Neither Liberty Nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law

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NEITHER LIBERTY NOR JUSTICE: ANTI-GAY INITIATIVES, POLITICAL PARTICIPATION, AND THE RULE OF LAW

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to . . . .

INTRODUCTION

Early on the Saturday morning of June 27, 1969, drag queen Sylvia Rivera "was just not in the mood" when police raided the Stonewall Inn, a popular gay bar located in New York City's Greenwich Village. Apparently, many of the Stonewall's patrons—ranging from full-time transvestites to straight-looking Upper East Side professionals—felt the same. They saw the bar as an "oasis" and "a safe retreat from the harassment of [homosexuals in] everyday life . . . ." They were tired of police aggression and brutality; tired of legalized discrimination; tired of reprobation. So when police stormed into the bar that morning, just as they had done two weeks earlier, the 200 patrons of the Stonewall Inn did not scatter and disappear into the darkness of morning. They resisted. "You could feel the electricity going through people," Rivera remembers, "You could actually feel it. People were getting really, really pissed . . . ." The crowd started to toss coins and scream epithets at the officers but soon graduated to throwing bottles, cans and bricks. Rioters set fires, broke windows, and vandalized police vehicles, finally taking control of the street and forcing the officers into the Stonewall's interior. According to Deputy Inspector Pine, "I had been in combat situations, [but] there was

1 Reitman v. Mulkey, 387 U.S. 369, 387 (Douglas, J., concurring) (citing 5 WRITINGS OF JAMES MADISON 272 (Hunt ed. 1904)).


3 Id. at 182.

4 See infra § I(A)(1).

5 See DUBERMAN, supra note 2, at 196.

6 Id.
never any time that I felt more scared than then." Pine called for a specially-trained riot-control unit to help suppress the violence; an uneasy and temporary calm descended at about three-thirty that morning, more than two hours after the police raid had begun. But two more nights of rioting followed before the peace was finally secure.

The unrest at the Stonewall Inn, often referred to as the "Stonewall Rebellion," marks a turning point in the gay rights movement. According to Professor Patricia Cain, Stonewall "provided a symbolic radical shift in lesbian and gay arguments for civil rights." It reflected a changing sociopolitical climate. She sketches the historical context of the Stonewall Rebellion as follows:

Martin Luther King preached nonviolent opposition to the racist power structure and led civil rights marches to protest the inequality between black and white Americans. Student radicals in Berkeley . . . claim[ed] their free speech rights. Students . . . protest[ed] the war in Viet Nam. . . . In 1968, protestors at the Democratic convention in Chicago were beaten by police officers. It was

7 Id. at 198.
8 For a historical account of the Stonewall Rebellion, see id. at 181.
10 Although the word "gay" in this Note usually refers to gay men, terms such as "pro-gay" and "gay rights" are meant to include lesbians and bisexuals. Additionally, I use the word "homosexual" to refer to lesbians and bisexuals as well as to gay men. Some people object to the clinical and sexual overtones of the word "homosexual," noting that clinicians introduced the term in association with their descriptions of homosexuality as a pathology. See id. at 1626 (citing David F. Greenberg, The Construction of Homosexuality 2-3 (1988); Mary McIntosh, The Homosexual Role, in Forms of Desire 27-28 (Edward Stein ed., 1990)). Furthermore, many lesbians believe that the word "homosexual" conjures up the image of the gay man and thus excludes women. Margaret Cruikshank, The Gay and Lesbian Movement 4 (1992). One could also object to including bisexuals under a heading that implies strict same-sex attractions. Although I agree with these criticisms, I can find no suitable substitute for the word "homosexual," and so I continue to use it. Some writers prefer the term "gay," because it lacks the clinical overtones of "homosexual" and because it was "chosen by [gays themselves], as a sign of [their] refusal to be named by, judged by, or controlled by the dominant majority." Cruikshank, supra, at 91. But "gay," like "homosexual," excludes lesbians and bisexuals.

The word "queer" may eventually prove superior to any of these words in that it does not distinguish between lesbian, gay and bisexual people and even leaves open the possible inclusion of other groups, like transvestites. I suspect that much of the problem with terminology in pro-gay literature stems from the fact that the homosexual-heterosexual dichotomy constructed by theorists does not accurately reflect human sexual behavior. Human sexuality, according to Alfred Kinsey, is a continuum: "The world is not to be divided into sheep and goats. . . . Only the human mind invents categories and tries to force facts into separated pigeon-holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex." Alfred C. Kinsey et al., Sexual Behavior in the Human Male 639 (1948).
11 Cain, supra note 9, at 1581.
within this broader context of resistance and public challenges to governmental authority that the Stonewall riots began.\textsuperscript{12}

The gay liberation movement of the 1960s, like other political movements during that decade, revealed the inherent tension between political obligation and justified resistance to law.\textsuperscript{13} The "drag queens and the nellies"\textsuperscript{14} who threw bricks at police officers outside the Stonewall Inn refused to subordinate themselves to an unjust legal system. In certain respects, they resembled political protesters engaged in civil disobedience. The brutal treatment they customarily received at the hands of the police had slowly attenuated their sense of obligation to law and had ultimately fueled, and perhaps even justified, their resistance to its officers.\textsuperscript{15}

This Note discusses political obligation and justified resistance to law in the context of \textit{Romer v. Evans},\textsuperscript{16} the most important gay rights case to reach the Supreme Court since \textit{Bowers v. Hardwick}.\textsuperscript{17} In \textit{Romer}, the Court invalidated Amendment Two, a proposed amendment to the Colorado Constitution, which lower courts had characterized as constitutionally "‘fencing out’ an independently identifiable class of persons;”\textsuperscript{18} as violating the Equal Protection Clause by “[a]llowing the majority to prohibit a small, unpopular group of citizens from obtaining favorable legislation;”\textsuperscript{19} and as “undermining the integrity of our nation”\textsuperscript{20} by "giv[ing] effect . . . to private prejudice.”\textsuperscript{21} The Court had an opportunity in \textit{Romer} to affirm the Colorado Supreme Court’s finding that the United States Constitution protects a fundamental interest in equal participation in the political process. But it declined to do so. Although it affirmed the judgment of Colorado’s highest court, it did so on different grounds.\textsuperscript{22}

\section*{Footnotes}

\textsuperscript{12} \textit{Id.} at 1580 (footnote omitted).
\textsuperscript{13} \textit{See infra} §§ II(A), II(B) (discussing political obligation and justified rule departures).
\textsuperscript{14} "The symbolic power of Stonewall lay in the fact that it was the drag queens and the nellies—the most unassimilated—who were the most visible and the most vocal." \textit{Cain}, \textit{supra} note 9, at 1581.
\textsuperscript{15} \textit{See infra} §§ II(A), II(B) (discussing political obligation and justified rule departures).
\textsuperscript{16} 116 S. Ct. 1620 (1996).
\textsuperscript{17} 478 U.S. 186 (1986); \textit{see also infra} § I(A)(3).
\textsuperscript{19} \textit{Equality Found.}, 860 F. Supp. at 433.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 444 (citing \textit{Palmore v. Sidoti}, 466 U.S. 429, 433 (1984)).
The Supreme Court struck down Amendment Two by applying a mere rational basis review (in contrast to the state supreme court, which had subjected the challenged law to strict scrutiny). Justice Kennedy wrote that the law "fail[ed], indeed defie[d], even this conventional inquiry." The Court's holding, therefore, represents a strong statement about the Constitution's intolerance for government-sanctioned prejudice. And for many citizens, the Court's favorable posture towards lesbian, gay and bisexual people represents a welcome, albeit belated, event. The Court's decision has two additional benefits, as well. First, by declining to utilize the state court's rationale, the Supreme Court avoided the elucidation of yet another fundamental right. It thereby escaped the inevitable criticism that would have followed such action since, in this aftermath of the Warren Court Era, many lawyers and scholars view the substantive due process doctrine as an albatross. Second, the Court wisely chose to steer clear of this terrain in the context of a gay rights case. If it had adopted the rationale of the state court, it would have only fueled the anti-gay argument that the Romer plaintiffs sought "special rights" from the state of Colorado.

Ultimately, even while declining to recognize a "new" fundamental interest, the Court acknowledged the importance of fair and equal political participation. If one reads between the lines in Romer, one sees that the Court has, through its biting application of the rational basis test, created a case that harmonizes with the precedent relied upon by the Colorado Supreme Court. And so it must have. As this Note will demonstrate, equal political participation is "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'" Section One of the Note presents the legal context of Romer v. Evans by surveying the lesbian, gay and bisexual struggle for equal rights; by describing contemporary equal protection doctrine; and by examining equal protection challenges to laws like the one struck down in Romer. Section Two analyzes the moral context of the case by considering the holding of the Colorado court in the framework of John Rawls' A Theory of Justice. It discusses possible theoretical grounds for a prima facie obligation to obey the law; presents an argument for justified rule departures; and examines the effect of those departures on political stability. Section Three concludes that anti-gay laws like the ballot initiative invalidated in Romer threaten civil society by attenuating the obligation to obey the law, suggesting that an interest in equal political participation

23 Id. at 1627.
24 See infra note 374 and accompanying text.
25 Romer, 116 S. Ct. at 1629-30 (Scalia, J., dissenting).
is "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection . . . ."28

I. THE LEGAL CONTEXT

The lesbian, gay and bisexual community burst out of its closet that June morning in 1969 when the patrons of the Stonewall Inn stood up to the New York police.29 Their act of resistance resulted in heightened visibility for the queer community as a whole as more and more people publicly acknowledged their homosexuality.30 But the Stonewall Rebellion did not, contrary to popular mythology, christen the modern gay rights movement.31 This Section traces that movement from the pre-Stonewall era to the Supreme Court's landmark decision in Bowers v. Hardwick to the present gay rights battles on the equal protection front. It also presents a basic overview of equal protection doctrine in order to lay the groundwork for its subsequent analysis of the Colorado court's recognition of a fundamental interest in equal participation in the political process.

A. A BRIEF HISTORY OF THE GAY RIGHTS MOVEMENT32

1. The Pre-Stonewall Era

American homophobia33 has expressed itself in violence and discrimination for over four centuries. During that time period, lesbian, gay and bisexual people have been

condemned to death by choking, burning, and drowning; 
[have been] executed, jailed, pilloried, fined, court-martialed, prostituted, fired, framed, blackmailed, disinherited, declared insane, driven to insanity, to suicide, [to]

28 Romer, 116 S. Ct. at 1628.
29 Cain, supra note 9, at 1582 (citing John D'Emilio, Sexual Politics, Sexual Communities 219, 237-38 (1983) [hereinafter D'Emilio, Sexual Politics]).
30 Id.
31 Id. at 1580.
33 The dictionary defines "homophobia" as an "aversion to gay or homosexual people or their lifestyle or culture." American Heritage Dictionary of the English Language 867 (3d ed. 1992).
murder, and [to] self-hate, [have been] witch-hunted, entrapped, stereotyped, mocked, insulted, isolated, pitied, castigated, and despised . . . . [have been] castrated, lobotomized, shock-treated, and psychoanalyzed . . . .

Nevertheless, the queer community has persistently resisted its subordination at the hands of a heterosexual majority.

In 1924, during which time "[r]epression was standard practice," Henry Gerber founded the first public gay rights organization in the United States. The Society for Human Rights, as he called it, survived for only a short time before Chicago police arrested and jailed several of its members. Some twenty years later, however, after World War II, several gay men established the more long-lived Mattachine Society in Los Angeles. They began publishing the magazine One, a collection of news, information, and other writing of interest to the lesbian, gay and bisexual community. In 1954, the U.S. Postal Service confiscated the October issue of One, refusing to deliver it on the grounds that it contained obscenity. The magazine brought suit in federal court, claiming that the Postal Service had violated its First Amendment rights; had abridged its right to equal protection of the law; had deprived it of property without due process; and that the Postmaster had abused his discretion. Although One lost at the trial and appellate levels, it triumphed at the Supreme Court, and chapters of the Mattachine Society, along with those of another important homophile organization—the Daughters of Bilitis (a lesbian group founded in San Francisco in 1955)—began to appear throughout the country. These organizations concentrated on the social and informational needs of lesbian, gay and bisexual people, as

34 Katz, supra note 32, at 11.
35 Cain, supra note 9, at 1556.
36 Id. at 1555-56.
37 Id. at 1556. A wife of one of the members had turned the organization in to the Chicago police. The police never made the charges clear and eventually the case was dismissed. Id.
38 Id. at 1558. According to Jonathan N. Katz, the name "Mattachine" came from a medieval secret society of unmarried men. These men wore masks during rituals in which they protested oppression. Harry Hay, one of Mattachine's founders, felt that the name signified the position of homosexuals in the United States in the 1950s: "masked and unknown figures, fighting for social change." Id. at 1558 n.43 (citing Katz, supra note 32, at 412-13).
39 Id. at 1559.
40 The Mattachine Society used the term "homophile" instead of "homosexual" to describe the organization's membership because of the negative connotations attached to the latter term. See Andrea Weiss & Greta Schiller, Before Stonewall: The Making of a Gay and Lesbian Community 40-41 (1988). I use the term here to describe Daughters of Bilitis because of the historical similarities between the two organizations.
41 A lesbian couple, Del Martin and Phyllis Lyon, formed the Daughters of Bilitis. Cain, supra note 9, at 1561.
42 Id.
well as on civil rights issues. In addition to providing the magazine *One*, for example, the Mattachine Society backed Frank Kameny when he challenged his government employer for dismissing him based on his sexual orientation. At the time, such dismissals were commonplace; in fact, in 1953, President Eisenhower extended a World War II policy that excluded lesbian and gay Americans from the armed services to the entire federal civil service.

