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Democracy is indeed an elusive concept and any effort to develop the constituent elements of so important a political idea ought to be encouraged. From any number of perspectives it is clear that democracy must include more than simply ratifying the outcomes of either citizen or representative voting.[1] And when a court is asked to set aside the results of a process some describe as democratic, the challenge to enrich the concept becomes even more pressing, particularly when the judicial power is invoked in the name of enhancing democracy.[2] The Supreme Court's decision in *Romer v. Evans*[3] dramatically poses the problem. The Court there invalidated a state constitutional provision that had been adopted by a direct vote of the citizens of the state of Colorado. For Justice Scalia in dissent, it was inconceivable for the Court to set aside this purest expression of democracy.[4]

In her Article, Professor Schacter addresses the challenge posed by *Romer*, and in doing so seeks to broaden and enrich the concept of democracy. Professor Schacter rejects the narrow,

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1. See, for example, Kenneth Arrow, *Social Choice and Individual Values* (Wiley, 2d ed. 1963); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge, 1982). Professor Schacter has pointed out that the Court may itself subscribe to several theories of democracy that do not consist solely of such ratification. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 613-46 (1995).

2. The classic expression is found in John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U., 1980).

3. 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

4. See *Romer*, 116 S. Ct. at 1629-37 (Scalia, J., dissenting). See also Justice Thomas's dissent in *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1875, 131 L. Ed. 2d 881 (1995) (Thomas, J., dissenting) (lamenting the majority's willingness to strike down a state provision prescribing term limits for state delegates to Congress that had garnered nearly 60% of the popular vote).

conventional approach that undergirds Justice Kennedy's majority opinion and the Court's general equal protection analysis. Rather than focusing—as the Court does—on the problem of the rights of the minority to be free from majority abuse, Professor Schacter attempts to offer two substantive refinements to the idea of democracy.

First, Professor Schacter argues that democracy must include a fundamental right to participate in the political process.[5] Thus, the evil of the law in *Romer* was not just majority discrimination, but the ultimate disenfranchisement of gays from the political process. With no ability to seek the protection of the government, gays were virtually frozen out of the ordinary give and take of interest group politics. Second, Professor Schacter argues that democracy must include the social dimensions of citizenry and identity.[6] These social dimensions of democracy occur outside of formal law and outside of what is normally considered the political process, at the most basic of citizen-to-citizen relations in society. This world—the non-legal, non-political—is the arena in which norms evolve that define our daily freedoms, where attitudes are formed and roles created, and where the most fundamental structures of human interaction are put in place.[7] Full participation in this social sphere is a central component of what it means to be a citizen in a democracy. For Professor Schacter, these two refinements better explain the result in *Romer*, and are part of her larger project to develop a broader, more substantively enriched vision of democracy.[8]

There is much to agree with in Professor Schacter's Article, and it certainly offers us a better understanding of the result in *Romer v. Evans* and the concept of democracy. She offers two specific components of what she claims to be a fuller account of democracy—citizen participation in the political process, and an inclusion of the social sphere. My disagreement with the Article is where it leaves off. Claims that democracy must or should include certain spheres of action or protect certain participatory rights (more

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5. See Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 Vand. L. Rev. 361, 399 (1997).

6. See id. at 400.

7. See *Symposium: Law, Economics, & Norms*, 144 U. Pa. L. Rev. 1643 (1996). See in particular Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. Pa. L. Rev. 2079, 2096-98 (1996) (describing the "Code of the Streets"—the extralegal social code of inner-city youth); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181 (1996). See also Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 914-21 (1996) (describing extralegal norms that govern a wide sphere of everyday activity and are enforced by equally extralegal social sanctions).

