenged laws. *See infra* notes 111-41 and accompanying text. The Colorado Supreme Court's analysis in *Evans* is not supported by a fair reading of these cases.

102. 403 U.S. 1 (1971).

103. *Evans*, 854 P.2d at 1281.

104. *Gordon*, 403 U.S. at 5-6.

Evans discussed *Gordon's* treatment of *Hunter* at length. It noted that *Gordon* distinguished *Hunter's* applicability to the West Virginia statutes because the bond restrictions in *Gordon* applied equally to all public appropriations that would benefit from revenues; the charter at issue in *Hunter*, however, specifically required a referendum only on fair housing legislation. Therefore, the *Evans* court concluded that the legislation invalidated in *Hunter* restricted a specific group's political participation, while that upheld in *Gordon* did not. Thus, the principle the *Evans* court gleaned from its reading of *Hunter* and *Gordon* is that "no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote."¹⁰⁵

Evans asserts that *Gordon* is clear evidence of the applicability of *Hunter's* neutrality principle to political disputes beyond those involving racial groups. If *Hunter* was only a "race" case, *Evans* reasoned, then the court in *Gordon* could simply have dismissed *Hunter* as irrelevant to the political dispute involved in *Gordon*.¹⁰⁶

Thus, in the wake of its highly selective reading of *Hunter* and *Gordon*, the *Evans* majority reasoned: "When taken together, these facts clearly support the conclusion that *Hunter* applies to a broad spectrum of discriminatory legislation."¹⁰⁷ Given the demands of "neutrality" under this reading of the case law, *Evans* formulated its right:

We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny.¹⁰⁸

Amendment Two, therefore, violates the political neutrality demanded by this view of equal protection:

Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles

105. *Evans*, 854 P.2d at 1282 (quoting *Gordon*, 403 U.S. at 5).

106. *Evans*, 854 P.2d at 1282.

107. *Id.*

108. *Id.* (footnote omitted).

out one form of discrimination and removes its redress from consideration by the normal political processes.¹⁰⁹

Thus, Amendment Two "must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause."¹¹⁰ Accordingly, the court remanded the case to the trial court to determine whether Amendment Two was supported by a compelling state interest as required under strict scrutiny.

IV. *EVANS'* ILLUSORY RIGHT

The potential scope of the right recognized by the Colorado court in *Evans* is breathtaking. If the court means what it says, it has discovered a constitutional right of any "independently identifiable class of persons" to have its political agenda insulated against the constitutional rights of others.

The idea animating this remarkable new right is the truism that constitutional law discourages political participation by groups who favor unconstitutional legislation. For example, gays, lesbians, and bisexuals were discouraged by Amendment Two, because it made their desire to regulate the businesses and properties of others — through restrictive "gay rights" laws — more difficult to accomplish. Similarly, many Catholic and evangelical Christian parents are discouraged by the Establishment Clause, because it prohibits the enactment of their political preferences for state-financed parochial schools. Pro-life groups, members of which often share an "independently identifiable" religious heritage, are discouraged by the unenumerated right of privacy, by state Equal Rights Amendments, and by other provisions of state constitutions protecting reproductive rights, because these provisions prohibit their strong preferences for laws designed to protect human life in the womb. Crime victims are discouraged from political participation by the Fourth, Fifth, Sixth, and Eighth Amendments, and by their counterparts in state constitutions, because these civil liberties invalidate laws that violate the rights of criminal defendants.

109. *Id.* at 1285. The court further held that gays, lesbians, and bisexuals are an "independently identifiable group" whose "ability to participate in the political process" was restricted by Amendment Two. *Id.*

110. *Id.* at 1286. On remand in *Evans* the trial court concluded that Amendment Two was not necessary to support a compelling state interest and, therefore, permanently enjoined its enforcement. The Colorado Supreme Court affirmed this ruling in *Evans II*. *Evans v. Romer*, Nos. 94SA48, 94SA128, 1994 Colo. LEXIS 779 at *43-*44 (Colo. Oct. 11, 1994).

The list is endless. Constitutional law routinely discourages groups from seeking to legislate political agendas which violate the constitutional rights of others. Indeed, one of the purposes of constitutional law undoubtedly is to insulate persons whose rights are protected by the Constitution against political agendas designed to restrict those rights. The *Evans* court has turned the Constitution against itself by inventing a constitutional right not to be discouraged from political participation by the existence of constitutional law. Under this bizarre reading of the Constitution, civil liberties are viewed as some kind of virus and the Equal Protection Clause becomes a vaccine which immunizes the legislative programs of all "independently identifiable groups" against the constitutional rights of others.

Clearly, the Constitution does not provide protection for any and every such group against the political discouragement that necessarily arises when a group seeks to enact laws which restrict the constitutional liberties of others. More plausibly, the *Evans* court stretched *Hunter* and its progeny beyond recognition in order to protect not all "identifiable groups," but rather one, "non-suspect" group in particular. As a result, the people of Colorado were denied the right to advance their civil liberties by amending the state constitution to protect themselves against attempts to legislate the restrictions and prohibitions of homosexual rights laws.

The *Evans* court acknowledged that the right to vote cases, the reapportionment cases, and the ballot access cases do not support the startling new right employed by the court to bring strict scrutiny to bear on Amendment Two. As noted above, the court's rationale turns primarily on an expansive reading of *Hunter* and its progeny to protect the political participation of identifiable groups. Thus, the accuracy of *Evans'* reading of the *Hunter* line of decisions is critically important for the viability of the *Evans* right.

A careful reading of those cases, however, demonstrates that the reasoning of the Colorado Supreme Court in *Evans* was seriously flawed, if not incoherent. *Hunter* and its progeny are not about an Equal Protection Clause at war with other constitutional liberties. Rather, these decisions recognize an important principle within clear and reasonable parameters. Their analyses are inextricably intertwined with the central meaning of equal protection — the protection of racial minorities and similar "suspect" classes against laws which place "unusual burdens" upon

them.¹¹¹ The rule of these cases can be stated as follows: Laws that interfere with the right of racial and other suspect classes to participate in the political process are subject to strict scrutiny even if the laws are facially neutral.