2. The Stonewall Era

In addition to suffering discriminatory treatment on the job during that time period, lesbian, gay and bisexual people faced intimidation and harassment in the few places in which they could socialize. Bars and nightclubs served an important social function for the queer community during the 1950s and 1960s, and state authorities frequently harassed the patrons and owners of these establishments. Several important cases during those decades centered on the associational rights of lesbians and gay men. In *Stoumen v. Reilly*, for example, the California Supreme Court created what was probably the first favorable gay rights holding in the United States. In finding that the California Board of Equalization could not suspend an owner's liquor license just because his place of business catered to known homosexuals, the justices wrote:

The fact that the Black Cat was reputed to be a "hang-out" for homosexuals indicates merely that it was a meeting place for such persons. Unlike evidence that an establishment is reputed to be a house of prostitution, which means a place where prostitution is practiced and thus necessarily implies the doing of illegal or immoral

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43 None of these groups concentrated specifically on legal issues, however. *See id.* at 1564.

44 *Id.* at 1561-62. Kameny lost in both the lower and in the appellate court; the Supreme Court denied certiorari. *See id.* at 1574, 1575 n.142; *see also* Marcus, *supra* note 32, at 93-103 (quoting Kameny describing his story).

45 *See generally* Cain, *supra* note 9, at 1572-80 (describing several cases of discrimination against homosexual employees in government service).


48 *See generally* Cain, *supra* note 9, at 1567-72.

49 234 P.2d 969 (Cal. 1951).

50 Cain, *supra* note 9, at 1567.
acts on the premises, testimony that a restaurant and bar is reputed to be a meeting place for a certain class of persons contains no such implication. Even habitual or regular meetings may be for purely social and harmless purposes, such as the consumption of food and drink, and it is to be presumed that a person is innocent of crime or wrong and that the law has been obeyed.\textsuperscript{51}

Nonetheless, California authorities continued to harass the patrons of gay bars and to revoke the owners’ liquor licenses.\textsuperscript{52} Similar official conduct occurred throughout the country.\textsuperscript{53} As late as 1967, the City of Miami prohibited liquor licensees from employing “known homosexual[s], from selling liquor to a known homosexual, and from allowing two or more homosexuals to congregate on the[ir] premises.”\textsuperscript{54} Given this background of official intimidation, it is not surprising that the gay bars of the period had an illicit, clandestine atmosphere. One patron of the Stonewall Inn described it as “a real dive, an awful, sleazy place set up by the Mob for hustlers . . . .”\textsuperscript{55} In fact, the owners of many gay bars had ties to the Mafia.\textsuperscript{56} These mostly-heterosexual owners treated their lesbian and gay clientele contemptuously, watering down drinks and inflating prices.\textsuperscript{57} Payoffs to the police protected the bars from closure.\textsuperscript{58} But police raids continued. Officers would appear unexpectedly, arrest patrons and employees, and confiscate liquor.\textsuperscript{59} It was in this climate of intimidation and harassment that the confrontation at the Stonewall Inn occurred.

After the Stonewall Rebellion in 1969, the lesbian, gay and bisexual community became more visible as individuals began to openly identify themselves as queer in larger numbers than ever before. “The silence of the closet was broken . . . as the ranks of persons willing to stand up and be counted as lesbian and gay swelled significantly.”\textsuperscript{60} More gay rights organizations appeared and their memberships grew. This newfound visibility paved the way for the 1977 election of Harvey Milk to the Board of City Supervisors of San Francisco. Eight years after Stonewall, Milk be-

\textsuperscript{51} Stoumen, 234 P.2d at 971 (citation omitted).
\textsuperscript{52} Cain, supra note 9, at 1568-69.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 1572. A Florida court upheld the ordinance as a rational means through which to protect the public health, morals and safety. \textit{Id.} (citing Inman v. City of Miami, 197 So. 2d 50, 51 (1967), cert. denied, 201 So. 2d 895 (Fla. 1967), and cert. denied, 389 U.S. 1048 (1968)).
\textsuperscript{55} DUBERMAN, supra note 2, at 181 (quoting gay journalist Jim Fouratt).
\textsuperscript{56} For an interesting account of the Stonewall’s Mob managers, see \textit{Id.} at 183-85.
\textsuperscript{57} \textit{Id.} at 181.
\textsuperscript{58} \textit{Id.} at 185.
\textsuperscript{59} \textit{Id.} at 183, 192. The first openly gay bar in Manhattan lost twelve cases of liquor and fifty cases of beer during its first raid. \textit{Id.} at 183.
\textsuperscript{60} Cain, supra note 9, at 1582.
came the first openly-gay elected official in the United States. During his tenure, he worked to represent the interests of all of San Francisco's minority communities. When Proposition Six—an anti-gay plebiscite aimed at lesbian and gay schoolteachers—appeared on the California ballot, he campaigned vigorously against it. Unfortunately, Milk's term was cut short twenty days after the defeat of Proposition Six and eleven months after his election to the Board when former City Supervisor Dan White shot and killed Milk in his office in City Hall.

Gay rights advocates did not give up despite the loss of Harvey Milk. They argued against anti-gay initiatives like the one defeated in California and worked to secure the passage of laws and policies forbidding discrimination on the basis of sexual orientation. Their efforts met with strenuous opposition. Actress and singer Anita Bryant, for example, spearheaded a successful campaign to repeal a six-month-old

61 THE TIMES OF HARVEY MILK (Cinecom International Films 1986).
62 See, e.g., id.
63 Id. Proposition Six was also known as the “Briggs Initiative.” Id.
64 Id. Dan White shot and killed the Mayor of San Francisco as well. Both men were in their offices at City Hall when the assassinations occurred. In a verdict that stunned the lesbian, gay and bisexual community, the citizens of San Francisco, and the nation, Dan White was convicted of voluntary manslaughter and sentenced to seven years in prison. Commentators had assumed that White would receive the death penalty. White’s defense centered around his depression and his sugar-laden diet. The media termed it the “Twinkie Defense.” Id.; see also CRUIKSHANK, supra note 10, at 74 (claiming that the voir dire examination eliminated people of color and lesbian or gay people so that the jury wound up looking just like Dan White: straight, white and middle-class).

Milk knew from the beginning of his campaign for a position on the Board that, as a gay man, his assassination “could happen any day, at any place, at any time.” THE TIMES OF HARVEY MILK, supra note 61. After his election, he made a recording in which he said, “If a bullet should enter my brain, let that bullet destroy every closet door. . . . I would like to see every gay lawyer, every gay architect come out, stand up and let the world know. That would do more to end prejudice overnight than anybody could imagine. I urge them to do that, urge them to come out. Only that way will we start to achieve our rights.” LARRY GRoss, CONTESTED ClosEms: Tem PoLrrcs AND ETmcs oF OurNo 24-25 (1993). On the night of his death, with thousands of San Franciscans holding white candles, Milk’s recording was broadcast from the steps of City Hall. THE TIMES OF HARVEY MILK, supra note 61. For a thorough examination of Dan White’s motives and the events leading up to Milk’s assassination, see id.

65 An “initiative” is a special form of “plebiscite,” in which citizens place a measure on the ballot by securing a specified number of signatures. The population at large then votes for or against the measure in a general election. A “referendum” is a plebiscite in which a measure is ratified or disapproved by the electorate after its adoption by the legislature. Laws are more commonly enacted by legislative drafting and ratification. See generally Robin Charlow, Judicial Review, Equal Protection and the Problem with Plebiscites, 79 CORNELL L. REV. 527, 531-32 (1994) (arguing against a special level of judicial review for laws adopted by initiative). Voters have used both methods to pass anti-gay laws, but because such laws are usually referred to as “initiatives,” I adopt that language here. The plebiscite process is often referred to as “direct democracy.”

66 Washington state voters defeated a similar initiative at about the same time. ADAM, supra note 32, at 104-06.
67 See, e.g., id. at 102-20.
pro-gay ordinance in Dade County, Florida. But the lesbian, gay and bisexual community persevered. In addition to calling for gay-protective laws in the areas of housing and employment, pro-gay legal defense organizations began to consider a constitutional challenge to state bans on sodomy.

3. The Hardwick Era

The events that would provide the basis for that challenge occurred on the morning of August 3, 1982 when Officer K. R. Torick, of the Atlanta Police Department, arrested Michael Hardwick for committing the crime of sodomy, defined by a Georgia statute as "any sexual act involving the sex organs of one person and the mouth or anus of another." A sodomy conviction carries a sentence of one to twenty years in prison. Attorneys from the Georgia affiliate of the American Civil Liberties Union (ACLU) approached Michael Hardwick shortly after his arrest. They had visited courtrooms every day for the previous five

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68 Id. at 103-04.
69 People often fail to understand the central role played by criminal sodomy statutes in discrimination against lesbian, gay and bisexual people: equating homosexuality with sodomy and sodomy with criminal activity figures at the core of governmental discrimination against homosexuals. Sodomy statutes threaten lesbian, gay and bisexual people with surveillance, arrest, indictment, conviction and imprisonment. For a discussion of the importance to the queer community of challenging such laws, see Cain, supra note 9, at 1587 (sodomy statutes "are the bedrock of legal discrimination against gay men and lesbians") (quoting Abby Rubenfeld, the former director of the Lambda Legal Defense and Education Fund); Anne B. Goldstein, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993).
72 "A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years." Id.
73 Irons, supra note 70, at 382. In 1957, when the ACLU issued its first national policy statement on gay rights, it endorsed the constitutionality of sodomy statutes (the ACLU also considered an employee's homosexuality as relevant to the issuance of a security clearance). Cain, supra note 9, at 1583. Ten years later, the ACLU endorsed the idea that the privacy rights recognized in Griswold v. Connecticut should extend to all private consensual sexual conduct between adults—heterosexual as well as homosexual. D'Emilio, Sexual Politics, supra note 29, at 213. In 1973, the ACLU created the Sexual Privacy Project in order to challenge government regulation of sexuality. Cain, supra note 9, at 1584. By 1975, over half the states had nullified their sodomy laws. Irons, supra note 70, at 385. In 1983, the ACLU teamed up with the Lambda Legal Defense and Education Fund to host a national meeting of lesbian and gay legal organizations in order to develop a strategy for attacking sodomy laws. LAMBDA UPDATE 3 (LAMBDA LEGAL DEFENSE & EDUCATION FUND) Feb. 1984.
years in the hopes of finding a case like Hardwick's. The fact pattern seemed ideal. Hardwick had not engaged in sexual activity "in the presence of strangers" or kept his "windows and doors open to the whole world." Officer Torick had arrested him for behavior occurring in the privacy of his own home, "a sanctuary to which . . . the [Constitution] accords special protection." And Hardwick, unlike other potential defendants, had a supportive family and did not fear the loss of his job if he became involved in a gay rights case.

On March 31, 1986, Michael E. Hobbs, representing the State of Georgia, and Laurence H. Tribe, representing Michael Hardwick, argued the case before the United States Supreme Court. Professor Tribe, a Harvard law professor and one of the preeminent constitutional law scholars in the country, had appeared before the Court more than a dozen times and had an impressive record. He contended that "private, consensual, adult sexual acts partake of the traditionally revered liberties of intimate association and individual autonomy" protected by the Constitution. Six decades of privacy precedent, according to Professor Tribe, mandated an outcome that favored Hardwick. At the close of oral arguments, the Hardwick team could taste victory. They were sure they would win. But the Supreme Court, focusing its inquiry narrowly on the sexual intimacy between same-sex couples, found that the penumbral right to privacy elucidated in prior case law did not extend to homo-

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74 IRONS, supra note 70, at 396-97 ("[T]hey'd been trying for five years to get a perfect case.").
76 Rotary Int'l, 481 U.S. at 547. Many sodomy charges result from behavior that occurs in public or semi-public areas. See IRONS, supra note 70, at 396-97.
77 TRIBE, supra note 70, at 1434 (footnotes omitted).
78 "I was fortunate enough to have a supportive family who knew I was gay. I'm a bartender, so I can always work in a gay bar. And I was arrested in my own house. So I was a perfect test case." IRONS, supra note 70, at 397 (in the words of Michael Hardwick).
79 Id. at 388.
80 Id.
81 TRIBE, supra note 70, at 1428.
82 See id. at 1422-23.
83 IRONS, supra note 70, at 399-400 (presenting Michael Hardwick's account of March 31, 1986—the day on which the Court heard oral arguments).
sexual sodomy.\textsuperscript{85} In the words of Michael Hardwick, "Nobody expected it."\textsuperscript{86}

\textit{Bowers v. Hardwick}, the most important gay rights case ever to reach the Supreme Court, thus ended in defeat for the claimants. The case also struck a legal blow so severe to the lesbian, gay and bisexual community that it has not yet recovered.\textsuperscript{87} \textit{Hardwick} forecloses the application of strict scrutiny in the substantive due process arena, forcing pro-gay litigators to avoid privacy claims in challenges to anti-gay laws and to focus instead on the Equal Protection Clause. By grounding their arguments against discriminatory laws on equal protection, rather than on due process, advocates of gay rights hope to carve out a constitutional niche in which courts will apply strict or intermediate scrutiny to laws that unfairly burden homosexuals. But this strategy may not successfully bypass the \textit{Hardwick} holding. "Since \textit{Hardwick} was decided," according to Professor Nan Hunter,

the threshold question in the litigation of lesbian and gay rights cases has become whether \textit{Hardwick} only extinguishes the claim to a substantive due process privacy right, or whether it also predetermines challenges under the Equal Protection clause. The courts must still decide whether the decision in \textit{Hardwick} was a ruling on conduct or a ruling on a class of people.\textsuperscript{88}

\textsuperscript{85} \textit{Hardwick}, 478 U.S. at 191. Commentators have argued that the issue in \textit{Hardwick} should have been controlled by \textit{Griswold} and \textit{Eisenstadt} on the theory that a heterosexual person using birth control has no more connection to procreation than did Michael Hardwick and his companion. \textit{Geoffrey R. Stone et al., Constitutional Law} 974-76 (2d ed. 1991); \textit{see also} Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

\textsuperscript{86} \textit{Irons, supra} note 70, at 400. Michael Hardwick describes the day he learned of the Supreme Court's decision: "A friend of mine had been watching cable news and had [seen a report of the Court's decision] .... When I opened the door he was crying and saying that he was sorry, and I didn't know what the hell he was talking about. Finally I calmed him down and he told me what had happened: that I had lost by a five-to-four vote.