8. See Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L. J. 107 (1995); Schacter, 108 Harv. L. Rev. at 593 (cited in note 1).

than or in addition to others) are useful points for departure, yet eventually they require a more robust defense, or at least a more detailed description of how these components—political participation and the social sphere—operate in a democracy.[9] Failure to provide the latter places the former on shaky ground, or worse yet, such claims can be misunderstood as mere exhortations to design a system of democracy along the lines suggested. Yet the facts, background, and context of *Romer v. Evans* provide an opportunity to detail a richer account of the mechanics of democracy, and to describe a normative defense for the claims that are implicit in Professor Schacter's effort. I offer three propositions, drawn from *Romer v. Evans*, that at least ought to be explored in Professor Schacter's account of democracy.

Proposition One: Democracy cannot narrowly focus on participation in the political or governmental process and the right to vote, but must include the individual's antecedent choice, including the right to travel and choose a community in which to live.

The Court in *Romer v. Evans* tells a simple, static story of a political process that ends with the state of Colorado—through its citizens—discriminating against gays in a statewide initiative, Amendment 2. The state's action is the Court's focus, which allows the Court to analyze the case as a classic equal protection problem—a minority is being oppressed by the actions of the majority. Yet the political process that triggered the dispute in *Romer* is actually much more complicated and interesting. Gays in Colorado had obtained modest political victories by having antidiscrimination ordinances enacted in local communities. Amendment 2 was adopted in response to these political victories, and acted to reverse these gains. Thus, Amendment 2 did not simply provide that the state would offer no protection against discrimination for gays; it specifically prohibited any local governmental entity from doing so, even if the citizens and representatives of that community wished to adopt such policies.

While claiming that democracy must include the rights of citizens to participate in the political process, Professor Schacter does not ask where this participation is to occur, and never explores the significance of what seems to be the real democracy puzzle posed by

9. See also Sandel, *Liberalism* (cited in note 1).

Romer v. Evans—how does the concept of democracy address a conflict between "democratic" outcomes at two levels of local government?

It seems evident that in parts of Colorado, communities had evolved that provided gays a modest level of tolerance and participation. Three communities whose ordinances were reversed by Amendment 2—Aspen, Denver, and Boulder[10]—would seem to fall into this category. If those communities are open and accessible—not just for gays but also for others who choose to live in a political and social community generally tolerant of gays[11]—individuals may select and live where their preferences will most likely be honored. Their political preferences should be reflected in successful political outcomes. Central to this matching of preferences is the right of persons to travel to and settle in such a community.[12] And without this right to travel it is likely that democracy will do a poor job of ensuring that individuals maximize their welfare.

Imagine a community with one hundred people, in which sixty people vote against an ordinance and forty people vote for the ordinance. The forty people can remain in the community and have their preferences unfulfilled. Or they can move to another community, where their preferences are more in line with the majority's. Large communities sometimes do an inadequate job of implementing the preferences of their citizens and it is an essential component of democracy to allow people the right to exit and form or join new communities.[13] In the context of *Romer v. Evans,* the interesting question is whether communities have evolved that provide gays some level of tolerance, protection, and political participation, and that are accessible to both gays and those who seek to live in

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10. *Romer,* 116 S. Ct. at 1623.

11. Justice Scalia generally ignores this second group of supporters for antidiscrimination ordinances. His concern is that "because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities," such persons can devote their political power to gaining "not merely a grudging social toleration, but full social acceptance, of homosexuality." Id. at 1634 (Scalia, J., dissenting). Thus Justice Scalia identifies only those who engage in same-sex intimacy as credible advocates of homophilic legislation.

12. For snapshots of the evolution of the fundamental right te travel, see, for example, *Shapiro v. Thompson,* 394 U.S. 618 (1969) (holding unconstitutional a state residency requirement for welfare assistance when the requirement infringed upon a citizen's fundamental right to travel, to "migrate," which was derived from "constitutional concepts of personal liberty"), overruled in part on other grounds, 415 U.S. 651 (1974); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (holding unconstitutional Tennessee's residence requirement for voting because the requirement violated the "fundamental interest" in voting and burdened the right to travel).