A. *Hunter and its Progeny as Suspect Class Cases*

It is central to the rationale of the *Evans* court that *Hunter* and its progeny are not suspect classification cases.¹¹² After all, if the charter amendment in *Hunter* had been struck down on the grounds that it used an improper suspect classification, then *Hunter* would be a weak foundation upon which to build a radical new right of political participation for non-suspect (but identifiable) classes. Unfortunately for the Colorado Supreme Court and its champions among the opponents of Amendment Two, a careful reading of *Hunter* makes clear that it is a race case and nothing more.

As noted above, *Hunter* struck down a city charter amendment which required local ordinances dealing with racial, religious, or ancestral discrimination in housing to be approved by a majority of the city's voters at a general election.¹¹³ The racially discriminatory impact of the amendment to Akron's city charter was crucial to the Court's rationale in *Hunter*.

The reason *Hunter* was not an "easy" suspect class case is because the charter amendment was facially neutral, *i.e.* it did not explicitly discriminate among different racial groups.¹¹⁴ Therefore, the case ran headlong into the principle that facially-neutral classifications are not suspect absent proof of "a racially discriminatory purpose."¹¹⁵ Under this rule, a formally neutral classification will be upheld — even if it has a racially disproportionate impact — unless "from the totality of the relevant facts" a

111. *Washington v. Seattle School District No. 1*, 458 U.S. 457, 486 (1982). See also *Hunter v. Erickson*, 393 U.S. 385, 391-92 (1969) ("[b]ecause the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race. . . racial classifications are 'constitutionally suspect'") (emphasis added).

112. *Evans*, 854 P.2d at 1282 (denying that *Hunter* is "nothing more" than a racial classification case).

113. *Hunter*, 393 U.S. at 386.

114. *Id.* at 390. The *Evans* court cited *Hunter's* complexity as proof that it could not possibly be a race case "and nothing more." *Evans*, 854 P.2d at 1282.

115. *Washington v. Davis*, 426 U.S. 229, 239 (1976). *Hunter*, which was decided several years before the discriminatory purpose requirement had been clearly established by the Court, anticipated this development in the law. See Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 147.

purpose to discriminate, on the basis of race or a similar suspect characteristic, is established.¹¹⁶

The reason *Hunter* was difficult was not, as the court in *Evans* suggests,¹¹⁷ because it was crafting a sophisticated new right of political participation for any and every identifiable group. Rather, *Hunter* was hard because the Court needed to explain how the facially-neutral classification constituted a "meaningful and unjustified official distinction[] based on race."¹¹⁸ In other words, the Court's work in *Hunter* was to point out that, despite its surface neutrality, the charter amendment placed "special burdens on racial minorities" concerning their ability to enact legislation prohibiting racial discrimination in housing.¹¹⁹

Hunter's progeny further supports this analysis. For example, although in *Washington Initiative 350* did not explicitly discriminate on the basis of race, it made it more difficult for racial minorities to enact legislation designed to integrate public schools.¹²⁰ The Court held that the initiative created a highly suspect racial classification because it "remove[d] the authority to address a racial problem — and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests."¹²¹ The Supreme Court carefully discussed the meaning of *Hunter* and explained why legislation of the kind challenged in that case "falls into an inherently suspect category:"

[W]hen the political process or the decisionmaking mechanism used to address racially conscious legislation — and only such legislation — is singled out for peculiar and dis-

116. *Id.* at 242. See also *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-68 (1977).

117. *Evans*, 854 P.2d at 1282:

"If . . . *Hunter* is a 'race' case and nothing more, the Supreme Court could have summarily dismissed the notion that it was applicable in *Gordon*. The fact that the Court did not do so, however, strongly suggests that the holding of *Hunter* cannot be limited in application only to the review of legislation which discriminates on the basis of race."

This uncommonly trivial argument overlooks the fact that *Hunter* does not cease to be a "race" case simply because it is not an easy case. As any fair and competent reading of the decision will show, *Hunter* is a complex and difficult racial classification case. See *Hunter*, 393 U.S. at 390-92.

118. *Hunter*, 393 U.S. at 391.

119. *Id.* at 391 (emphasis added).

120. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982).

121. *Id.* at 474 (emphasis added). The Court repeatedly emphasized that what it found objectionable about Initiative 350 was "the racial nature of the way in which it structures the process of decisionmaking." *Id.* at 480 n. 23 (alteration in the original).

advantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'"¹²²

There is simply no way to read *Hunter* and *Washington* as standing for any proposition broader than the one just quoted. Both cases involved the Court's efforts to implement the principle lying at the core of equal protection — "the prevention of meaningful and unjustified official distinctions based on race."¹²³

As Justice Erickson's thoughtful dissent in *Evans* makes clear, the majority's reading of *Hunter* as the source of a broad right of political participation for "identifiable groups" was expressly discussed and rejected by the Supreme Court in *James v. Valtierra*.¹²⁴ *James* upheld the constitutionality of a California constitutional amendment which provided that no "low rent housing project" could be undertaken by "any state public body" until the project was approved by a majority of the voters at a community election.¹²⁵

Thus, as in *Evans*, the California amendment made it more difficult for an identifiable group (the poor) to enact part of its legislative agenda through the normal political process. Appellees in *James*, a number of low income residents of California, made this exact argument to the Court.¹²⁶ And the Court explicitly rejected this attack on California's "procedure for democratic decisionmaking."¹²⁷ Justice Black's majority opinion was both succinct and persuasive:

But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.¹²⁸

Since the Court read *Hunter* as a case involving political burdens on racial minorities,¹²⁹ and since the poor are not a suspect class

122. *Id.* at 485-86 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971) and *Hunter*, 393 U.S. 385 at 391).