I was totally stunned. .... I just cried—not so much because I had failed but because to me it was frightening to think that in the year of 1986 our Supreme Court . . . could make a decision that was more suitable to the mentality of the Spanish Inquisition." \textit{Id.} Hardwick describes calling his attorneys, Kathy Wilde, of the ACLU, and Professor Tribe, looking for some encouraging words. Professor Tribe "was more devastated than [Hardwick] was." \textit{Id.} \textit{Newsweek} magazine printed a poll that said fifty-seven percent of the population opposed the decision. \textit{Id.} at 401.

\textsuperscript{87} In the opinion of this writer, the queer community will not recover from \textit{Hardwick} until the Supreme Court overrules it.

\textsuperscript{88} Nan D. Hunter, \textit{Life After Hardwick}, 27 Harv. C.R.–C.L. L. Rev. 531, 531-32 (1992). If litigators distinguish status from conduct, courts might reject the argument that homosexuals as a class are wholly defined by potentially-criminal conduct. Thus, they might apply heightened scrutiny to anti-gay laws even though the \textit{Hardwick} Court used a rational basis review. \textit{See infra § I(C).}
Several federal courts have held that *Hardwick* does bar heightened scrutiny, even in the equal protection context. Because states may constitutionally criminalize sodomy, they reason, “[i]t would be quite anomalous, on its face, to declare status defined by [that] conduct . . . as deserving of strict scrutiny under the equal protection clause.” Other courts, and numerous commentators, on the other hand, have reached the opposite conclusion. They argue that courts may apply strict scrutiny to anti-gay laws challenged under the Equal Protection Clause without running afoul of the *Hardwick* mandate because (1) *Hardwick* dealt solely with a substantive due process claim; and (2) *Hardwick* dealt with conduct instead of status. The Supreme Court’s opinion in *Romer v. Evans* did not end this debate. Because the Court utilized a rational basis test in striking down the amendment at issue in that case, it left open questions about the possibility of strict or intermediate scrutiny in other gay rights cases.

In *Romer*, the Court squarely confronted—and hopefully curtailed—the newest threat to the civil rights of lesbian, gay and bisexual people: the anti-gay initiative. During the last two decades, the queer community has secured the passage of anti-discrimination laws or policies in 119 localities and in at least twenty states, including the District of Columbia. During that same period, however, religious and political

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89 Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); see also, e.g., Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).


92 I call this the “newest” threat not because the initiative process has never been used against the queer community before (it has: e.g., California’s Proposition Six in 1977), but because it seems to be the current weapon of choice among homophobes.

conservatives have fought against extensions of civil rights protection to homosexuals. In fact, they have successfully placed plebiscites on the ballot in approximately thirty-eight of the communities that had adopted gay-protective laws. And they have experienced victory in thirty-four of those communities. In 1992, for example, voters approved anti-gay initiatives or referenda in Colorado, Florida, Maine, Ohio, and Oregon.

These initiatives typically begin with a group of citizens placing a measure on the ballot by securing a specified number of signatures. At election time, the public votes either for or against the measure; it becomes law if more than half the voters favor it. Colorado's Amendment Two, approved by a fifty-three percent margin, typifies such an initiative. It reads:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall

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96 According to the Constitution of the State of Colorado, a citizen must obtain signatures from registered voters equal to at least five percent of the number of votes cast for all candidates for the office of secretary of state in the last general election. COLO. CONST. art. V, § 1 cl. 2.


98 53.4% of the voters favored Amendment Two; 46.6% opposed it. Evans v. Romer, 854 P.2d 1270, 1272 (Colo.), cert. denied, 510 U.S. 959 (1993).

99 According to Suzanne Goldberg, attorney for Lambda Legal Defense and Education Fund, three types of anti-gay initiatives presently exist. The first type, like Colorado’s Amendment Two, explicitly mentions lesbian, gay and bisexual people. The second type, which Professor William Adams calls the “stealth measure,” does not. Instead, a stealth measure lists certain categories upon which people cannot discriminate—e.g., race, color, religion, sex, age, and handicap—and expressly limits future protection to those categories listed. (Sexual orientation, of course, is absent from the list.) The third and most recent generation of anti-gay initiatives base their exclusion of lesbian, gay and bisexual people on sexual behavior in an effort to utilize the Hardwick holding. Suzanne Goldberg & William Adams, Address at the American Association of Law Schools Conference (Jan. 6, 1995). For a discussion of Hardwick, see infra § I(A) (3).
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.  

If Amendment Two had become law, lesbian, gay and bisexual people would have had no legal recourse from discrimination in housing, employment, or other areas. They could have secured the passage of gay-protective legislation only by first amending their state constitution. To do so would have required a supermajority of votes in their state legislature; a constitutional convention; or an appeal to the same democratic body that had truncated their rights in the first place. Other groups could secure the passage of protective legislation by garnishing the support of a simple majority of their legislators—a much easier task.

These events never came to pass, however, because on October 11, 1994, the Colorado Supreme Court permanently enjoined the state from enforcing Amendment Two, holding that it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. According to the court, Amendment Two would have interfered with the fundamental right of lesbian, gay and bisexual people to “participate equally in the political process.”

A federal district court in Ohio applied similar reasoning to invalidate an anti-gay initiative approved by Cincinnati voters. But the threat to gay civil rights continued. In 1994,

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100 Evans, 854 P.2d at 1272.
101 Repealing an amendment to the state constitution would have required a 2/3 majority in both houses and subsequent ratification by a majority of the voters. Colo. Const. amend. XIX, § 2 cl. 1.
102 Id. § 1.
103 Citizens could always use the initiative process to amend their state constitution again, repealing a previously-enacted anti-gay amendment. See, e.g., John F. Niblock, Comment, Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny, 41 UCLA L. Rev. 153, 163-64 (1993).
104 Winning the support of a majority of voters in any given jurisdiction “is a far more onerous task” than lobbying a legislative body. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 428 (S.D. Ohio 1994), aff’d in part, vacated in part, 54 F.3d 261 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996) (remanding in light of Romer, 116 S. Ct. 1620 (1996)) (referring to the testimony of Guy Guckenberger, who had been a member of the Cincinnati City Council for over twenty years and was, at the time of his testimony, a County Commissioner in Hamilton County, Ohio), rev’d, 54 F.3d 261 (6th Cir. 1995); see also infra § 1(C) (2).
106 Equality Found., 860 F. Supp. at 433-34. In 1993, voters had approved by initiative a proposed amendment to the Charter of the City of Cincinnati, popularly known as “Issue
citizens' groups attempted to place anti-gay measures on the ballots in nine states. Oregon voters considered anti-gay amendments to their state constitution for three consecutive years, and the Oregon Citizens' Alliance successfully introduced thirty-three anti-gay initiatives at the city and county level. In Florida, the American Family Association promised to introduce anti-gay proposals at local levels throughout the state. Against this backdrop, Lambda Legal Defense and Education Fund (Lambda) attorney Suzanne Goldberg observed that (despite the Colorado Supreme Court's ruling in *Evans v. Romer*) "anti-gay initiatives have not disappeared and more are expected to emerge in local, if not statewide, contests."

Thus, the struggle against anti-gay discrimination, begun in the early 1900s, endures. Lesbian, gay and bisexual people continue to operate in a cultural climate characterized by the pervasive vilification of homosexuality. Anti-gay prejudice remains an accepted form of bigotry at every level of American society; it begins in the home and emanates Three." The proposed amendment read in relevant part as follows: "The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. . . . Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect." *Id.* at 422.


108 See *Docket Update*, *Lambda Update* (Lambda Legal Defense and Education Fund), Fall 1994, at 10, 11; *Docket Update*, *Lambda Update* (Lambda Legal Defense and Education Fund), Fall 1993, at 8, 8.


110 Goldberg, *supra* note 107 at 4-5.

111 When we engage in private, consensual sexual activity in our homes, for instance, we are vulnerable to arrest and punishment. *See*, e.g., Bowers v. Hardwick, 478 U.S. 186, 196 (1986). And gay teenagers face rejection by parents and peers. *See*, e.g., Amelia Craig, *The Kindness of Strangers: A Lesbian and Gay Youth Detention Center in Utah*, *Lambda Update* (Lambda Legal Defense and Education Fund), Fall 1993, at 4, 4 (describing allegations by two youths that their parents sent them to an institution in Utah in order to "de-gay" them); Richard Posner, *Sex and Reason* 308 (1992) ("[I]f the hypothetical cure for homosexuality were something that could be administered—costlessly, risklessly, without side effects—before a child had become aware of his homosexual propensity, you can be sure that the child's parents would administer it to him, believing, probably correctly, that he would be better off."). According to Judge Posner, tolerance of homosexuality would aid parents in identifying homosexual tendencies in their children so that they would not "condone 'sissyish' behavior in infancy," thus making it "difficult for [their] little boy to become properly boyish." *Id.* at 308-09.
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outward into work, 112 religion, 113 politics 114 and law. 115 According to Professor Jane Schacter:

Gay men and lesbians live in a regime of formal inequality, where it is lawful to deny people employment, housing, and access to public accommodations solely because of their sexual orientation under the law of all but eight states. Gay men and lesbians cannot marry in any state, have restricted parenting rights in most states, are subject to criminal prosecution for consensual sexual activity in almost half of the states, may not serve openly (and perhaps not even in the closet) in the military, and suffer numerous other restrictions. Anti-gay violence, moreover, is dramatically on the rise. 116

112 See supra § I(A) (1); see also, e.g., Doe v. Gates, 981 F.2d 1316, 1318 (D.C. Cir. 1993) (upholding the CIA’s dismissal of a gay employee on the basis of his sexual orientation); Padula v. Webster, 822 F.2d 97, 102-04 (D.C. Cir. 1987) (upholding the FBI’s dismissal of a lesbian employee on the basis of her sexual orientation); Drorenburg v. Zech, 741 F.2d 1388, 1396-98 (D.C. Cir. 1984) (upholding the Army’s dismissal of a homosexual service member based on his sexual orientation). The dismissal of lesbian and gay employees is not limited to national security jobs. In the early 1990s, for example, the management of the Cracker Barrel restaurant chain attempted to fire all of its lesbian and gay employees. See, e.g., Bob Cohn, Discrimination: The Limits of the Law, NEWSWEEK, Sept. 14, 1992, at 38. And the nation’s schools suffer from anti-gay prejudice as well. In November of 1994, for instance, a poster pinned to the bulletin board outside a classroom at Cornell Law School, purporting to educate voters about an openly-lesbian candidate for New York State Attorney General, said: “Attention Voters: NYS Attorney General candidate Karen Burstein is a known whore: guilty of Sodomy/Incest/Rape’s equivalent/Treason; an avowed Satanist! (also) [sic].” On file with the author.

113 See, e.g., D’EMILIO, SEXUAL POLITICS, supra note 29, at 13.


115 See generally Cain, supra note 9 (presenting a legal history of the struggle for gay civil rights).

116 Jane S. Schacter, The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents, 29 HARP. C.R.-C.L. L. REV. 283, 298 (1993) (footnotes omitted). “Other restrictions . . . include discrimination in insurance, credit, and employment and tax benefits granted to married heterosexual couples but not to [committed] homosexual couples.” Id. But see Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993) (holding that laws denying marriage licenses to same-sex couples violate the Equal Protection Clause of the state constitution) (on remand to the trial court); Dean v. District of Columbia, 653 A.2d 307, 309 (D.C. Ct. App. 1994) (challenging laws that restrict the right to marry to heterosexual couples). For examples of anti-gay violence, see CRUikshank, supra note 10, at 84 (discussing an incident that took place in 1990 in which a man shot and killed a lesbian while she and her lover were camping along the Appalachian trail after having tracked the women for an entire day); Jeffrey S. Byrne, Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity, 11 YALE L. & POL’Y REV. 47, 64 n.231 (1993) (describing a 1992 incident in which the shipmates of a gay sailor who had just come out to his commanding officer beat him to death in a public restroom); Christopher Muther, Annual Local, National Violence Stats Rise Again, BAY WINDOWS, Mar. 11, 1993, at 1 (describing a 1993 incident in
At the same time, lesbian, gay and bisexual individuals can disclose their sexual orientation perhaps more easily than ever before, and the existence of legal defense organizations such as Lambda,\textsuperscript{117} and of gay-protective laws throughout the country, indicate that the queer community has made significant gains since the days of Henry Gerber's Society for Human Rights. Although the \textit{Hardwick} decision crippled an emerging gay rights jurisprudence based on privacy and autonomy, cases like \textit{Evans} and \textit{Romer}\textsuperscript{118} signal that the Equal Protection Clause might provide a viable alternative to substantive due process arguments. The next subsection presents the legal context in which the Colorado Supreme Court decided \textit{Evans}, providing an overview of the equal protection doctrine so important to the current gay rights struggle.