13. Jonatban Macey notes that states suffer stiff regulatory competition because individuals adversely affected by state regulation may exit the state and migrate to a more favorable regulatory environment. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism,* 76 Va. L. Rev. 265, 273 (1990).

what they believe will be a more tolerant community. It may be that the modest political successes that were undone by the state-wide initiative addressed in *Romer v. Evans* were the result of a series of demographic and social migration patterns.[14] The compact geographical concentration of gays that some have observed—often as an essential part of self-defense[15] and identity formation[16]—and the political successes that follow,[17] may be linked to the fundamental right to travel and form social, economic, and political communities on a local level.

Of course, Tiebout argued that an efficient level of public goods will be set if people are allowed to travel and select a community that reflects their preferences.[18] So too, it is rational for individuals to seek out those communities that best reflect their preferences on

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14. See Kenneth D. Wald, James W. Button, and Barbara A. Rienzo, *The Politics of Gay Rights in American Communities: Explaining Antidiscrimination Ordinances and Policies*, 40 Am. J. Pol. Sci. 1152, 1156-57 (1996) (arguing that the principal stimulus for gay political action was social dislocation and geographic migration following World War II).

15. See Margaret Cruikshank, *The Gay and Lesbian Liberation Movement* 2-3 (Routledge, 1992) (asserting that group solidarity allows comfortable revelation of individual identity that otherwise would invite intolerahle persecution).

16. There is a wealth of social science literature exploring this relationship. See, for example, Vivienne C. Cass, *Homosexual Identity Formation: A Theoretical Model*, 4(3) J. Homosexuality 219, 229-34 (1979) (identifying contact with other gays and the gay subculture as necessary te homosexual identity formation); Stephen Cox and Cynthia Gallois, *Gay and Lesbian Identity Development: A Social Identity Perspective*, 30(4) J. Homosexuality 1 (1996) (describing the "social interaction" approach to identity development, which places an emphasis on interaction with the gay subculture as an important step in the development of a gay identity). But see Susan Krieger, *Lesbian Identity and Community: Recent Social Science Literature*, in Estelle B. Freedman, Barbara C. Gelpi, Susan L. Johnson and Kathleen M. Weston, eds., *The Lesbian Issue: Essays from SIGNS* 223, 223 (U. of Chicago, 1985) (noting that a lesbian community may harm the formation of lesbian identity as well as nurture it). See also Vivienne C. Cass, *Homosexual Identity: A Concept in Need of Definition*, 9(2/3) J. Homosexuality 105, 112 (1983/1984) (gathering studies that describe the influence of gay subculture on gay identity); Krieger, *Lesbian Identity* in Freedman, Gelpi, Johnson, and Weston, eds., *The Lesbian Issue* at 229-37 (cited in this note) (listing nine social science studies from the 1970s and 1980s evaluating both the positive and negative influences of cohesive communities on the formation of lesbian identity). Compare these approaches with that of Richard Troiden, who argues that identity disclosure is a matter of post hoc identity "management" rather than a prerequisito to identity development. Richard R. Troiden, *Self, Self-Concept, Identity, and Homosexual Identity: Constructs in Need of Definition and Differentiation* 10(3/4) J. Homosexuality 97, 105 (1984).

17. For examples of political successes due to geographic compactness, see Cruikshank, *Liberation Movement* at 134-35 (cited in note 15) (recognizing the political advances gained in San Francisco, which was an early and enduring haven for gay men and lesbians); Barry D. Adam, *The Rise of a Gay and Lesbian Movement* (Twayne, rev. ed. 1995) (detailing homophile movements throughout the century). See also Cruikshank, *Liberation Movement* at 121 (cited in note 15) (stating that the first political "victory" for homosexual people was the very right to associate in gay bars).

18. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).

tolerance toward gays or other oppressed groups.[19] Thus, while Professor Schacter is clearly correct in criticizing the majority in *Romer v. Evans* for adopting the simplistic majority versus minority model to measure the constitutionality of Amendment 2, she nonetheless fails to explore an important part of political activity. *Romer* suggests that she should include within her concept of political participation the basic right of the citizen to travel and to join a political, social, and economic community, choices that precede the involvement of citizens in interest group politics.