123. *Id.* at 486 (quoting *Hunter*, 393 U.S. 385 at 391).

124. 402 U.S. 137 (1971). See *Evans*, 854 P.2d at 1297-99 (Erickson, J., dissenting).

125. *James*, 402 U.S. at 139 n.2.

126. They argued that the California amendment constituted "unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." *Id.* at 142.

127. *Id.* at 143.

128. *Id.* at 142.

129. *Id.* at 140-41.

under the Equal Protection Clause, the Court held that the California amendment could be invalidated "only by extending *Hunter*, and this we decline to do."¹³⁰ The *Evans* court made no serious attempt to distinguish *James* as relevant to the validity of Amendment Two under the Equal Protection Clause.¹³¹ *James* is a strong precedent for upholding Amendment Two and similar popular initiatives which "give citizens a voice on questions of public policy."¹³²

Likewise, the court's attempt in *Evans* to read *Gordon* as support for an extremely far-reaching right of political participation fails to persuade.¹³³ In *Gordon*, the Supreme Court upheld a West Virginia law that proscribed the state's political subdivisions from incurring bonded indebtedness or raising taxes without the prior approval of 60% of the voters in a referendum. The Court held that unlike the facts of *Hunter* and other previous cases, the West Virginia law did not single out any "discrete and insular minority" for special burdens.¹³⁴ Therefore, it concluded that "so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause."¹³⁵

The *Evans* majority argues that since the West Virginia laws upheld in *Gordon* "had nothing to do with racial minorities or any other traditionally suspect class, yet the Court felt compelled to discuss *Hunter*," it is clear that the principle in *Hunter* "applies to a broad spectrum of discriminatory legislation."¹³⁶ This assertion — it can not seriously be called legal reasoning — is unpersuasive. The Supreme Court in *Gordon* did precisely what *Evans* said

130. *Id.* at 141. Even the dissent in *James* agreed that this was the proper analysis. They differed with the majority only in their belief that classification on the basis of poverty should be treated as suspect under the Equal Protection Clause. *Id.* at 144-45 (Marshall, J., dissenting).

131. The court dismissed *James* as being "best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*." *Evans v. Romer*, 854 P.2d 1270, 1282 n.21 (Colo. 1993) (en banc). This is simply not a fair reading of the case, because it is clear that the *James* Court rejected the argument that the California amendment made it more difficult for an identifiable group (the poor) to enact part of its legislative agenda through the normal political process. See *supra* notes 124-28 and accompanying text.

132. *James*, 402 U.S. at 141.

133. *Evans*, 854 P.2d at 1281-82.

134. *Gordon v. Lance*, 403 U.S. 1, 5 (1970).

135. *Id.* at 7.

136. *Evans*, 854 P.2d at 1282. The court attempted to bolster this specious reasoning by adding the following trivial insight: "If . . . *Hunter* is a 'race' case and nothing more, the Supreme Court could have summarily dismissed the notion that it was applicable in *Gordon*." *Id.*

it did not do — it discussed *Hunter* only to distinguish it as a case involving legislation which singled out racial minorities and other suspect classes for unfavorable treatment.¹³⁷ Although the West Virginia laws made it more difficult for some political groups to enact their legislative agendas, they did not discriminate against any racial or other suspect class and, therefore, did not violate the Equal Protection Clause.¹³⁸ Thus, *Gordon* is an application — not a repudiation — of the “race only” reading of *Hunter*.

Taken one by one or together, *Hunter*, *Washington*, *James*, and *Gordon* do not support a broad right for any and every identifiable group to have its political agenda insulated against the civil liberties of others. Rather, these cases recognize that the central purpose of the Equal Protection Clause is to protect racial and other suspect classes against discriminatory state action. Therefore, laws that interfere with the right of racial and ethnic minorities to participate in the political process are subject to strict scrutiny even if the laws are facially neutral.¹³⁹ However, laws that make it more difficult for non-suspect groups to enact their political agendas, such as the laws upheld in *James* and *Gordon*, do not conflict with the Supreme Court’s understanding of equal protection.¹⁴⁰ Since Amendment Two falls into the latter category, the court in *Evans* should have upheld Amendment Two under a rational basis test.¹⁴¹

137. *Gordon*, 403 U.S. at 5.

138. *Id.* at 5-7. The Court expressly stated that although West Virginia “has indeed made it more difficult” for supporters of tax increases and bond issues to succeed, “there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue.” *Id.* at 5, 6.

139. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467-70 (1982); *Hunter v. Erickson*, 393 U.S. 385, 390-93 (1969). These cases do not create a fundamental right of political participation. They merely hold that a classification that restricts the ability of a suspect class to participate in the political process is a suspect classification notwithstanding its facial neutrality.

140. *James v. Valtierra*, 402 U.S. 137, 141-43 (1971); *Gordon*, 403 U.S. at 5-7.

141. Amendment Two clearly serves the rational and legitimate governmental purpose of protecting the religious freedom, freedom of conscience, and property rights of the employers, landlords, and other persons protected by the amendment. In fact, the basic civil liberties protected by Amendment Two at least arguably provide a compelling justification for governmental action. For a discussion of these issues, see *infra* notes 165-79 and accompanying text.

B. *Suspect Classes or Identifiable Classes?*

Regardless of the merits of the analysis in *Evans* of the *Hunter* line of cases, should a broad right of political participation be recognized for any "identifiable class of persons?" Or should the line remain where the Supreme Court has drawn it — at the point of suspect classes?