\section*{B. AN EQUAL PROTECTION PRIMER}

Equal protection occupies a role so central in constitutional jurisprudence that it cannot be said to spring only from the Equal Protection Clause of the Fourteenth Amendment itself.\textsuperscript{119} Although that Clause provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws," the guarantee of equal justice under the law comes also from the Due Process Clauses of the Fifth and the Fourteenth Amendments; it comes from the body of the Constitution; and in matters of race, it comes from the Thirteenth and Fifteenth Amendments.\textsuperscript{120} Some scholars believe equal protection is so crucial a guarantee that it serves as a guardian of virtually all constitutional freedoms.\textsuperscript{121}

What does "equal protection of the laws" mean? At minimum, it means that government cannot enact legislation except to further some legitimate state interest.\textsuperscript{122} And it requires that the means chosen to further that interest relate rationally to the desired end.\textsuperscript{123} Thus, government cannot create legal distinctions between similarly situated individuals be-

\begin{itemize}
  \item \textsuperscript{117} Lambda Legal Defense and Education Fund is a not-for-profit public interest organization founded in 1973 to advance the rights of lesbian, gay and bisexual people through test-case litigation and public education. \textbf{LAMBDA UPDATE (LAMBDA LEGAL DEFENSE AND EDUCATION FUND)}, Fall 1994, at 2, 2.
  \item \textsuperscript{118} This Note uses "\textit{Evans}" to describe the case as it was litigated in the Colorado Supreme Court and "\textit{Romer}" to describe the case during its appellate review at the United States Supreme Court.
  \item \textsuperscript{119} \textbf{TRIBE}, supra note 70, at 1436-37.
  \item \textsuperscript{120} \textit{Id.} at 1437.
  \item \textsuperscript{121} \textit{Id.} at 1436.
  \item \textsuperscript{122} \textit{Id.} at 1440.
  \item \textsuperscript{123} \textit{Id.}.
\end{itemize}
cause such distinctions are unreasonable.\textsuperscript{124} It cannot, for example, classify citizens as eligible or ineligible to attend a certain public school based on their race.\textsuperscript{125} In addition, government cannot, absent a "compelling" state interest, distribute benefits or burdens in a manner that interferes with the exercise of, or access to, a fundamental right.\textsuperscript{126}

This subsection describes four elements of equal protection doctrine. First, it describes the requirement of state action, in which a challenger must show that the government, or an actor sufficiently like the government, has discriminated unreasonably against some group. Second, it defines rational basis review, the ordinary, deferential manner in which courts review challenged laws. Third, it discusses the existence of suspect classifications which automatically trigger a more rigorous standard than a mere rational basis review. Finally, it describes what happens if a challenged law implicates a fundamental interest.

1. \textit{State Action}

The Equal Protection Clause applies to both the state and federal government through the Fourteenth and Fifth Amendments, respectively.\textsuperscript{127} It does not apply to private action. Thus an equal protection challenge requires at the outset a showing that state action is involved in the discriminatory classification. Laws that depend on government for their implementation—through police, prosecutors or the judiciary—have passed this hurdle with varying degrees of ease.\textsuperscript{128} Even civil suits can involve state action. In \textit{Palmore v. Sidoti},\textsuperscript{129} for example, the divorced father of a white, three-year-old girl sought custody of the child when her mother married an African-American man. Acknowledging the possibility that the girl might suffer social stigmatization due to prejudice against inter-racial marriage, the Court unanimously ruled that such considerations could not constitute a valid ground for a custody decision: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."\textsuperscript{130}

\textsuperscript{124} \textit{Id.} at 1438, 1440; \textit{see also} \textsc{Stone, supra} note 85, at 536.
\textsuperscript{125} \textsc{Tribe, supra} note 70, at 1438.
\textsuperscript{126} \textit{Id.} at 1454.
\textsuperscript{127} \textsc{U.S. Const. amend. V}; \textsc{U.S. Const. amend. XIV}.
\textsuperscript{128} \textit{See, e.g.}, \textit{Shelley v. Kraemer}, 334 U.S. 1, 19 (1948) (holding that judicial enforcement of a racially restrictive covenant involved the state in a "denial of equal protection of the laws"); \textit{see also} \textsc{Theodore Eisenberg, Civil Rights Legislation: Cases and Materials} 86-89 (3d ed. 1981) (discussing state action); \textsc{Stone, supra} note 85, at 1593 (same).
\textsuperscript{129} 466 U.S. 429 (1984).
\textsuperscript{130} \textit{Id.} at 433.
2. Rational Basis Review

Once a court resolves the preliminary question regarding the existence of state action, it must determine the appropriate standard of review to apply to the challenged law. Courts do not overturn every law that treats some group differently. In most cases, they defer to legislatures: "[t]he general rule is 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." In other words, courts normally analyze a challenged law with a rational basis review. They hesitate to invalidate laws created by the political branches because of their own attenuation from the democratic process and because of the legislature's superior ability to engage in the detailed, policy-based fact-finding necessary for statutory enactments. Almost every classification survives a rational basis review.

Under some circumstances, however, courts will apply this level of review with "bite." This type of rational basis review might give rise to an invalidation of the challenged law for any of three reasons. First, a court might characterize as "illegitimate" the government's purported interest in enacting the challenged measure. For example, in *Metropolitan Life Ins. Co. v. Ward*, the Supreme Court found that an Alabama statute taxing out-of-state insurance companies at a higher rate than domestic insurance companies in order to "promot[e] the business of . . . domestic insurers . . . by penalizing foreign insurers" violated the Equal Protection Clause. According to the Court, the government's objective was "not a legitimate state purpose." It struck down the statute while applying only a rational basis review. Second, a court might find irrational the means chosen to achieve a given, legitimate interest. In applying a rational basis review to an employment discrimination statute in *Logan v. Zimmerman Brush Co.*, for instance, the Supreme Court held that denying the state's Fair Employment Practices Commission jurisdiction over any claim they failed to process within 120 days did not rationally relate to expediting dispute resolution—the government's proffered objective. The Court invalidated the state law.

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132 STONE, supra note 85, at 4541; TRIBE, supra note 70, at 1442-43.
135 Id. at 877.
136 Id. at 880. Note that there was a strong dissent in this case in which Justices O'Connor, Brennan, Marshall and Rehnquist joined. See id. at 883-902.
137 455 U.S. 422 (1982).
138 Id. at 433.
Finally, a court might find that the measure in question has at its foundation an improper purpose.\textsuperscript{139} Certain classifications, although not suspect or semi-suspect,\textsuperscript{140} still give rise to a probability that bias was involved in their creation. In \textit{City of Cleburne v. Cleburne Living Center},\textsuperscript{141} the Supreme Court struck down a Texas measure requiring a special use permit for the operation of a group home for the mentally retarded. Although mental retardation does not constitute a suspect or semi-suspect classification, the Court characterized the challenged classification as based on an improper purpose. In short, the Court said, “the . . . [classification] in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .”\textsuperscript{142} Similarly, in \textit{U.S. Dept. of Agriculture v. Moreno},\textsuperscript{143} the Court struck down a portion of the Food Stamp Act of 1964 designed to “exclude[ ] from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household.”\textsuperscript{144} It found improper the possible desire on the part of Congress to exclude “hippie communes” from the federal food stamp program.\textsuperscript{145} Thus, courts may invalidate legislation aimed at politically unpopular groups, even when engaged in a rational basis review, by piercing the government’s proffered interest in order to reveal a hostile purpose.

3. \textit{Strict and Intermediate Scrutiny}

In some equal protection cases, however, courts cannot engage in a mere rational basis review. They must apply “intermediate scrutiny,” in which they uphold a challenged law only if its classification relates “substantially” to an “important” governmental objective, or they must apply “strict scrutiny,” in which they uphold the challenged law only if its implementation is “necessary” to promote a “compelling” governmental interest.\textsuperscript{146} Strict scrutiny is almost always fatal to a challenged law.\textsuperscript{147}

\textsuperscript{139} The rule against improper purposes in Equal Protection Doctrine essentially means that “if you ask the state what purpose it is achieving by treating a group differently, the state can’t answer, ‘We want to treat that group differently.’” The state cannot, in other words, “turn the classification into the purpose.” Matthew Coles, \textit{Equal Protection and the Anti-Civil-Rights Initiatives: Protecting the Ability of Lesbians and Gay Men to Bargain in the Pluralist Bazaar}, 55 Ohio St. L.J. 563, 566 (1994).

\textsuperscript{140} See infra § I(B) (3).

\textsuperscript{141} 473 U.S. 432 (1985).

\textsuperscript{142} Id. at 450.

\textsuperscript{143} 413 U.S. 528 (1973).

\textsuperscript{144} Id. at 529.

\textsuperscript{145} Id. at 543.

\textsuperscript{146} See, e.g., Tribe, supra note 70, at §§ 16-26, 16-6.

\textsuperscript{147} Id. at 1451 (citing Gerald Gunther, \textit{The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 Harv. L. Rev. 1, 8 (1972)).
In certain circumstances, then, courts will abandon their deferential role vis-a-vis the legislature and subject challenged laws to heightened scrutiny. This process acknowledges the majority's inability to make certain political choices—such as those that would harm minority populations—even if many people feel strongly inclined to do so. Laws that demonstrate "prejudice against discrete and insular minorities" automatically trigger strict scrutiny, the most demanding level of review. Classifications based on race, national origin and sometimes on alienage, therefore, constitute inherently suspect classes. Laws distinguishing on those bases receive the most stringent review. In order to justify such a law, the government must produce more than just a legitimate or even an important state interest. It must produce a compelling interest. And it must prove that the challenged law is necessary to further that interest; the means/end relationship must, in other words, be perfect.

Intermediate scrutiny, a less stringent level of review poised somewhere between rational basis review and strict scrutiny, applies to "semi-suspect classifications," like those made on the basis of gender and illegitimacy. In order to justify laws that discriminate on these bases, the government must produce an important state interest and, although the means/end relationship need not be perfect, the means must substantially further the desired end.

4. Fundamental Interests

Just as the majority cannot make choices that would harm certain underrepresented groups, it likewise cannot make choices that would burden fundamental interests. In his famous footnote four of United States v. Carolene Products Co., Justice Stone observed that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." Courts will therefore depart from their ordinary rational basis review and will analyze laws challenged under the Equal Protection Clause with strict scrutiny if they implicate the fundamental interest in equal voting opportunity. In order to salvage such a law, the government would

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150 In the much-criticized case of Korematsu v. United States, for example, the Supreme Court upheld the large-scale internment of Japanese Americans during World War II on the theory that there existed a "compelling" state interest in the prevention of espionage and sabotage by those persons. Korematsu v. United States, 323 U.S. 214, 217 (1944).
151 304 U.S. 144, 152-53 & n.4 (1938).
152 See e.g., Davis v. Bandemer, 478 U.S. 109 (1986) (observing that gerrymandering may violate the Equal Protection Clause where it in fact disadvantages members of the
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need to demonstrate that its implementation is necessary to further a compelling state interest.

Courts will strictly scrutinize laws implicating other fundamental interests, as well, such as the right to interstate travel, the right to have access to the judicial process, and the right to make independent decisions about procreation. They identify fundamental interests by reference to history and tradition; precedent, for example, plays a major role in determining what constitutes a “fundamental” right. In Palko v. Connecticut, Justice Cardozo described fundamental interests as those “principle[s] of justice [so] rooted in the tradition and conscience of our people” that citizens view them as “implicit in the concept of ordered liberty.” Without these interests, he wrote, “neither liberty nor justice would exist.”

C. Equal Protection Challenges to Anti-Gay Initiatives in the State Courts

Prior to May of 1996, two courts—the Evans court in Colorado and the Equality Foundation court in Ohio—had invalidated anti-gay initiatives on equal protection grounds. Both courts found that the challenged laws, if enforced, would have burdened the fundamental interest of lesbian, gay and bisexual people to participate equally in the political targeted party); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (invalidating a state law restricting participation in school district elections to property-owning parents of school-age children); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (striking down a state poll tax); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (overturning a state law resulting in an inequal distribution of the right to vote); Tribe, supra note 70, at § 16-10 (discussing equal voting opportunity as a fundamental right).


155 The right to make independent decisions about procreation actually emanates from the overall fundamental interest in privacy or, as Professor Tribe describes it, the interest in making “intimate personal choices.” Id. § 16-7.


158 Id. at 326.

Thus, both courts engaged in strict scrutiny reviews. According to the *Evans* court, “[t]he state . . . failed to establish that Amendment 2 [was] necessary to serve any compelling governmental interest in a narrowly tailored way.” Its decision was based entirely on a fundamental rights analysis.