Proposition Two: The pre-participatory acts of choice of community formation and the initial stages of political development in that community may not be prematurely terminated—sub-units within a larger political entity must be given time to gain strength and cohesiveness.

Democracy is a dynamic, competitive process. Proposition One identifies one strand of political participation: citizens may travel and choose to be part of a community. As individuals choose communities where their political preferences are more likely to be honored, political successes in these local smaller governmental units may be accomplished. This was obviously the case in *Romer v. Evans*, where gays had achieved success on the municipal level with the enactment of ordinances banning discrimination based on sexual orientation. And it was these local political victories that threatened voters in other parts of the state of Colorado. Faced with this threat the political strategy of those who disagreed with the gay rights ordinances was clear: to subsume the municipal units within a larger and more hostile political arena at the statewide level.

The first obvious consequence of this strategy was to undo the effect of the right to travel and choose a political community. For those citizens who chose Aspen, Denver, or Boulder the political arena was now the state of Colorado. The shifting of the issue to the state level forced their political interactions into a more hostile arena. The political power that gays had obtained through community choice was engulfed and diffused. In Tiebout's terms, the forty citizens who moved out of the community of one hundred to better maximize their utility were now forced back into that larger community so that their

19. See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 4, 109 (Harvard U., 1970) (describing the power to exit communities as a way for individuals to obtain their social preferences).

choices could be undone. But the strategy of shifting the political arena that triggered the litigation in *Romer v. Evans* poses an even more fundamental question about democratic process and the evolution of political units: can the majority within a larger political system kill off a potentially competitive minority ideology by unilaterally forcing the competitor into interaction that the citizens of competitor would prefer to avoid? In other words, the rational strategy for the threatened majority may be to try to kill off political development in a smaller system early on before it becomes a new majority. Viewed in this manner, lessons may be drawn from two disciplines that seek to understand survival and evolution of competing strategies within different systems.

First, an analogy may be drawn to findings in the field of evolutionary biology.[20] Biologists have observed that a developing species has a better chance of survival if the species limits external interactions and produces a system of cooperation and interdependence.[21] And conversely, when the interaction is random and does not allow for the formation of cooperative, interdependent communities, the species will face barriers to survival. The lesson from species evolution is therefore quite clear: remain separate and gain strength by avoiding interaction in the larger population. Immediate involvement will choke off growth and development.

Similar conclusions have been derived from experimental game theory. Computer tournaments have been run to see what strategy wins out among others in a prisoner's dilemma. The strategies offered in the tournaments range from the competitive, mean, or bad to the nice, forgiving, and cooperative.[22] Anyone using a strategy characterized as nice or forgiving is immediately overwhelmed and defeated if placed into a large tournament with players using bad or

20. No doubt the application of some of this learning—controversial within the field of biology itself—must be done with a fair amount of caution and realization of the limits of the analogy to legal evolution. Other applications of evolutionary biology and explorations of the limits of its usefulness to law can be found in Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harv. L. Rov. 641 (1996) (incorporating modern trends in evolutionary science into the classical analogy between biological evolution and law and economics); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 Vand. L. Rov. 1407 (1996) (drawing analogies between the evolution of biological systems and the evolution of law); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 Colum. L. Rev. 38 (1985). See also Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 J. Contemp. Health L. & Policy 265 (1993) (warning of the practical effects of importing concepts from evolutionary biology to law).

21. See Robert Axelrod, *The Evolution of Cooperation* 98-100 (Basic Books, 1984).

22. Id. at 27-54 (describing various tournament stratogies and their relative successes).

mean strategies.[23] A different outcome occurs if multiple players using the nice or forgiving strategies are allowed a minimum number of interactions that allow them to accumulate points by their cooperation efforts. When that limited interaction occurs the nice or forgiving strategies will eventually become strong enough to compete effectively in the larger game against the bad or hostile strategies.[24] Indeed, once established the nice strategies become evolutionarily stable.