Clearly, the Supreme Court has made a wise choice by going this far and no further. In a society such as ours which places a high value on freedom, the judiciary should be very reluctant to recognize a right of any identifiable group to have its regulatory agenda protected against the civil liberties of others. Although *Evans* did not define the concept of an "independently identifiable group,"¹⁴² it did conclude that it was broad enough to cover non-suspect classes such as homosexuals and bisexuals.¹⁴³ Moreover, while denying that it was opening the constitutional floodgates for groups wishing to use the political process to enact laws restricting the civil liberties of others, the court supplied no limiting principle to contain its right of political participation.¹⁴⁴

Are supporters of state-financed parochial schools, pro-life groups, and crime victims groups "independently identifiable classes" for purposes of the right of political participation? If not, why are they out and homosexuals in? If so, then the time has come to throw out much of state and federal constitutional law, because many such identifiable groups routinely are flouted in the political process by the state and federal constitutional

142. *Evans*, 854 P.2d at 1282-86.

143. *Id.* at 1285.

144. *Id.* at 1283-86. The authors of a leading constitutional law casebook point out that even the Ku Klux Klan might be an "identifiable group" whose political agenda is protected under *Evans*:

The Constitution itself places a number of political issues "beyond" the political process — like racial bigotry (the Reconstruction Amendments) and the establishment of a state religion (the First Amendment). "Identifiable" groups, such as the Ku Klux Klan and certain religious groups (like the Anglicans, who have the "state church" in England) are precluded from using the normal political processes to obtain goals that may be important to them.

DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR., & PHILIP P. FRICKEY, *CASES AND MATERIALS ON CONSTITUTIONAL LAW 72-73* (Supp. 1994). Does the *Evans* principle extend to protect the political agenda of the KKK against the state or federal constitutional rights of racial and religious minorities? If not, then the Colorado court will need a theory to explain "why restricting the KKK's political participation is less defensible than restricting that of gays and lesbians." *Id.* at 73.

rights of others.¹⁴⁵ That's how constitutional law works, and it is this idea that seems to confuse the *Evans* court. In short, *Evans* is wrong because constitutionalism is not unconstitutional. If homosexuals and bisexuals (and perhaps other sexual-behavior groups who have yet to form a liberation movement) are to be insulated against popular civil liberties initiatives like Amendment Two, it should come only after they have convinced the Supreme Court to include them as a suspect class. Basic freedoms are too important to have to yield whenever liberty intersects with the regulatory agenda of any identifiable special interest.

V. GRASSROOTS INITIATIVES AND EQUAL CITIZENSHIP: WHO IS STIGMATIZING WHOM?

Professor Kenneth Karst has argued that Amendment Two and similar grassroots initiatives are constitutionally suspect because they clash with the principle of "equal citizenship."¹⁴⁶

145. This point was discussed at length in the introductory paragraphs of Section IV. In the *Cincinnati* case, a federal trial court attempted to distinguish between "independently identifiable groups" and mere "identifiable groups." The court said that "the difference between an 'independently identifiable group' and an 'identifiable group' is that where the factor identifying the group transcends the mere support for any given issue, the group is 'independently identifiable.'" Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 434 n.12 (S.D. Ohio 1994). "On the other hand, a group whose sole identifying characteristic is that group's support for a single issue is merely an identifiable group." *Id.* Under this definition, most "identifiable groups" are also "independently identifiable groups." Just as gays and lesbians share an inclination to engage in same-sex relationships, the groups in our hypotheticals all share experiences, relationships, and beliefs which transcend any single political issue. For example, the supporters of state-financing for parochial schools share a common culture dating back several thousand years, a Biblical world view, and a deep religious commitment. Similarly, many (perhaps most) pro-life groups, such as Lutherans For Life, the Christian Coalition, and organized groups of traditional Roman Catholics, are composed of individuals who share characteristics which transcend the politics of abortion. Finally, members of crime victims groups share the pain, humiliation, and frustration of having been traumatized first by a criminal perpetrator and then by a criminal justice system which often seems more concerned with criminals than with justice. Any generally applicable definition of "independently identifiable group" that is broad enough to include homosexuals and bisexuals will almost certainly include many other groups whose policy preferences have been placed beyond the ordinary political process by the federal and state constitutional rights of individuals. See *supra* note 144.

146. KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 182 (1993) [hereinafter KARST, *LAW'S PROMISE*]. Karst describes the principle of equal citizenship as follows:

Without a doubt, the idea of equality of citizenship lies at the core of the Fourteenth Amendment; however, contrary to Karst, initiatives such as Amendment Two serve to advance — not inhibit — the ability of all groups to participate in our diverse and pluralistic society free of government-imposed stigma and discouragement.

According to Karst, the problem with Amendment Two is what he calls its “expressive effects.”¹⁴⁷ He argues it stigmatizes homosexuals by “formally declaring the separation of a group of people from the community of citizens who are worthy of governmental protection against discrimination.”¹⁴⁸ In other words, by constitutionalizing the right “to discriminate against citizens on the basis of their sexual orientation”¹⁴⁹ the citizens of Colorado have “pronounce[d] an official anathema on homosexual orientation.”¹⁵⁰ Moreover, Karst fears that the initiative has somehow legitimized “antigay” attitudes and behaviors, given citizens “per-

Each individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant. The principle thus centers on those aspects of equality that are most closely bound to the sense of self and the sense of inclusion in a community.

KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 3* (1989) [hereinafter KARST, “*BELONGING TO AMERICA*”]. In other words, government should refrain from harming “the equal citizenship values of respect, participation, and responsibility.” KARST, *LAW’S PROMISE*, *supra*, at 177.

147. KARST, *LAW’S PROMISE*, *supra* note 146, at 183.

148. *Id.* at 185.