The *Equality Foundation* court, in contrast, offered two additional and independent rationale for its equal protection holding. First, it concluded that laws discriminating on the basis of sexual orientation constitute semi-suspect classifications. Thus, it reviewed “Issue Three” (a proposed amendment to Cincinnati’s City Charter that substantially resembles Colorado’s Amendment Two) with intermediate scrutiny. It found that the measure was not “substantially tailored to a sufficiently important governmental interest.” Second, it found that Issue Three failed even a rational basis review. According to Judge Spiegel, “we can conceive of no legitimate governmental purpose rationally related to a law which prohibits a minority group from ever obtaining anti-discrimination legislation on its behalf . . . ” The court therefore held Issue Three unconstitutional “under even the most deferential standard of review, let alone the most exacting.” The Sixth Circuit subsequently reversed its decision.

This subsection explores the reasoning in *Evans* and *Equality Foundation* by first describing how anti-gay initiatives involve state action; by second discussing the fundamental interest analysis conducted by both courts; by third evaluating whether or not laws aimed at gay, lesbian, and bisexual people can constitute suspect or semi-suspect classifications; and by finally presenting the rational basis analysis under which the *Equality Foundation* court invalidated Issue Three. Finally, the subsection discusses Justice Scott’s *Evans* concurrence, in which he argues for

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160 *Equality Found.*, 860 F. Supp. at 449; *Evans*, 882 P.2d at 1341 & n.4.
161 *Equality Found.*, 860 F. Supp. at 449; *Evans*, 882 P.2d at 1341.
162 *Evans*, 882 P.2d at 1350.
163 See id. at 1339-41.
164 The *Equality Foundation* court also invalidated Issue Three as violating the plaintiffs’ First Amendment rights to freedom of expression and association, as infringing their First Amendment right to petition the government for redress of grievances, and as unconstitutionally vague. *Equality Found.*, 860 F. Supp. at 449.
165 Id. at 436.
166 Compare id. at 422 with infra text accompanying note 100 (quoting the text of both initiatives).
167 *Equality Found.*, 860 F. Supp. at 440-44.
168 Id. at 441.
169 Id. at 443.
170 Id. at 444.
a revival of the Privileges or Immunities Clause in order to circumvent limitations in equal protection jurisprudence.

1. **State Action Analysis**

In *Reitman v. Mulkey*,172 the Supreme Court considered a challenge to a facially neutral amendment to the California State Constitution popularly known as “Proposition Fourteen.”173 Citizens had passed the amendment by plebiscite in a statewide election shortly after California had enacted fair housing laws prohibiting private discrimination on the basis of race in certain commercial transactions.174 Proposition Fourteen would have prohibited the State of California from interfering with “the right of any person . . . to decline to sell, lease or rent . . . property to such person or persons as he, in his absolute discretion, chooses.”175 It would have repealed existing anti-discrimination laws and prohibited the passage of such laws in the future.176 The proponents of the measure contended that it placed California in a permissibly neutral position with regard to private discrimination.177 The amendment did not differ, they claimed, from a simple repeal of fair housing laws—something the state could clearly do.178 Proposition Fourteen did nothing more, they contended, than remove government from an area of private conduct properly immune from state interference. In other words, it simply eliminated a “state-created impediment upon freedom of choice.”179

The Supreme Court, in a five to four decision, disagreed. Proposition Fourteen, the majority said, established the right to discriminate as “one of the basic policies of the State”180 and made California a “partner in the . . . act of discrimination.”181 The measure, according to the Court, insured that “[t]he right to discriminate, including the right to discriminate on racial grounds, was . . . embodied in the State’s basic charter, immune from legislative, executive, or judicial regulation at any level of the state government.”182 On this reasoning, the Court affirmed a lower court ruling that Proposition Fourteen unconstitutionally involved the

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173 *Id.* at 370-71.
174 *Id.* at 373-74.
175 *Id.* at 371.
176 *Id.* at 389 (Harlan, J., writing for the dissent).
177 *Id.*
178 *Id.* The events leading up to the litigation in *Reitman* took place before the passage of the federal Fair Housing Act. *See* JESSIE DUKEMINIER & JAMES E. KRIER, PROPERTY 441 n.15 (3d ed. 1993) (discussing the 1968 enactment of the Fair Housing Act).
179 *Reitman*, 387 U.S. at 390 (Harlan, J., writing for the dissent).
180 *Id.* at 381.
181 *Id.* at 375, 376 (quoting Mulkey v. Reitman, 413 P.2d 825, 834 (Cal. 1966), and embracing its judgment, respectively).
182 *Id.* at 377.
State of California in private discrimination.\textsuperscript{183} States cannot, without running afoul of the Constitution, authorize conduct that would violate the Fourteenth Amendment if engaged in directly by government.\textsuperscript{184}

Justice Harlan, however, writing for the dissent, saw California's involvement in Proposition Fourteen differently. "I believe [that] the state action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination," he wrote.\textsuperscript{185} He viewed the challenged amendment as "a neutral provision restoring to the sphere of free choice . . . private behavior within a limited area of the racial problem."\textsuperscript{186} He feared that the majority's holding would herald a day in which federal courts could reach "[e]very act of private discrimination."\textsuperscript{187}

Some commentators have agreed with this position. Professor Theodore Eisenberg, for example, characterizes \textit{Reitman v. Mulkey} as "[t]he outer limits of . . . state action;"\textsuperscript{188} and Professor Richard Epstein describes it as "one of the most . . . controversial decisions of the Warren Court . . . ."\textsuperscript{189} Professor Epstein argues that \textit{Reitman} "obliterate[d] the public-private distinction"\textsuperscript{190} supposedly protected by the state action doctrine. He believes that the Supreme Court mistakenly characterized pure inaction as government involvement and, in so doing, improperly justified the use of federal power to influence private behavior.\textsuperscript{191} Justice Rehnquist took this position when he wrote: "the crux of [the] . . . complaint [was] not that the State [had] acted, but that it [had] refused to act."\textsuperscript{192}

\textsuperscript{183} \textit{Id.} at 381. If Proposition Fourteen had been a legislative enactment, instead of an amendment to the California State Constitution, the outcome would have been the same. \textit{Tribe, supra} note 70, at 48 n.26.

\textsuperscript{184} \textit{Reitman}, 387 U.S. at 374 (quoting \textit{Mulkey v. Reitman}, 413 P.2d 825, 834 (Cal. 1966)).

\textsuperscript{185} \textit{Id.} at 395 (Harlan, J., writing for the dissent).

\textsuperscript{186} \textit{Id.} at 394 (Harlan, J., writing for the dissent).

\textsuperscript{187} \textit{See id.}

\textsuperscript{188} \textit{Eisenberg, supra} note 128, at 88-89. He characterizes \textit{Hunter v. Erickson}, another case upon which the \textit{Evans} and \textit{Equality Foundation} courts depend, in the same way. \textit{Id.} For a discussion of \textit{Hunter}, see \textit{infra} § I(C) (2) (a).

\textsuperscript{189} Richard A. Epstein, \textit{Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages}, 92 Mich. L. Rev. 2456, 2469 (1994); \textit{see also Stone, supra} note 85, at 1601-14 (discussing state inaction).

\textsuperscript{190} \textit{See, e.g., Epstein, supra} note 189, at 2470.

\textsuperscript{191} \textit{See id.} at 2457, 2470.

\textsuperscript{192} \textit{Stone, supra} note 85, at 1610 (quoting Justice Rehnquist in the majority opinion in \textit{Flagg Bros. v. Brooks}, 436 U.S. 149 (1978) (holding that no state action was present where a state statute authorized the sale by private warehouse owners of their clients' property without meeting the requirements of the Due Process Clause)); \textit{see also DeShaney v. Winnebago County Dept. of Social Servs.}, 489 U.S. 189 (1989) (no state action where Wisconsin social services had knowledge of, and had intervened several times to remedy, the abuse of Joshua DeShaney by his father—abuse that eventually resulted in permanent retardation).
Other commentators argue that government cannot always " acquiesce passively"\textsuperscript{193} in any given state of affairs. They point out that "many [widely accepted] equal protection cases can be characterized as involving state inaction."\textsuperscript{194} Some scholars argue further that it would be reasonable to constitutionally "require the state to control the conduct of . . . [private] persons."\textsuperscript{195} A private individual's discriminatory treatment of African Americans, for example, may not in itself violate the Equal Protection Clause, but the state's permissive policy regarding such discrimination might.\textsuperscript{196} The Fourteenth Amendment could be construed as having created an affirmative duty on the part of government to protect individual rights.\textsuperscript{197}

The similarity of circumstances in \textit{Reitman}, \textit{Evans}, and \textit{Equality Foundation} is striking. Amendment Two and Issue Three, like Proposition Fourteen, appeared in response to the passage of anti-discrimination laws.\textsuperscript{198} Each measure would have repealed that legislation and prohibited the passage of similar legislation in the future. In addition, the proponents of the anti-gay initiatives, like the proponents of the racially-discriminatory measure in \textit{Reitman}, argued that those laws placed government in a permissibly neutral position.\textsuperscript{199} The Supreme Court obviously recognized, in deciding \textit{Romer v. Evans} without disputing the presence of state action, that Amendment Two, like Proposition Fourteen, "[was] a form of sophisticated discrimination whereby the people of [Colorado] . . . harness[ed] the energies of private groups to do indirectly what they [could not] . . . allow their government to do [directly]."\textsuperscript{200} In fact, \textit{Romer} more clearly involves the state in invidious discrimination because Amendment Two, in contrast to Proposition Fourteen, discriminated on its face.\textsuperscript{201}

Insofar as the \textit{Reitman} majority focused its inquiry on the presence or absence of state action, however—and assumed, with little explanation, that Proposition Fourteen constituted an equal protection violation—the decision provides little guidance in evaluating the equal

\begin{footnotes}
\item \textsuperscript{193} See \textit{Stone}, supra note 85, at 1610.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id. at 1593.
\item \textsuperscript{196} See id.
\item \textsuperscript{197} See id.
\item \textsuperscript{198} Compare supra § I(A) (3) (discussing the events surrounding the passage of recent anti-gay initiatives) with supra § I(C) (1) (discussing the passage of Proposition Fourteen).
\item \textsuperscript{199} Coloradoans for Family Values, for example, claimed that Amendment Two "remove[d] government from this terribly divisive issue." Defendants-Appellants' Opening Brief at 49, Evans v. Romer, 882 P.2d 1335 (1994) (Nos. 94-SA-048 and 94-SA-128 (consolidated)), aff'd, 116 S. Ct. 1620 (1996). See also Brief for the ACLU at 13, \textit{Evans}.
\item \textsuperscript{200} Reitman v. Mulkey, 387 U.S. 369, 383 (1967) (Douglas, J., concurring).
\item \textsuperscript{201} See infra text accompanying note 100.
\end{footnotes}
protection issues in *Evans*. The three cases that follow provide more guidance in that endeavor.

2. Fundamental Interest Analysis

The *Evans* and *Equality Foundation* courts (as well as the *Romer* Court) assumed that a facially discriminatory amendment to the state constitution and to the city charter, respectively, involved government activity; they did not even mention the state action doctrine in their opinions.\(^{202}\) The courts focused instead on determining whether or not Colorado's Amendment Two and Cincinnati's Issue Three infringed on a fundamental right in violation of the Equal Protection Clause. Utilizing three core cases, they found that the anti-gay initiatives at issue would violate the fundamental interest of lesbian, gay and bisexual people to participate equally in the political process. This subsection traces their reasoning by examining each of these cases in turn. It concludes by analyzing a fourth case which might serve to clarify some of the ambiguities left by the other three.

a. *Hunter v. Erickson*\(^{203}\)

In *Hunter*, the Supreme Court struck down a voter-initiated amendment to the Akron City Charter similar to the one invalidated in *Reitman*. Akron voters had adopted the amendment by ballot initiative. It required popular approval by referendum of any fair housing ordinance enacted by the Akron City Council that involved "race, color, religion, national origin or ancestry."\(^{204}\) Citizens had placed the initiative on the ballot in response to a fair housing ordinance designed to prohibit discrimination on those very bases.\(^{205}\)

The Supreme Court struck down the measure, holding, with only one dissenting vote, that it violated the Equal Protection Clause of the United States Constitution.\(^{206}\) The Court evaluated the proposed amend-

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\(^{202}\) *Equality Foundation* does discuss the idea of state neutrality, but it nowhere mentions the state action doctrine by name. *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), *aff'd in part, vacated in part*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996) (remanding in light of *Romer*, 116 S. Ct. 1620 (1996)). If a court ever has occasion to evaluate the constitutionality of a stealth initiative, a finding of state action may become more difficult. For a definition of "stealth initiative," see *supra* note 99. Both Amendment Two and Issue Three discriminated against lesbian, gay and bisexual people on their faces. If an initiative did not so obviously discriminate, a court would face a situation in which it had to distinguish between permissible state neutrality and impermissible endorsement of discriminatory practices. See *supra* text accompanying notes 188-99.


\(^{204}\) Id. at 387.

\(^{205}\) See id. at 386. The amendment would have suspended the operation of existing fair housing laws. "Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein." Id. at 387.