Again, the parallel to democratic development in *Romer v. Evans* is interesting. Gay political success occurred when political interactions were limited to those who had chosen the same "strategy" of living in Aspen, Denver, or Boulder. But when these political groups were, so shortly after political success, thrown into state-wide competition, they were overwhelmed and defeated.[25] Local democratic majorities, like other evolving competitive systems, may also require time to develop strength on their own before inclusion into a larger arena.

By expanding democracy to include these first two propositions—a right to travel and form communities and a right not to be immediately overwhelmed by larger political communities—it is necessary to examine more closely and critically those social, economic, and political forces that shape the choices and structures of communities. At the same time, however, this dynamic model of democracy begins to provide a response to Justice Scalia's economic account of the reasons why the state-wide initiative in *Romer v. Evans* ought to have been upheld. In a twist on footnote four of *United States v. Carolene Products Co.*,[26] Justice Scalia argues against any need for

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23. Id. at 63-64.

24. Id. at 64-69, 129-32 (describing this strategy of "clustering" or invasion by clusters).

25. Perhaps a similar phenomenon of premature predation has occurred with the advent of the "Defense of Marriage Act", Pub. L. No. 104-99, 110 Stat. 2419, codified at 28 U.S.C. § 1738 and 1 U.S.C. § 7 ("DOMA"). DOMA was passed in fear that state court developments in Hawaii will result in the recognition of same-sex marriages. The federal legislature took it upon itself to foreclose the possibility of required interstate recognition of such marriages under the Full Faith and Credit Clause by asserting that the Clause does not cover same-sex marriage decrees. Thus, the federal government made a nationwide "pre-emptive strike" against homophiles working for marriage rights on a state-by-state basis.

I do not want to overstate the tolerance of local communities, particularly as compared with policy made at the national level. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (1995), vacated and remanded, 116 S. Ct. 2519, 135 L. Ed. 2d 1044 (1996) (upholding a city charter amendment preventing the city council from providing "preferential treatment" based on homosexual orientation). Nonetheless, the relevant question is whether smaller political markets are more likely to be affected by competition and migration patterns.

26. 304 U.S. 144 (1938).

heightened judicial protection of gays. To him, gays are not an oppressed discrete and insular minority but a cohesive, affluent, and organized part of the powerful elite.[27] They suffer none of the free-rider or resource problems that disempower larger, more diffuse, and more poorly organized minorities.[28]

Putting aside this reductionist understanding of what it means to be affluent or powerful, the first two propositions outlined above begin to show why Justice Scalia's economic analysis of interest group interaction is incomplete. His economic model never takes into account the need for competition among communities,[29] the rights of people to travel to and form communities, or the unfairness and stifling of democracy that occurs when subgroups are denied the right to grow independently and gain political strength.

Of course, to all of this Justice Scalia might offer three responses. First, he might insist that there was a fair and typical political fight among interest groups at the statewide level and gays lost; those in Aspen, Denver, or Boulder certainly can claim no right to absent themselves from the politics of Colorado, a state they presumably chose to live in. But such a response assumes the answer to the difficult questions of democracy in *Romer v. Evans*. Was the fight on the state level fair, or was it a premature attack on thriving, local political communities?

Second, Justice Scalia might claim that he is not interested in the economics of group and community formation and political evolution. This would indeed be an odd response, since it is he who championed the use of interest-group analysis in not only *Romer v. Evans*, but other areas of law as well.[30]

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27. See *Romer*, 116 S. Ct. at 1634 (Scalia, J., dissenting). The "discrete and insular minorites" approach can he traced back to *Carolene Products*, 304 U.S. at 153 n.4. For an early effort to reconceptualize *Carolene Products*, see Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 715-716 (1985).

28. See *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 53-57 (Harvard U., 1971) (discussing superior action effectiveness of smaller groups).