149. *Id.* at 184. Professor Karst argues that under *Reitman v. Mulkey*, 387 U.S. 369 (1967), an initiative violates the Equal Protection Clause if it creates a state constitutional right to discriminate. KARST, *LAW’S PROMISE*, *supra* note 146, at 183. In *Reitman*, the Court struck down an initiative which effectively repealed state and local fair housing laws and embodied a broad right to discriminate, “including the right to discriminate on racial grounds,” in the California constitution. 387 U.S. at 377. The Court held that the initiative “would involve the State in private *racial discrimination* to an unconstitutional degree.” *Id.* at 378-79 (emphasis added). In effect, *Reitman* stands for the proposition that a state may not encourage others to discriminate “on grounds which admittedly would be unavailable under the Fourteenth Amendment should state action be involved.” *Id.* at 374. The rationale of the Court in *Reitman* does not apply to citizen initiatives, like Amendment Two, which do not apply to suspect or quasi-suspect classes such as race, ethnicity, or gender. Discrimination on the basis of morally-significant behavior, such as homosexuality, is completely unlike the irrational and invidious racial discrimination that was struck down in *Reitman*. For a discussion of suspect classes and Amendment Two, see *supra* notes 29-64 and accompanying text.

150. KARST, *LAW’S PROMISE*, *supra* note 146, at 185.

mission to hate," and may have encouraged "insults" and even "physical attacks" directed at homosexuals.¹⁵¹

Careful analysis of Amendment Two and its context, however, demonstrates that its effect is exactly the opposite of what Karst asserts. It is gay rights legislation which stigmatizes, marginalizes, and fences out identifiable groups of individuals, and Amendment Two serves to remove this stigma and its associated harms and restores government to a position of benign neutrality.

An important purpose and effect of the gay political agenda is to stigmatize, marginalize, and silence religious traditionalists,¹⁵² and to fence them out from authentic participation in the economic and social life of the community.¹⁵³ Consider the

151. *Id.* at 186. Amazingly, Karst even goes so far as to compare Amendment Two to the infamous Jim Crow laws which once mandated racial separation in Southern states. Karst's cynical attempt to demonize the citizens of Colorado who supported Amendment Two as gay-bashers and haters calls to mind Marshall Kirk and Hunter Madsen's self-proclaimed "gay manifesto for the 1990's." MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL* (1989). Kirk and Madsen propose a campaign of "unabashed propaganda" to advance gay rights, one aspect of which includes demonizing those who believe homosexual behavior is sinful or immoral by comparing them to Klansmen, Nazis, and similar racists "whose associated traits and attitudes appall and anger Middle America." *Id.* at 189. By stooping to employ the techniques of homosexual rights fundamentalists, Karst detracts from an otherwise thoughtful (if seriously mistaken) analysis.

152. Religious traditionalists are, of course, not the only ones who believe homosexual behavior is unethical. Gay rights laws also harm the secular counterparts of religious traditionalists, persons whose traditional beliefs about human sexuality are based upon non-religious ethical principles. For the sake of convenience, we will use the term "traditional believers" to refer collectively to religious and secular traditionalists.

153. A primary goal of the gay agenda is to target those who believe homosexual behavior is sinful or immoral, and portray these individuals and their beliefs as shameful and discreditable. Consider the public relations strategy for gay rights suggested by Kirk and Madsen:

The best way to make homohatred look bad is to vilify those who victimize gays. The public should be shown images of ranting homohaters whose associated traits and attitudes appall and anger Middle America. The images might include:

- Klansmen demanding that gays be slaughtered or castrated;
- Hysterical backwoods preachers, drooling with hate to a degree that looks both comical and deranged;
- Menacing punks, thugs, and convicts who speak coolly about the "fags" they have bashed or would like to bash;
- A tour of Nazi concentration camps where homosexuals were tortured and gassed.

KIRK & MADSEN, *supra* note 151, at 189. It is important to recognize that when Kirk and Madsen speak of "homohaters" by their own admission they are referring not to the fringes of society but to "30-35% of the citizenry." *Id.* at 175.

effect of legislation prohibiting employment and housing discrimination on the ability of traditional believers to govern their businesses in accordance with their most profound and deeply held principles and beliefs.

Take the hypothetical case of Margaret McCabe, an elderly woman who was recently widowed and is supporting herself on Social Security and a little income generated by a five-plex apartment building she owns and manages. As a devout Roman Catholic, Mrs. McCabe believes that fornication and homosexual behavior are serious sins and that it is sinful for her to facilitate others who wish to commit these sins. She also wishes to maintain a "family atmosphere" in the building for her tenants. What is the effect on Mrs. McCabe's claim to equal citizenship when her home state enacts legislation prohibiting employment and housing discrimination on the basis of sexual practice or preference?¹⁵⁴ How is her citizenship affected when an initiative similar to Amendment Two is adopted?

Moreover, there is an anti-religious slant to this hateful campaign, because Kirk and Madsen believe that most of the targeted "homohaters" are God's army of bigots. *Id.* at xv ("These days, America rebukes all bigotry, except that which it imagines is God's."). These stigmatizing tactics were recently directed at an eminent scholar who had accepted an invitation to speak at Harvard Law School. When Oxford Professor John Finnis spoke at Harvard on April 19, 1994, his speech was rudely interrupted by protestors, he was called a "hate-monger" and a "homophobe", and his invitation to speak at Harvard was compared to inviting the Grand Wizard of the KKK to lecture at that august citadel of higher education. A commentary written by a Harvard law student for the school's newspaper could have been written by Kirk and Madsen (but not, we hope, by Professor Karst):

They [the Harvard community] passively allow homophobia to have a legitimate forum in which to spread its hateful, violent message that homosexuals are moral perverts whom society must suppress. But homophobia's message is not simply an alternative point of view; it is every bit as repugnant and dangerous as the view that all blacks are dumb and lazy or that the Holocaust is the creation of a Jewish conspiracy. Indeed, like anti-Semitism and racism, homophobia has a body count.

Scott Wiener, *Homophobia Cannot Be Tolerated*, HARVARD LAW RECORD, Apr. 29, 1994, at 11. John Finnis is a distinguished scholar who has published many important works on the relationship between law and morality. See, e.g. MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH (1991); NATURAL LAW AND NATURAL RIGHTS (1989); FUNDAMENTALS OF ETHICS (1983). That one of the world's leading authorities on natural law should be treated this way at Harvard University because of his views on sexual morality speaks volumes about the intolerance and fervor of the gay rights movement.