\(^{206}\) Id. at 393.
ment against the documented history of racial discrimination in Akron, concluding that "although the law on its face treats Negro and white, Jews and gentiles in an identical manner, the reality is that the law's impact falls on the minority." Thus the Court characterized the amendment as facially neutral while acknowledging the unique burden it placed on certain minority groups. Although fair housing legislation might in theory prevent discrimination against Anglo Americans as much as it would against, say, Mexican Americans, the former group does not, in practice, require such protection. In the words of the Court, "[t]he majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." The direct beneficiaries of fair housing legislation of the type targeted by the Akron initiative are racial, ethnic and religious minorities. The Court noted that the challenged amendment did not neutrally allocate government power in such a way as to make it more difficult for every group to enact legislation in its favor. For most groups, passage of an ordinance by the City Council would suffice. But for the groups singled out by the amendment, "a referendum was required ...." Such a restructuring of the governmental process, according to the Hunter Court, violates the constitutional guarantee of equal protection: "the State may 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."

What the Akron initiative did under a thin veneer of neutrality, Colorado's Amendment Two did in a facially discriminatory manner. In contrast to the initiative at issue in Hunter, Amendment Two explicitly

\[207\] Id. at 391.
\[208\] Id.
\[209\] The Court characterizes the challenged initiative as "an explicitly racial classification" presumably because that would have been its effect, not because it was facially discriminatory. See Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 468 (1982); Hunter, 393 U.S. at 389. Note that Justice Harlan and Justice Stewart, who had dissented in Reitman, described the proposed amendment in Hunter as "discriminatory on its face" and as having the "clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation ... in their interest." Hunter, 393 U.S. at 395 (Harlan, J., dissenting). For them, the Akron initiative lacked facial neutrality because it mentioned race, ethnicity and religion on its face.
\[210\] Hunter, 393 U.S. at 391.
\[211\] It did not, for example, require that the people ratify every enactment of the City Council by referendum.
\[212\] Hunter, 393 U.S. at 390.
\[213\] Id.
\[214\] Id. at 393.
discriminated against "homosexual, lesbian or bisexual" people. It did not prevent anti-discrimination legislation involving "sexual orientation;" it expressly prevented anti-discrimination legislation designed to protect lesbian, gay and bisexual people in particular. Amendment Two singled out a particular group for special disadvantage in the political process even more clearly than did the Akron initiative. Divorced people, pet owners and even heterosexuals could have secured fair housing legislation after the passage of Amendment Two by a simple majority vote in their state legislature. The queer community, on the other hand, could have secured anti-discrimination legislation only by first amending their state constitution. That would have entailed the far more arduous task of garnishing a majority of votes in a statewide election; achieving a supermajority in the state legislature, or rewriting the state constitution.

Some commentators attempt to explain Hunter in terms of race. They argue that the Supreme Court applied strict scrutiny to the Akron amendment because it discriminated against traditionally suspect classes. The Colorado Supreme Court, however, interpreted Hunter to speak in terms more broad than those encompassing racial discrimination alone. It pointed out that the Court forbid states from disadvantaging "any particular group" in its quest for favorable legislation. The Court did not restrict its terms to racial or religious minorities. The Equality Foundation court agreed. According to Judge Spiegel, Hunter clearly represents more than just "a routine application of the principle that racial classifications must be strictly scrutinized." He described the language used in Hunter as "unmistakably race-neutral." Both courts, moreover, pointed out that Hunter relied exclusively on precedent having to do with voting, and not with cases dealing with racial discrimination. Thus one may reasonably, and perhaps necessarily, interpret Hunter as something more than a "race case."

216 Id. at 1272; see also supra text accompanying note 100 (quoting the language of Amendment Two).
217 See supra notes 101-04 and accompanying text (discussing the extra burdens associated with Amendment Two); see also infra text accompanying notes 228-33.
218 See, e.g., Evans, 854 P.2d at 1279 (Erickson, J., dissenting).
219 Id. at 1279 (majority opinion).
220 Id. (quoting Hunter v. Erickson, 393 U.S. 385, 393 (1969)).
222 Id. at 431.
223 Equality Found., 860 F. Supp. at 431; Evans, 854 P.2d at 1279-80.

In Washington, the Supreme Court invalidated yet another statewide initiative. Initiative 350, the measure at issue, provided that "no school board ... shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence." A citizens’ group had drafted and successfully introduced Initiative 350 in response to a 1978 decision by the Seattle School Board to combat racial segregation in elementary and secondary schools through a mandatory busing policy. The Seattle School District, along with two other school districts, brought suit against the State of Washington, claiming that Initiative 350 violated the Equal Protection Clause of the Constitution.

The Supreme Court ruled for the plaintiffs, describing Initiative 350 as "subtly distort[ing] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." The challenged law would have passed constitutional muster if it had allocated political power according to neutral principles. "[T]he executive veto, or the typically burdensome requirements for amending state constitutions ... are not subject to equal protection attack," for example, because they restructure the political process so as "to place obstacles in the path of everyone seeking to secure the benefits of governmental action." But this law, according to the Court, "expressly require[d] those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action." Initiative 350 removed authority from the normal decision-making body in one area only: that of racial integration. The Supreme Court held that Hunter condemned such reallocations of power.

Colorado’s Amendment Two would have worked a similar reallocation of power. Like Initiative 350, it would have removed one particular issue from the normal political process. The Colorado legislature and municipal governments could have debated any fair housing issues except those involving the rights of lesbian, gay and bisexual people. "[O]n those issues of importance to this identifiable group,” the Evans plaintiffs argued, “the representatives of gay men, lesbians, and bisexuals [would

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226 Id. at 462.
227 Id. at 461-62.
228 Id. at 467.
229 Id. at 470.
230 Id.
231 Id.
232 Id. at 474.
233 Id.
be] rendered incapable of granting relief." Thus *Washington* and *Hunter* appear to control *Evans*.

Some commentators seek to distinguish *Washington* from *Evans* on racial grounds, however. According to the *Evans* defendants, for example, *Washington* "reaffirmed race as the touchstone" of suspect class analysis. Justice Erickson, the sole dissenter in *Evans*, adheres to this view. He described both *Hunter* and *Washington* as cases based on a traditional suspect classification analysis, not on a fundamental rights analysis. But both the *Evans* and the *Equality Foundation* courts rejected this interpretation. Each court acknowledged that the existence of racial discrimination "weighed heavily in the [Supreme] Court's consideration" of *Hunter* and *Washington*, but asserted that "it would be erroneous to conclude that the 'neutral principle' precept is applicable only in the context of racial discrimination."

Moreover, neither the *Evans* nor the *Equality Foundation* court treated the initiatives at issue as mere repeals, even though they arguably would have functioned only to revoke anti-discrimination legislation enacted at lower levels of government. Colorado and Ohio could, after all, abolish local government entirely. Thus, the argument goes, states should have plenary power to curtail the proper functions of those governments. The *Washington* defendants, for example, argued that the State of Seattle's ability to abolish school boards entirely implied that the lesser power to create a rule of decision for school boards (in matters involving mandatory bussing) must follow. But, according to the Supreme Court, Initiative 350 did not simply repeal a law enacted at a lower level of government: "Initiative 350 . . . works something more than the 'mere repeal' of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government." Amendment—

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236 Evans, 854 P.2d at 1297 (Erickson, J., dissenting).

237 Id. at 1281 (majority opinion).


240 Id. at 494 (Powell, J., dissenting).

241 Id. at 498.

242 Id. at 494-95.

243 Id. at 483 (majority opinion).
ment Two and Issue Three would have done the same. In addition to repealing existing anti-discrimination laws, they would have prevented the passage of such laws in the future, thus disabling the state legislature in any subsequent attempt to protect the lesbian, gay and bisexual citizens of its state. Hence these initiatives would have gone further than just "burdening" future attempts to enact such legislation. They would have prevented them. According to the Washington majority, this state of affairs would have offended the Constitution.

c. *Gordon v. Lance*²⁴⁴

In *Gordon*, the Supreme Court upheld a state law that had been attacked on equal protection grounds. West Virginia citizens challenged a statute requiring that any political subdivision seeking to incur bonded indebtedness or to increase taxes beyond limits established by the state constitution submit those issues to the voters for approval in a referendum election. The statute required 60% voter approval in order that the measure become law. After two such referendums failed, with the fiscal proposals receiving 51.55% and 51.51% of the vote,²⁴⁵ citizens who favored the proposals sued for a declaratory judgment. They claimed that the 60% requirement violated the Equal Protection Clause of the United States Constitution. The rule, they argued, violated the principle of "one person, one vote," by weighing the "no" votes more heavily than the "yes" votes.²⁴⁶

In a seven-to-two decision, the Supreme Court upheld West Virginia's law, making it clear in the process that the principles articulated in *Hunter* and in *Washington* do not extend only to matters of race. The Court distinguished *Gordon* from *Hunter* by noting that the latter applied to "fair housing legislation alone" whereas the former applied across the board to all fiscal matters involving taxation or bonded indebtedness, whatever their purpose.²⁴⁷ The sixty percent requirement reviewed in *Gordon* did not, in other words, single out one particular issue for special treatment. The Court could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote."²⁴⁸ It allowed the measure to stand, concluding that "so long as such provisions do not

²⁴⁴ 403 U.S. 1 (1971).
²⁴⁵ *Id.* at 3.
²⁴⁶ See Tribe, supra note 70, at 1096 n.3.
²⁴⁷ *Gordon*, 403 U.S. at 5.
²⁴⁸ *Id.* (citing Carrington v. Rash, 380 U.S. 89 (1965)).
discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause."\[249\]

The *Evans* court thought it significant that the Supreme Court "felt compelled to discuss *Hunter*" even though *Gordon* did not involve any traditionally suspect classes.\[250\] If *Hunter* had turned on the racially-discriminatory nature of the Akron initiative, then the Court would have distinguished it on those grounds. But it made no mention of race. "The fact that the Court did not do so," in the words of the *Evans* majority, "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."\[251\] In *Gordon*, the Court discussed "independently identifiable" classes, not "racial groups."\[252\] The class singled out for discriminatory treatment in Colorado consisted of those people who would benefit from laws prohibiting discrimination on the basis of sexual orientation: namely, the lesbian, gay and bisexual citizens of Colorado.\[253\] Thus, the principles articulated in *Hunter* and *Washington* apply forcefully to the fact pattern in *Evans*.

Some commentators, however, would still disagree. They view *Hunter* and its progeny as cases involving traditionally suspect classes despite the *Gordon* holding. The main support for this position comes from *James v. Valtierra*,\[254\] a case in which a majority of the Supreme Court refused to extend *Hunter* to a provision that was not "aimed at a racial minority."\[255\] In *James*, the Court examined an amendment to the California Constitution adopted by initiative that provided that "no low-rent housing project should be developed, constructed, or acquired . . . by a state public body until the project was approved by a majority of those voting at a community election."\[256\] The *James* opinion, written by Justice Black,\[257\] contains language that arguably contradicts the Court's language in *Gordon*: "a lawmaking procedure that 'disadvantages' a par-

\[249\] *Id.* at 7.
\[251\] *Id.*
\[252\] *Gordon*, 403 U.S. at 5, 7.
\[253\] Cf. *Hunter v. Erickson*, 393 U.S. 385, 390-91 (1969) (holding that a law requiring approval by referendum of fair housing statutes aimed at eliminating discrimination based on "race, color, religion, national origin or ancestry" burdens minorities).
\[255\] *James*, 402 U.S. at 141. In distinguishing *Hunter*, the Court stated that that case had dealt with a law that would have placed "special burdens on racial minorities within the governmental process." *Id.* at 140 (citing *Hunter*, 393 U.S. at 391). It went on to say that "[t]he present case could be affirmed only by extending *Hunter*, and this we decline to do." *Id.* at 141.
\[256\] *Id.* at 139.
\[257\] Justice Black dissented in *Reitman*, *Washington* and *Hunter*. He extolled the virtues of the majority rule plebiscite processes that produced the laws challenged in those cases. *See*, e.g., *Hunter*, 393 U.S. at 397.
ticular 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."\textsuperscript{258}

The Evans and Equality Foundation courts did not, however, find James useful as a general proposition. The Evans court explained that James may be best understood "as a case declining to apply suspect class status to the poor, and not as a limitation on Hunter."\textsuperscript{259} This analysis seems sound for two reasons. First, all of the justices who joined in the majority opinion in James also joined the Gordon opinion, in which they applied Hunter to a law that did not involve a racial classification.\textsuperscript{260} Thus race alone cannot constitute the distinguishing feature between James and Gordon. Second, the Supreme Court has demonstrated extreme reluctance, since the end of the Lochner era, to examine economic issues with anything more than the most deferential review.\textsuperscript{261} In fact, the dissenters in James disagreed with the majority on those very grounds. They argued that a classification based on poverty merited suspect class designation and strict scrutiny review.\textsuperscript{262} Professor Tribe agrees with the Evans court that James is, more than anything else, an aberration, relegated to that area of constitutional law reserved for classifications based on wealth.\textsuperscript{263}

Taken as a whole, then, Hunter, Washington and Gordon provided the basis upon which the Evans and Equality Foundation courts invalidated Amendment Two and Issue Three. Notwithstanding the Supreme Court's Romer decision, these cases arguably stand for the proposition that state governments cannot exclude an identifiable group from equal participation in the political process. Gordon makes clear that this prohibition does not apply only to racial, ethnic, and religious groups. According to Justice Marshall, "[i]t is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination . . . ."\textsuperscript{264}

d. Karcher v. Dagget\textsuperscript{265}

But how can a court isolate an independently identifiable group? Hunter, Washington and Gordon provide little guidance. Karcher v. Dagget, however, may provide some answers. In Karcher, the Court up-

\textsuperscript{258} James, 402 U.S. at 142.
\textsuperscript{260} Id.
\textsuperscript{261} See generally, Stone, supra note 85, at 807-08 (discussing deferential review to economic regulations since Lochner).
\textsuperscript{262} James, 402 U.S. at 144-45 (Marshall, J., writing for the dissent).
\textsuperscript{263} Tribe, supra note 70, at 1665-71.
\textsuperscript{264} James, 402 U.S. at 145 (Marshall, J., writing for the dissent).
\textsuperscript{265} 462 U.S. 725 (1983).
held a New Jersey reapportionment scheme and, in a concurring opinion, Justice Stevens tackled some interesting equal protection problems.