29. See note 18 and accompanying text.

30. See Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Modcl of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1304-08 (1990) (describing public choice theory and interest-group analysis as an informing principle behind Justice Scalia and other textualists' abliorrence for legislative history as a tool of statutory interpretation); *Pennell v. San Jose*, 485 U.S. 1, 21-24 (1988) (Scalia, J., concurring in part and dissenting in part) (opining that a local provision requiring landlords to reduce rent for "hardship" tenants is a form of forced private welfare and therefore in violation of the Takings Clause).

Third, Justice Scalia might say that municipalities and citizens thereof have no rights separate from and independent of their rights as citizens of a state. It is this last point that is quite intriguing, and here that Professor Schacter's quest for a redefinition of democracy falls short in not including a discussion about which units of government—and which civic relationships—deserve either constitutional or political recognition in a democracy. In a series of cases arising early in the twentieth century, the Supreme Court held that municipalities and citizens thereof had no constitutional status.[31] States were the only constitutionally relevant unit of local government. It seems that this claim ought to be open to re-examination by Professor Schacter. Perhaps for her the question is not worth pursuing, since we have a Supreme Court that has recently reaffirmed notions of state sovereignty and re-emphasized the special role that states have in the federal union.[32]

Against this background it seems unlikely that the Court would have much interest in abandoning the states' rights revival and embracing a conception of federalism that recognizes more local governmental units and the individual as a citizen of a municipality. But as odd as that interpretation would be in the current constitutional climate, it can be found and traced back to earlier cases in which the Court extended the right to vote to municipal elections.[33] Moreover, in this context the Court's recent opinions on racially-drawn voting districts offer some interesting parallels as well. Justice Kennedy and

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31. See, for example, *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (stating that the United States Constitution does not protect municipalities from state control, and that "[m]unicipal corporations are political suhdivisions of the State," subject at all times to the whim or will of that state). See also *City of Worcester v. Worcester Consolidated Street Railway Co.*, 196 U.S. 539, 548-50 (1905) (collecting cases establishing that "[t]he city is the creature of the State" and thus has no constitutional significance as a government body).

32. See *United States v. Lopez*, 115 S. Ct. 1624, 1634, 131 L. Ed. 2d 626 (1995) (holding the Gun-Free School Zones Act unconstitutional as an impermissible regulation of intra-state commerce); *New York v. United States*, 505 U.S. 144 (1992) (holding that the federal government may not co-opt the machinery of the state government to implement federal regulations and therefore striking as unconstitutional under the Tenth Amendment the Low-Level Radioactive Waste Policy Act). See also *Gregory v. Ashcroft*, 501 U.S. 452, 456-70 (1991) (holding that the federal government may not infringe on a state's right to prescribe qualifications for state officials and therefore rejecting an ADEA challenge to state law prescribing mandatory retirement for state judges). For an extreme version of state sovereignty see *Term Limits*, 115 S. Ct. at 1875-914 (Thomas, J., dissenting).

33. See *Rome v. United States*, 446 U.S. 156, 166 (1980) (applying the Voting Rights Act to municipalities). For a more general argument that the city has constitutional significance see Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980). See also Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 1996 Yale L. & Pol. Rov./Yale J. Rog. 149, 158 ("The notion that interstate regulatory competition involves solely the states qua states is naive."); id. at 171-72 (urging analysis of regulatory arrangements between states and local governments).

Justice O'Connor seem most troubled by the drawing of district lines that appear odd or peculiar and do not follow more "naturally occurring" boundaries or living patterns.[34] In their view, compactness, the cohesiveness of a community, and respect for local governmental units should determine districting. It may be that their broader acceptance of the political significance of these local political-geographic lines—represented in *Romer v. Evans* by the political actions of towns like Aspen, Denver, and Boulder—that made Justice O'Connor and Justice Kennedy willing to set aside the statewide initiative and restore the governmental actions of these local political communities.