154. Duncan, *supra* note 7, at 395. See, e.g., Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991), *review dismissed and cause remanded*, 859

To use Karst's terminology, traditional believers like Mrs. McCabe have been harmed severely by the "stigmatizing expression" of the homosexual rights law.¹⁵⁵ This law, enacted under the banner of tolerance, declares Mrs. McCabe — and her religion — homophobic, wrong, and immoral.¹⁵⁶ It forces her to choose between her deeply held (and widely shared) ethical beliefs and the right to participate in the economic life of the community. Under this law, the price of authenticity for Mrs. McCabe — of being herself and obeying her God — is governmentally-mandated separation from the rest of the citizenry.¹⁵⁷ She may not be both an authentic believer and a landlord.¹⁵⁸

P.2d 671 (Cal. 1993). See also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 136-45 (1993).

155. See KARST, *LAW'S PROMISE*, *supra* note 146, at 185. The Supreme Judicial Court of Massachusetts has recognized that nonconformity with fair housing laws prohibiting discrimination against unmarried cohabitants "may stigmatize the defendants in the eyes of many and thus burden the exercise of the defendants' religion." *Desilets*, 636 N.E.2d at 237-38.

156. Professor Karst has described eloquently the harms inflicted by stigmatizing laws:

Stigma — especially stigma propagated by government — produces harms that are both immediate and consequential. The immediate harms are psychic: insult, humiliation, indignity for the people stigmatized.

KARST, *LAW'S PROMISE*, *supra* note 146, at 185-86.

157. If the concept of equal citizenship is "most closely bound to the sense of self and the sense of inclusion in a community," homosexual rights laws strike at the heart of Mrs. McCabe's claim under the principle. See KARST, *BELONGING TO AMERICA*, *supra* note 146, at 3.

158. KARST, *LAW'S PROMISE*, *supra* note 146, at 185-86. We will resist the temptation to echo Professor Karst and assert that gay rights laws give "permission to hate" traditional believers like Mrs. McCabe. *Id.* at 186. See *supra* note 153. For a compelling account of a pastor of a small church in San Francisco who became the target of anti-Christian violence and hatred when he challenged a local gay rights ordinance, see CHUCK McILHENNEY ET AL., *WHEN THE WICKED SEIZE A CITY* (1993). This hatred of traditional religion is not confined to the fringes of the homosexual community. It is ubiquitous in gay literature. Consider, for example, an essay about Roman Catholic clergy published earlier this year by Paul Monette, an openly gay intellectual whose work has won a National Book Award and three Lambda Literary Awards. In an essay entitled *My Priests*, Monette frequently vents his hatred and rage about the Catholic Church and its leadership. He refers to "the Axis powers in Rome", "the Vatican Nazis" and "the Polish Pope and his diabolical sidekick, Cardinal Ratzinger, the Vatican's Minister of Hate." PAUL MONETTE, *LAST WATCH OF THE NIGHT: ESSAYS TOO PERSONAL AND OTHERWISE* 55 (1994). He describes the Church's teaching about human sexuality as "only for making babies, starving ones ideally, because they make better copy and bring in more gold to Rome." *Id.* at 64. See also PAUL MONETTE, *BECOMING A MAN: HALF A LIFE STORY 2* (1992) (referring to "the Nazi Popes and all their brocaded minions, the rat-brain politicians, the wacko fundamentalists and their Book of Lies"). Monette, who is dying of AIDS, has directed his rage at religious institutions whose

The same is true of gay rights legislation governing employment. For example, the owner of a Christian bookstore might reasonably decide that it is inappropriate to employ a practicing and unrepentant homosexual to work as a clerk in his business.¹⁵⁹ The employer might wish to take character into account when hiring persons whose responsibilities include recommending Bibles, devotionals, and hymnals to customers. Under the gay rights law, the Christian employer is branded an outlaw by the state and forced to choose between his religious conscience and his business.¹⁶⁰

Clearly, homosexual rights legislation violates the principle of equal citizenship, because it constitutes "a legislative determination to use the law's coercion as a means of establishing a social definition [of traditional believers] that is itself incapacitating."¹⁶¹ To participate equally in society, these believers must deny an important part of their identity. The law requires them to be untrue to who they are and what they believe.¹⁶²

Viewed against this background, the effect of Amendment Two and similar grassroots initiatives is not to stigmatize and harm homosexuals, but rather to remove the stigma and associated harms inflicted on traditional believers by state and local homosexual rights legislation. Contrary to Karst's arguments, these initiatives do not separate homosexuals from the rest of the community. Citizens remain free to hire or rent apartments to persons of all sexual persuasions. Homosexuality is not declared unlawful or immoral. The only effect of these initiatives is to provide that political majorities may not enact legislation that fences out traditional believers. In other words, the initiatives take a neutral position on the ethics of human sexuality. Both traditional believers and sexual revolutionists (and everyone in

teachings about sexuality, if practiced, almost certainly would have protected our society against this deadly disease.

159. See Duncan, *supra* note 7, at 395. This is not to say that all traditional believers would make the same employment decision in this case. Others might see the employment relationship as an opportunity to reach a lost soul and lead him or her to repentance and saving grace. Still others might conclude that their employees' sexual lifestyles are irrelevant. The question here is whether government should use its coercive and expressive powers to stigmatize and forbid one or more of these religiously-motivated choices.

160. In other words, homosexual rights laws are to traditional believers as sodomy laws are to homosexuals.

161. See KARST, *LAW'S PROMISE*, *supra* note 146, at 182.

162. And in the case of religious traditionalists, homosexual rights laws sometimes require them to engage in conduct that violates their understanding of what pleases God. For a discussion of the conflict between homosexual rights laws and the free exercise of religion, see Duncan, *supra* note 7, at 416-45.

between) are free to live authentic lives in a pluralistic community.