He began by explaining that the Equal Protection Clause requires states to govern their citizens impartially. Rules that "serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or . . . rules that disadvantage a politically weak segment of the community . . . violate the constitutional guarantee of equal protection."266 He dismissed the notion that the Fourteenth Amendment only protects racial minorities. Numerous Supreme Court precedents, according to Justice Stevens, stand for the proposition that the Equal Protection Clause prohibits laws that interfere with political participation of "cognizable political as well as racial groups."267 He then offered a rudimentary definition of such groups: "Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context."268 At another point, Justice Stevens contends that identifiable groups become such "only when their common interests are strong enough to be manifested in political action . . . ."269

Thus, when defendants in cases like Evans and Equality Foundation bemoan the evils of extending constitutional protection to vaguely-defined "identifiable groups,"270 courts should recognize their own ability to fashion manageable standards, perhaps beginning with those suggested by Justice Stevens in Karcher. In Washington, the Court easily identified the group disadvantaged by Initiative 350 as "those who would benefit from laws barring racial, religious, or ancestral discriminations."271 On the same reasoning, lesbian, gay and bisexual people composed the group disadvantaged in Evans. State constitutional burdens placed on those who desire the re-election of incumbent officials, on the

266 Id. at 748.
267 Id. at 749. He quotes Justice Douglas in Williams v. Rhodes, 393 U.S. 23, 39 (1968), saying that "the Equal Protection Clause protects 'voting rights and political groups . . . as well as economic units, racial communities, and other entities.'" Id. Even Justices White and Powell, although they would have upheld the constitutionality of the reapportionment plan at issue, agreed in their dissents with the proposition that "[i]t would . . . be a different matter if . . . [the] plan invidiously discriminated against a racial or political group." Id. at 783 (White, J., dissenting) (emphasis supplied). Powell, likewise, agreed with Stevens' observations. Id. at 787.
268 Id. at 754 n.12.
269 Id. at 750.
270 As the defendants pointed out in Evans, "there are an unlimited number of identifiable groups which might be adversely affected by any distinction made by a law." Defendants-Appellants' Opening Brief at 13, Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (Nos. 94-SA-048 and 94-SA-128 (consolidated)), aff'd, 116 S. Ct. 1620 (1996).
other hand, do not single out a group identifiable independently of a provision limiting the terms of incumbents. Likewise, state prohibitions on gambling do not single out people who are, as a group, identifiable apart from that prohibition.

State limitations on abortion present a more difficult picture, however. The Colorado Constitution forbids state funding of abortions except in certain limited categories. Advocates of state funding for any other medical procedure could pass a law guaranteeing such funding by convincing a majority of their state legislators to vote for the measure. But advocates of state-funded abortions would have to amend the Colorado Constitution before going to their legislature. Does the group of women and men interested in state-funded abortions exist independently of the abortion issue? Do they constitute a politically weak segment of the society, or share the same political affiliations, or have other common interests strong enough to translate into political action in other areas? Their case is probably stronger than the case for those favoring legalized gambling, but it still falls on the same side of the line. People who favor publicly funded abortions do not necessarily come from a politically weak segment of society; they do not share the same political affiliation; and their other political interests, although in some instances similar, do not automatically coincide. Lesbian, gay and bisexual people can be identified as such regardless of their position on anti-discrimination laws. As soon as a lesbian couple displays physical affection toward one another in public, for example—or as soon as one of them places a framed photograph of the other on her office desk—they are identified as queer.

In summary, Hunter, Washington and Davis enhance a long line of precedent on topics such as voting rights, vote dilution, gerrymandering, and candidate and voter qualifications. According to the Evans and Equality Foundation analyses rejected in Romer, these cases stand for the proposition that citizens of the United States have a fundamental interest in equal participation in the political process; excluding any inde-

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272 In general, prohibitions on the re-election of incumbents disadvantage Republicans, but in any given election and at any point in the history of this country, with its shifting population patterns, that may or may not be the case. Cf. Davis v. Bandemer, 478 U.S. 109, 127, 143 (1985) (upholding a reapportionment plan that favored Republicans).
273 See Col. Const. art. XVIII, § 9 (gaming allowed only in certain towns).
275 Defendants-Appellants' Opening Brief at 13-14 & n.18, Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (Nos. 94-SA-048 and 94-SA-128 (consolidated)), aff'd, 116 S. Ct. 1620 (1996). The same problem is presented by the prospect of a state constitutional amendment forbidding private discrimination on the basis of sexual orientation. Such an amendment could arguably fence out the very group accused of excluding the lesbian, gay and bisexual community: the religious right. Id. at 16.
276 See also text accompanying note 552 (discussing term limits, prohibitions on gambling and limitations on abortion funding in the context of John Rawls' A Theory of Justice).
277 Tribe, supra note 70 at §§ 13-1 through 13-31.
pendently identifiable group from that process, such that it can never achieve beneficial legislation, violates the Equal Protection Clause of the Constitution. As the Hunter Court observed, "[i]f a governmental institution is to be fair, one group cannot always be expected to win."\textsuperscript{278} Karcher refines this basic proposition, providing some guidance regarding the definition of independently identifiable groups. The Colorado Supreme Court's fundamental rights analysis in Evans was sound as a matter of precedent, despite a contrary holding in the Sixth Circuit's Equality Foundation (2), and the Romer Court correctly acknowledged the importance of political participation even while declining to adopt the Evans court's rationale.

3. Semi-Suspect Class Analysis

Regardless of its overall merit, the fundamental rights analysis in Evans and Equality Foundation does expose and suffer from some of the weaknesses inherent in equal protection doctrine. The concept of an "identifiable" class seems unnervingly reminiscent of a "suspect" or "semi-suspect" class. Perhaps the Evans and Equality Foundation courts, in an attempt to protect the rights of lesbian, gay and bisexual people in a post-Hardwick environment, inadvertently wove together two strands of equal protection doctrine: suspect class and fundamental interests analyses.\textsuperscript{279} Perhaps they entered the realm of suspect classification analysis through the back door.

The Equality Foundation court entered that realm through the front door as well. It accepted the fundamental rights analysis described in the previous subsection, subjecting Issue Three to strict scrutiny and holding that it violated the Equal Protection Clause,\textsuperscript{280} but it found, in addition, that lesbian, gay and bisexual people constitute a semi-suspect class.\textsuperscript{281} Therefore, the court analyzed Issue Three with intermediate scrutiny, striking down the initiative even under this lower standard of review.\textsuperscript{282}

The court examined four indicia of suspectness in coming to its determination.\textsuperscript{283} First, it found that sexual orientation is an immutable

\textsuperscript{278} Hunter v. Erickson, 393 U.S. 385, 394 (1969).

\textsuperscript{279} According to Professor Tribe, some intermediate scrutiny equal protection cases are hybrids. They do not focus solely on the class singled out by the challenged law; they look, in addition, to the right that law implicates. TRIBE, supra note 70, at 1613 n.22. Evans (and Equality Foundation) may actually utilize this type of analysis.


\textsuperscript{281} Id. at 440.

\textsuperscript{282} Id. at 440, 444.

\textsuperscript{283} Id. at 436. The Equality Foundation court actually broke its analysis down into five categories, but in combining two of them—immutability and whether or not an individual has control over her sexual orientation—it essentially used only four criteria.
characteristic. According to the court, sexual orientation establishes itself before the age of five years and develops outside of an individual's control. Medical testimony cited by the court indicated that sexual orientation "is unamenable to techniques designed to change it, and that such techniques are considered unethical." Furthermore, the court found that "homosexual conduct" (or same-sex erotic activity) exists independently of "homosexual status" (or the fact of being a homosexual). "[W]hile sexual conduct may be a matter of volition," the court stated, "sexual orientation is not."

Second, the court found that lesbian, gay and bisexual people have suffered a collective history of invidious discrimination. Heterosexuals have, for example, erroneously and harmfully stereotyped the queer community—suggesting a connection, for instance, between homosexuality and pedophilia. In addition, medical professionals mistakenly characterized homosexuality as a mental illness until relatively recently. Moreover, lesbian, gay and bisexual people have experienced large-scale private and public discrimination.

Third, the court found the queer community to be politically powerless. According to the court, "undisputed evidence" indicated that lesbian, gay and bisexual people face unique obstacles in the political arena. For example, the queer community cannot effectively build coalitions with other political minorities because of its pervasive unpopularity. This, in turn, hampers the ability of lesbian, gay and bisexual people to pass legislation favorable to the queer community. For the court, the widespread appearance of anti-gay initiatives themselves evidenced both the level of hostility directed toward lesbian, gay and bisexual people and the political powerlessness of the group as a whole. "[W]hatever bona fide legislative victories gays, lesbians and bisexual[s] may have achieved in recent years, those victories are being 'rolled back' at an unprecedented rate and in an unprecedented manner." The court also noted the absence of openly gay officials from national decision-making positions, likening it to the absence of women at the time of

284 Id. at 437.
285 Id.
286 Id.
287 Id.
288 Id. at 436.
289 Id. at 436-37.
290 Id. at 437.
291 Id.
292 Id. at 438.
293 Id.
294 Id. at 439.
295 Id.
Frontiero v. Richardson,\textsuperscript{296} the case in which the Supreme Court designated gender a semi-suspect class.\textsuperscript{297}

Fourth, the court found that sexual orientation bears no relationship to an individual's ability to perform, participate in or contribute to society.\textsuperscript{298} The court cited the American Psychological Association for this proposition.\textsuperscript{299} It also quoted military testimony claiming that "female homosexual[s] in the Navy [are] . . . among the command's top professionals."\textsuperscript{300}

In ruling that lesbian, gay and bisexual people constitute a semi-suspect class, the Equality Foundation court acknowledged that its finding contradicted those of "numerous Courts of Appeals . . . ."\textsuperscript{301} But it distinguished its rationale from those of other courts, saying "We disagree . . . with the fundamental underpinning of those decisions . . . and therefore decline to follow their reasoning."\textsuperscript{302} The court found that homosexual status exists independently of homosexual conduct. A heterosexual celibate, for example, retains her sexual attraction to men—her sexual orientation—even though she abstains from sexual conduct.\textsuperscript{303}

According to the Equality Foundation court, "the fundamental underpinning of those [Circuit Court] decisions . . . [is] that homosexuality is a status defined by conduct . . . ."\textsuperscript{304} Thus, even though many courts, because of the Supreme Court's Bowers v. Hardwick holding,\textsuperscript{305} have declined to accord suspect or semi-suspect status to classifications based on sexual orientation, that precedent "does not preclude a finding that gays, lesbians and bisexuals constitute a quasi-suspect class."\textsuperscript{306}

The court relied heavily on the last finding. Sexual orientation, it said, not only exists outside an individual's control, it exists "independently of any conduct that the individual . . . may choose to engage in."\textsuperscript{307} In other words, sexual, erotic behavior, or "conduct," is distinct from sexual orientation, or "status." The court's jargon is no accident. The bifurcation of status and conduct has, since Bowers v. Hardwick, become the "driving force" in pro-gay litigation.\textsuperscript{308}

\textsuperscript{296} 411 U.S. 677 (1973).
\textsuperscript{297} Equality, 860 F. Supp. at 439; see also Frontiero, 411 U.S. at 686 n.17 (1973); Tribe, supra note 70, at 1562.
\textsuperscript{298} Equality, 860 F. Supp. at 437.
\textsuperscript{299} Id.
\textsuperscript{300} Id. (quoting Cammermeyer v. Aspin, 850 F. Supp. 910, 922 (W.D. Wash. 1994)).
\textsuperscript{301} Id. at 439.
\textsuperscript{302} Id.
\textsuperscript{303} See id. at 437.
\textsuperscript{304} Id. at 439.
\textsuperscript{305} Id.
\textsuperscript{306} Id. at 440. "Quasi-suspect" is synonymous with "semi-suspect." This Note uses the latter terminology.
\textsuperscript{307} Id. at 437.
\textsuperscript{308} Cain, supra note 9, at 1617.
Court held in 1986 that the Constitution does not protect consensual adult homosexual sodomy as defined by the statute at issue in the case,309 it placed an official stamp of approval on criminal sodomy statutes targeted at homosexuals. It thus set into motion a jurisprudence of sexual orientation that has at its center the concept of sodomy. In 1987, for example, the Court of Appeals for the District of Columbia called sodomy the "conduct that defines the class" of homosexuals,310 and in 1988, a member of the Ninth Circuit described sodomy as "fundamental to [homosexuals'] . . . very nature."311