At bottom, therefore, *Romer v. Evans* is a case about the formation, survival, and recognition of political communities. The reinstatement of the local gay rights ordinances and rejection of the actions of the people of the state of Colorado suggests the need for a discussion about political participation at various levels of government. It seems appropriate to inquire into these questions—vexing as they might be—before discussing more general rights of political participation.

Proposition Three: There may be an even more powerful relationship between the Court's assertion in Romer v. Evans *that the Colorado initiative was "unprecedented in our jurisprudence" and the central problem of gay marginalization and disenfranchisement.*

For Professor Schacter the problem of disenfranchisement and democracy are inextricably related. And she is surely correct in arguing that the disenfranchisement protected against in *Romer v. Evans* occurs on many levels. Most clearly, gay participation in the pluralist arena was affected by Amendment 2. Robbed of the power to enact protective laws, gays were given little incentive to participate in ordinary politics. In the private sphere, Amendment 2's repeal of the antidiscrimination laws left gays vulnerable in the manner highlighted by Professor Schacter.[35] What Proposition Three suggests is that the disenfranchisement, vulnerability, and invisibility may go even deeper than Schacter argues, to the basic level of identity construction. The point is worth pursuing, if for no other reason than

34. See, for example, *Shaw v. Reno*, 509 U.S. 630, 634-36 (1993) (describing one of the ultimately unconstitutional districts at hand as a "Rorschach ink blot text," and a "bug splattered on a windshield").

35. Schacter, 50 Vand. L. Rev. at 401-02 (cited in note 5).

that two people with quite different outlooks—Justice Scalia and Ronald Dworkin—have raised similar questions about the issue of disenfranchisement and identity.

Dworkin questions whether Amendment 2 is unique simply because it places certain legislative or governmental measures beyond the power of a local government to enact.[36] What Dworkin argues is that this is the whole point of a Constitution—to take issues out of the everyday local political process. Justice Scalia makes the point in a different and more hard-edged way. He suggests that Amendment 2 is really no different from a law providing that only state officials can offer a city contract to relatives of the city's mayor.[37] The example and Amendment 2 are identical for Justice Scalia, because they both take an issue salient to a discrete group of people, place that issue outside the normal political channels, and demand that the group achieves its political success through a more onerous process.[38]

The majority in *Romer v. Evans* certainly made no effort to respond to the question raised by Professor Dworkin and Justice Scalia. Professor Schacter attempts to do so by emphasizing the many ways in which Amendment 2 operated to disenfranchise gays in

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36. See Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. Review of Books 44, 48-49 (Aug. 8, 1996). See also *Romer*, 116 S. Ct. at 1634-35 (Scalia, J., dissenting) (citing the Eighteenth Amendment as an example of an enactment that placed an issue—consumption of alcohol—out of reach of not only local policy and state legislation, but state constitutional amendments and federal legislation as well).

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

38. There is an established line of cases holding that state and local officials may not take certain issues out of the normal political process and impose more demanding requirements on those seeking to enact laws that address those issues. See *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) (striking down as a violation of the Equal Protection Clause a state statute adopted through initiative that would prohibit local school boards from busing students te desegregate their schools); *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (invalidating as violative of the Equal Protection Clause an amendment te a city charter that would impose a heightened voting requirement to approve any city housing ordinance that sought to prevent discrimination). The Court has, however, made clear that this line of cases is limited to racial issues. See *Seattle School Dist.*, 458 U.S. at 484-87. See also *Arthur v. City of Toledo*, 782 F.2d 565, 573 n.2 (6th Cir. 1986); *James v. Valtierra*, 402 U.S. 137, 140-41 (1971) (refusing te extend *Hunter* beyond racial discrimination). The Court in *Romer* chose not to rely on this line of cases, probably because Amendment 2 lacked the racial subject matter that would trigger stricter scrutiny. The Court's rationale in *Romer*, based on rational basis scrutiny, made it clear that there was no interest in reviewing laws based on sexual orientation under a strict scrutiny standard. *Romer*, however, appears to be another case in which the Court has applied a heightened rational basis test without so characterizing its approach. See *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Although the Court's doctrinal analysis in *Romer* may be characterized as a basic failure in the Court's handicraft, some have found the incompleteness both substantively and strategically inventive. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 53-71 (1996); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 Stan. L. Rev. 45, 86-87 (1996) (arguing that the Court's "analytically imperfect" analysis allowed it to meet its goals of "overturn[ing] an especially egregious abuse of the political process, while creating no extension of equal protection rights").