Traditional believers are not "bigots," or "gay-bashers," or "homophobes." They are rational, reasonable, and compassionate human beings. For the most part, they sincerely believe that adherence to moral absolutes, to God's plan of moral action, is "the ideal of integral human fulfillment."¹⁶³ They "have accepted that to respect the moral limits proposed by the creator as implicit in his creative wisdom is, therefore, supremely intelligent and reasonable — is to do all that in this life we can do towards enhancing good and lessening evil, on the whole and in the long run."¹⁶⁴ These people deserve better than the stigmatizing and harmful treatment they get from government when it enacts homosexual rights legislation. They deserve the equal citizenship that is bestowed upon them by citizen initiatives such as Amendment Two.

VI. THE STATE INTERESTS SERVED BY INITIATIVES LIKE AMENDMENT TWO

Since citizen initiatives like Amendment Two contain no suspect classification and infringe no fundamental right, they are entitled to a strong presumption of validity and should be sustained so long as their provisions are "rationally related to a legitimate state interest."¹⁶⁵ In other words, any equal protection challenge against Amendment Two must fail unless the challengers overcome the presumption of validity by establishing that the amendment is completely irrational.¹⁶⁶

Some commentators have argued that initiatives like Amendment Two serve no rational basis.¹⁶⁷ None of these crit-

163. JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 106 (1991).

164. *Id.*

165. *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 440 (1985). "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude." *Id.*

166. "[T]he Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 442. As the Supreme Court clearly stated in *F.C.C. v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993): "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

167. See, e.g. Note, *supra* note 4, at 1914-16; Comment, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right's Campaign Against Lesbians and Gay Men*, 62 U. CINN. L. REV. 1055, 1079-86 (1994); Note, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection Of The Law*, 35 B.C.L. REV.

ics, however, explain why it is irrational for citizens to take action designed to protect basic and significant liberty interests against a restrictive regulatory agenda.¹⁶⁸ Important freedoms furthered by the initiatives include economic liberties, associational interests, and rights of religious and moral conscience. Some of these interests are of the highest order, and clearly provide a rational (indeed, arguably a compelling) basis to support the initiatives.

America strives to be a free society, one which as a general rule establishes a baseline of free choice and autonomy for consensual economic relationships. Therefore, entrepreneurs who must meet the payroll and bear the risks of the market generally are free to make major decisions about their businesses without unreasonable interference from government. This zone of economic freedom includes the right to make employment decisions and the right of exclusive possession of property.¹⁶⁹ Indeed, the Supreme Court of the United States recently reaffirmed that the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"¹⁷⁰ Typically, homosexual rights laws restrict these basic economic liberties.

221, 256-57 (1993). For a lower court decision striking down a law similar to Amendment Two under the rational basis test, see *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991). Overlooking important civil liberties interests furthered by the proposed charter amendment, the court asserted that it was designed to encourage private discrimination and had "no other visible end." *Id.* at 658. This unsupported conclusion could be reached only by the court's turning a blind eye to the many important interests which would have been served by the proposed amendment.

168. As we have already seen, gay rights legislation stigmatizes, marginalizes, and fences out many groups and individuals, and initiatives like Amendment Two serve to remove this stigma and protect the ability of all groups to participate in our diverse and pluralistic society free of government imposed burdens and discouragement. *See supra* Section V.

169. *See Duncan, supra* note 7, at 399. Generally, employers are free to hire or fire in accordance with their business judgment, and employees are equally free to accept offers of employment or not as it may please them. Historically, the law of landlord and tenant has also been governed by the principles of choice and mutual consent — landlords and tenants generally are free to enter into leases (or not) with whomever they choose and on any basis they choose. *Id.*

170. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). As Professor Richard Epstein recently observed in an essay on religious freedom in the welfare and regulatory state: "The protection of private property does more than promote market efficiency; it enhances the level of human freedom in the most intimate and personal parts of our lives." Richard A. Epstein, *The Welfare State's Threat to Religion*, WALL ST. J., July 27, 1994, at A15.

Moreover, homosexual rights laws often conflict with one of the most fundamental human rights, freedom of religion.¹⁷¹ When these laws are enacted, individuals with deep religious convictions, such as a devoutly Catholic landlord who believes it is sinful for him to rent an apartment to a homosexual couple, are often forced to disobey or displease God, in order to obey Caesar.¹⁷² Similarly, non-religious individuals may have deep ethical convictions that are overridden by these restrictive laws.¹⁷³

Amendment Two and similar voter initiatives are designed to protect these important liberty interests against infringement by government, and this clearly constitutes a rational basis for these measures. Indeed, although it is beyond the scope of this Article, a powerful case could be made that a compelling justification exists for laws like Amendment Two. Only by resorting to *ad hominem* and characterizing these important freedoms as "based exclusively upon dislike for gay people" or upon "irra-

171. See *supra* notes 152-62 and accompanying text. See also Duncan, *supra* note 7. Earlier this year, the Supreme Judicial Court of Massachusetts held that a landlord's right to religious freedom was "substantially burdened" by operation of a Massachusetts law forbidding marital status discrimination in housing. Attorney General v. Desilets, 636 N.E.2d 233, 238 (Ma. 1994). The court held that the effect of the law was to require the defendants, two devoutly Catholic brothers who owned a four-unit apartment house, "to enter into a contract contrary to their religious beliefs." *Id.* at 237. In his dissenting opinion in *Evans II*, Justice Erickson explained that homosexual rights ordinances passed in Aspen and Boulder were particularly destructive of religious freedom. For example, the Aspen ordinance "required churches to open their facilities to homosexual organizations if the facilities were opened to any community organization." *Evans v. Romer*, Nos. 94SA48, 94SA128, 1994 Colo. LEXIS 779 at *92 (Colo. Oct. 11, 1994) (Erickson, J. dissenting). Thus, if a church opened its facilities to a local right-to-life group, it was required to allow equal access to homosexual organizations.