public and private life. But Professor Schacter's response could be even more powerful if it claimed that the most basic individual freedom to recognize and develop a personal identity must include an element of social and political activity. Going back to Justice Scalia's example, would a person denied a right to a municipal contract claim that such a law impedes the ability to develop an individual identity or a full sense of self?[39] Except perhaps in the most corrupt of local patronage systems such a claim would be hard to maintain. Yet in the context of *Romer v. Evans* the issue is far more complex. The very scope and harshness of Amendment 2 may well impede the right to develop a personal identity and sense of self. Political participation—group formation, lobbying on key issues, and political identity—may be conceived of as a central part of the important process of how an individual establishes and defines a gay identity.[40] In the private sphere that Professor Schacter discusses, the forced invisibility that may result from Amendment 2 is likely to stifle the same kind of development of self. Thus, Amendment 2 tells a group that an important part of identity formation is either futile or faces high barriers to success. Gays are not only limited in their political and social activities, but are also told that they may not participate in the most basic human experience—the development of a self-identity.[41]

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39. Justice Scalia's point could be made more powerfully. For example, if a state constitution was amended by initiative to bar the deatb penalty or create a right to choose an abortion, would such a political result unconstitutionally disenfranchise those groups that had previously lobbied for the opposite result? The answer to even these examples no doubt lies in the differences in obstacles te identity formation these laws may pose as contrasted to the law in *Romer.*

40. Professor Cheshire Calhoun argues that being "gay" is defined as being a breaker of heterosexual laws. Chesbire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 Va. L. Rev. 1859, 1860, 1868-70 (1993). A logical extension of Professor Calhoun's definition places political lobbying for the repeal of sexual conduct laws and antidiscrimination regulations at the center of gay identity. See also Cox and Gallois, *Gay and Lesbian Identity Development*, 30(4) J. Homosexuality at 20-22 (cited in note 16) (describing political action as an identity enhancement strategy).

41. At a more fundamental level, Amendment 2 may have threatened not only gay identity but gay existence. In tlie state court and at oral argument before the Supreme Court there was discussion whether Amendment 2 would prohibit law enforcement officers and other government officials from protecting gays from physical assault. The Court's majority opinion alludes to the issue but never develops the point. See *Romer*, 116 S. Ct. at 1624-27. See also id. at 1630 (Scalia, J., dissenting) (disrespecting the "parade of horribles" including lack of protection from assault tbat was raised at oral argument). Tlie potential sweep of Amendment 2 thus raised a host of problems, and interesting questions about the obligation of the government to protect citizens from assault. In other cases the Court has been reluctant to include such a freedom within tbe concept of due process. See, for example, *Deshaney v. Winnebago County, Dept. of Social Services*, 489 U.S. 189, 194-203 (1989). Such an outcome in *Romer* would indeed have been puzzling. Tlie Court in other contexts has been eager to use the

Such a hypothesis is indeed speculative, and requires a much better understanding of the relationship between sexuality, identity, and political and social activity. Yet it may be a study worth undertaking, for if the concept of identity is so bound up with political participation, the disenfranchisement identified by Professor Schacter is particularly devastating. So understood, the questions raised by Professor Dworkin and Justice Scalia are answered, and there is even more force to the majority's description that Amendment 2 is "unprecedented in our jurisprudence."

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common law to define the liberties of individuals. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 876-902 (1987). Yet at the common law the freedom to be free of assault and battery was well established.