172. *Desilets*, 636 N.E.2d at 237-38. See *supra* note 171. The court noted that in addition to the "significant sanctions" imposed for violation of antidiscrimination laws, "nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many" and thus further burden religious freedom. *Desilets*, 636 N.E.2d at 237-38.

173. See, e.g., *United States v. Seeger*, 380 U.S. 163, 166 (1965), a case concerning conscientious objectors and the military draft, where the Supreme Court held that a sincere "belief in and devotion to goodness and virtue for their own sakes" was equivalent to a belief system based upon the existence of God. See also *Welsh v. United States*, 398 U.S. 333, 344 (1970) (exempting from military service "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.")

tional fears" is it possible for critics of Amendment Two to conclude that it fails rationality review.¹⁷⁴

In *City of Cleburne v. Cleburne Living Center, Inc.*,¹⁷⁵ the Supreme Court applied the rationality test and invalidated a city's denial of a special use permit for the operation of a group home for the mentally retarded. The city's action served no legitimate interest because it was based solely "on an irrational prejudice against the mentally retarded."¹⁷⁶ The zoning law invalidated in *Cleburne* was completely unlike citizen initiatives such as Amendment Two. The one was restrictive, the others are liberating. The zoning law in *Cleburne* was a governmentally-imposed restriction on property, whereas the initiatives remove governmental restrictions on business and property in order to advance basic freedoms of citizens.

The *Cleburne* Court was very careful to make clear that the zoning law was irrational only because government had singled out group homes for the mentally retarded for restrictions not imposed on other multiple-dwelling facilities.¹⁷⁷ Under Amendment Two and its progeny, however, employers and landlords are not forbidden from hiring or leasing apartments to homosexuals. They are completely free to do so, if they wish. The initiatives do not single out homosexuals for restrictions or prohibitions; they merely remove governmental restrictions on employers and property owners in order to protect basic civil liberties in the marketplace. These purposes are more than sufficient to satisfy

174. Note, *supra* note 4, at 1915. See also Note, *supra* note 167, at 256 ("The only objective of Amendment 2 is 'a bare . . . desire to harm a politically unpopular group.'")

175. 473 U.S. 432 (1985).

176. *Id.* at 450. Since the Court could find no purpose for this zoning restriction "other than a desire to discriminate against persons who were mentally retarded," it concluded that the city had acted without a rational basis. See 3 R. ROTUNDA & J. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.3, at 39 [hereinafter ROTUNDA & NOWAK]. Professor Laurence Tribe's analysis of *Cleburne* reaches the conclusion that the Court did not really apply the rationality test in invalidating the city's zoning action in that case. Rather, he argues, the Court "covertly" applied heightened scrutiny because of its concern that without judicial intervention the potential occupants of respondents' group home for the mentally retarded "would be left without appropriate shelter." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33, at 1612 (2d ed. 1988).

177. 473 U.S. at 447. The city did not require a special use permit "in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged . . . , private clubs, or fraternal orders." *Id.* The restrictions prohibited group homes for the mentally-retarded, however, solely based on an illegitimate purpose — "irrational prejudice against the mentally retarded." *Id.* at 450.

what the *Cleburne* Court recognized and reaffirmed as the "general rule" — that legislation is "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."¹⁷⁸

The Equal Protection Clause does not invalidate reasonable and legitimate economic and social legislation.¹⁷⁹ It should not be used to stifle the desire of the people to protect their basic civil liberties against the restrictive and stigmatizing homosexual rights agenda.

VII. CONCLUSION

Grassroots initiatives like Amendment Two are the product of a populist revolt against restrictive homosexual rights laws. These initiatives are an attempt by the people to protect their basic civil liberties and to promote equal citizenship values. Homosexual rights legislation stigmatizes, marginalizes, and fences out groups and individuals who hold traditional beliefs about sexual morality. Citizen initiatives operate to remove this stigma and its harmful consequences by restoring government to a position of benign neutrality regarding competing visions of human sexuality.

When initiatives like Amendment Two are approved by vote of the people, they are likely to be challenged under the Constitution by advocates of the homosexual regulatory agenda. Although these legal attacks may have some initial success in state courts and lower federal courts, they will falter in the long run because Amendment Two and its progeny are perfectly consistent with the letter and spirit of the Constitution as interpreted by the Supreme Court.

Homosexuals are not a suspect class, and there is no fundamental right for any identifiable class of persons to have its regulatory agenda insulated against the civil liberties of the people.

178. *Id.* at 440.

179. *F.C.C. v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). When reviewing legislation under the rational basis standard, the Supreme Court "justices have determined that they have no unique function to perform; they have no institutional capability to assess the scope of legitimate governmental ends in these areas or the reasonableness of classifications that is in any way superior to that of the legislature" or the people. 3 ROTUNDA & NOWAK, *supra* note 176, § 18.3 (1992). Therefore, under this test the Court asks only "whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. So long as it is arguable that [the legislature or the citizens] . . . had such a basis for creating the classification a court should not invalidate the law." *Id.* This is a very deferential test; Amendment Two should pass it with much room to spare.

Initiatives like Amendment Two are rational and reasonable laws designed to protect economic, religious, and other basic freedoms of citizens. Therefore, these laws should easily pass rationality review.

Charles Kingsley once observed that there are two kinds of freedom, "the false where one is free to do what he likes, and the true where he is free to do what he ought."¹⁸⁰ Enactment of the homosexual regulatory agenda shackles true freedom in the chains of false freedom. Amendment Two and its progeny are designed to remedy this injustice. These initiatives are not unconstitutional and should be vigorously enforced wherever and whenever they are adopted.

180. INTERNATIONAL ENCYCLOPEDIA OF QUOTATIONS 308 (John P. Bradley et al. eds., 1978).