By holding as it did in Bowers, the Court spawned a new generation of gay rights litigation that focuses on the distinction between homosexual status and homosexual conduct in order to avoid the Hardwick holding. According to Professor Patricia Cain, the Hardwick decision "has changed the course of gay rights litigation."312 If litigators do not distinguish status from conduct, courts might refuse to examine laws that discriminate against lesbian, gay and bisexual people with anything more than a rational basis review on the reasoning that homosexuals as a class are defined by conduct that states can constitutionally criminalize. But according to Professor Cass Sunstein, "[t]he conclusion that the Due Process Clause does not protect consensual homosexual sodomy does not resolve the question whether principles of equal protection forbid discrimination on the basis of sexual orientation."313 He argues that:

The Due Process Clause is backward-looking; a large part of its reach is defined by reference to tradition. The clause is closely associated with, even if not limited to, the view that the role of the Court is to protect against ill-considered or short-term departures from time-honored practices. The Equal Protection clause, by contrast, is grounded in a norm of equality that operates largely as a critique of traditional practices. [There is] reason to believe that constitutional protection against discrimination on the basis of sexual orientation will ultimately take place under the Equal Protection Clause. It

309 See supra § I(A) (3) (discussing the Hardwick case).
311 Watkins v. United States Army, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting).
312 Cain, supra note 9, at 1617.
313 Sunstein, supra note 90, at 1178.
should be unsurprising if such developments occur even in the wake of Bowers v. Hardwick.\footnote{Id. at 1179.}

4. Rational Basis Analysis

The Equality Foundation court also found that Issue Three failed a rational basis review.\footnote{Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 444 (1994), aff'd in part, vacated in part, 54 F.3d 261 (6th Cir. 1995), vacated, 116 S.Ct. 2519 (1996) (remanding in light of Romer, 116 S.Ct. 1620 (1996)).} A court must uphold a classification under this standard if it can conceive of any reasonable set of facts upon which to rationally base the classification.\footnote{See supra § I(B) (2).} In order to successfully defend an anti-gay initiative, then, the government should have to offer no more than a legitimate state interest and a reasonable\footnote{“Reasonable” and “rational” are used interchangeably in equal protection analysis.} means/ends relationship.

The Equality Foundation defendants offered six governmental purposes to which Issue Three, they claimed, rationally related. These interests ranged from conserving fiscal resources\footnote{Equality, 860 F. Supp. at 441.} and “promot[ing a] diversity of views”\footnote{Id. at 442.} to “advanc[ing] democracy.”\footnote{Id. at 441.} Nonetheless, the court held that Issue Three offended the Equal Protection Clause. Thus its rational basis review must have been more probing than most; it must have had bite.\footnote{See supra § I(B) (2).} The court itself said that “even the standard of rationality... must find some footing in the realities of the subject addressed by the legislation.”\footnote{Equality, 860 F. Supp. at 440 (quoting Heller v. Doe, 509 U.S. 312, 321 (1993)).} It looked at both the propriety of the government’s purportedly legitimate interest in a classification based on sexual orientation and the means chosen to effectuate the desired result. Ultimately—in language reminiscent of Cleburne and Moreno and seeming to invoke the “improper purpose” rule\footnote{See infra § I(A) (2).}—the court stressed the fact that the measure bespoke “a bare desire to harm an unpopular group...”\footnote{Equality, 860 F. Supp. at 443 (citing United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).} The Supreme Court has stated that such a desire can never constitute a legiti-
mate state interest.\textsuperscript{325} "[M]ere negative attitudes, or fear" of a given group do not rise to the level of legitimacy in governmental purposes.\textsuperscript{326} Therefore, Issue Three, under this analysis, ran afoot of the Equal Protection Clause in that it promoted an illegitimate and irrational state interest.

The Supreme Court reasoned similarly in its \textit{Romer} decision, invalidating Amendment Two via a rational basis review. Citing \textit{Moreno}, the Court observed that the law at issue "raise[d] the inevitable inference that the disadvantage imposed [was] born of animosity toward the class of persons affected."\textsuperscript{327} Justice Kennedy spent a mere paragraph discussing Colorado's proffered interests in Amendment Two. The state had argued that the law would promote freedom of association (specifically, by allowing landlords and employers to discriminate against lesbian, gay and bisexual people for religious or other reasons), and that it would help conserve fiscal resources better spent on fighting discrimination against bona fide suspect classes. The majority rejected this argument, concluding that "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."\textsuperscript{328}

5. \textit{The Evans Concurrence and a Suggested Alternative Holding}

Justice Scott concurred with the \textit{Evans} majority but wrote separately to argue that the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution would provide a more appropriate basis upon which to decide the case.\textsuperscript{329} Section One of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."\textsuperscript{330} According to Justice Scott, Amendment Two, if enforced, would not only violate the Equal Protection Clause, but would impermissibly burden the right of lesbian, gay and bisexual citizens to peaceably assemble and to petition their government for redress of grievances.\textsuperscript{331} Those rights, in Justice Scott's opinion, should find protection under the Privileges or Immunities Clause.

His discussion of that Clause, although not entirely unique, is certainly unusual. In fact, it contradicts the Supreme Court's interpretation of the Fourteenth Amendment. In 1873, only five years after the states ratified the Fourteenth Amendment, the Court construed the Privileges or


\textsuperscript{326} \textit{Cleburne}, 473 U.S. at 448.

\textsuperscript{327} \textit{Romer} v. Evans, 116 S. Ct. 1620, 1628 (1996).

\textsuperscript{328} \textit{Id.} at 1629.


\textsuperscript{330} U.S. CONST. amend. XIV, § 2.

\textsuperscript{331} \textit{Evans}, 882 P.2d at 1351.
Immunities Clause for the first time in the *Slaughter-House Cases*.\(^{332}\) It held that the Clause applies only to those privileges or immunities established by a state for its citizens and that it does not place certain rights "under the special care of the Federal government . . . ."\(^{333}\) Some privileges or immunities, however, do, according to the Court, "ow[e] their existence to the Federal government, its National character, its Constitution, or its laws."\(^{334}\) Those privileges include "the right of free access to . . . seaports;"\(^{335}\) the ability "to demand the care and protection of the Federal government over . . . life, liberty, and property when on the high seas;"\(^{336}\) and the "right to peaceably assemble and petition for redress of grievances . . . ."\(^{337}\)

The *Slaughter-House* construction of the Privileges or Immunities Clause has, in the words of Professor Tribe, rendered the Clause essentially "superfluous."\(^{338}\) As Justice Field pointed out in his dissent in that case:

If [the Privileges or Immunities Clause] . . . only refers, as held by the majority . . . to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated . . . no new constitutional provision was required . . . .\(^{339}\)

The *Slaughter-House* majority claimed that a construction of the Clause in which the Court incorporated either natural rights or the rights enumerated in the Bill of Rights would "radically [change] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."\(^{340}\) But, according to many commentators, this "quite arguably was precisely what the authors of the Amendment had in mind."\(^{341}\) The legislative history of the Fourteenth Amendment, in fact, does not necessarily mandate the *Slaughter-House* interpretation of the Privileges or Immunities Clause. It may even contra-

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\(^{332}\) 83 U.S. (16 Wall.) 36 (1873).

\(^{333}\) *Id.* at 78-79.

\(^{334}\) *Id.* at 79.

\(^{335}\) *Id.*

\(^{336}\) *Id.*

\(^{337}\) *Id.*

\(^{338}\) Stone, *supra* note 85, at 777.

\(^{339}\) *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

\(^{340}\) *Id.* at 78.

dict the Court's construction. According to Justice Scott, for example, "the original understanding [of the Privileges or Immunities Clause] was virtually written out of the Constitution by the United States Supreme Court in the Slaughter-House Cases." Several commentators agree, and, like Justice Scott, would applaud a revival of the Privileges or Immunities Clause. They support their arguments for revival with a historical analysis of the drafting and adoption of the Civil War Amendments.

In the words of Justice Scott, "[a] review of the legislative history . . . will not permit such an ambivalent view" of the Privileges or Immunities Clause as that contained in the Slaughter-House decision. Many scholars believe that "[t]he Civil War . . . and the Civil War amendments fundamentally realigned federal-state relations." In 1865, at the close of the Civil War, the states ratified the Thirteenth Amendment, thus prohibiting slavery and involuntary servitude and ending an era in which the judiciary could legitimately defend the enslavement of millions of people of African descent. But the Thirteenth Amendment proved insufficient to protect African Americans from continued violence and discrimination at the hands of both private and state actors. Thus Congress drafted, and the states—some of them reluctantly—ratified the Fourteenth and Fifteenth Amendments to the United States Constitution. The former Amendment provides that "[a]ll persons born or naturalized in the United States . . . are citizens . . . ." Congress designed it specifically to overrule the Dred Scott decision of 1856, in which the Supreme Court held that African Americans "were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." Scholarly consensus suggests that Congress had another purpose in mind in drafting the Fourteenth Amendment. It intended that Section One

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343 See e.g., Stone, supra note 85, at 774-777 (discussing the demise of the Privileges or Immunities Clause); John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1387-89 (1992).
344 Evans, 882 P.2d at 1353.
345 Stone, supra note 85, at 779.
346 U.S. Const. amend. XIII.
347 U.S. Const. amend. XIV, § 1.
349 Id. at 404.
350 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1.
would insure the constitutionality of the Civil Rights Act of 1866. The Reconstruction Congress had passed the Civil Rights Act of 1866 after passage of the Thirteenth Amendment. It declared that all persons born in the United States were citizens and assured the equal application of certain common law rights, such as the ability to enforce contracts and to own property. Opponents of civil rights attacked the Act as unconstitutional. According to Professor Eisenberg, "doubts as to the adequacy of the Thirteenth Amendment and the 1866 act became so acute that it was soon deemed advisable to recast the provisions in a more detailed mold of a new constitutional amendment. Such was the motivating factor that led to the birth of the Fourteenth Amendment." Thus, Congress drafted and the states ratified the Fourteenth and Fifteenth Amendments and the Civil Rights Act of 1870 was enacted into law.

It is with reference to this context—the aftermath of a civil war and a Reconstruction Congress that forever changed the balance of power between federal and state government—that the legislative intent behind the Privileges or Immunities Clause must be determined. According to Justice Scott, the framers of the Fourteenth Amendment thought the Clause “very important” and designed it to “impose[ ] substantive limits upon the states.” He quotes from Corfield v. Coryell phrases in which Justice Washington evidences a natural rights jurisprudence in his interpretation of the Privileges or Immunities Clause. According to Justice Washington, the Clause was meant to protect those privileges “which belong . . . to the citizens of all free governments.” He additionally describes the Clause as protecting rights relating to life, liberty, property, happiness and safety. Corfield, according to Justice Scott, became the "pole star" for the framers of the Fourteenth Amendment. Senator Howard, in presenting the Amendment to the Senate for adoption, used the Corfield interpretation of “privileges or immunities” and included also the rights to assemble and to petition the government for redress of grievances, as well as the guarantees in the first eight amendments to the Constitution. In his words,


352 Eisenberg, supra note 128, at 3.

353 Id. at 3.

354 Id. at 21.

355 Evans, 882 P.2d at 1353 (Scott, J., concurring) (quoting from the Congressional Globe, 39th Cong., 1st Sess., part 3, p. 2765 (1866)).

356 Id.

357 6 F. Cas. 546 (E.D. Pa. 1825) (No. 3230).

358 Evans, 882 P.2d at 1353 (citing Corfield, 6 F. Cas. at 551).

359 Id. (quoting Corfield, 6 F. Cas. at 551-52).

360 Id. at 1353-54.
To [the] . . . privileges and immunities [enumerated in Corfield], whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people . . . .

. . . The great objective of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.361

This history indicates that the framers of the Thirteenth and Fourteenth Amendments intended that Section One of the Fourteenth Amendment be something more than a "dead letter."

According to Justice Scott, "an unfortunate history and a refusal to rely upon the plain text of the [C]onstitution . . . has resulted in a Privileges or Immunities Clause that has been eclipsed by the Equal Protection and Due Process Clauses."362 With the Privileges or Immunities Clause gutted, courts began to incorporate the substantive guarantees included in the Bill of Rights through the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Most of those guarantees have been incorporated.363 The demise of the Privileges or Immunities Clause, then, opened the door for the problematic area of constitutional jurisprudence known as "substantive due process."364 Justice Scott bemoans the fact that courts have abandoned the Privileges or Immunities Clause since the Slaughter-House Cases, and "unfortunately, have instead built upon the Equal Protection Clause and Due Process Clause."365 This legacy is responsible for the claimants' reliance on the Equal Protection Clause in Evans and explains Justice Scott's belief that their argument (in a world in which the Privileges or Immunities Clause had substance) would not form the most appropriate basis from which to argue for gay rights.

According to Justice Scott, Amendment Two, if enacted, would have denied the right of lesbian, gay and bisexual people to petition their government for redress of grievances, to peaceably assemble, and to par-

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362 Evans, 882 P.2d at 1352.
363 Stone, supra note 85, at 777-78.
364 See id. at 759-1010.
365 Evans, 882 P.2d at 1355.
ticipate in the political process.\textsuperscript{366} "[T]he right peaceably to assemble and petition is meaningless," in the words of Justice Scott, "if by law government is powerless to act."\textsuperscript{367} He explains further that "[i]t should be axiomatic that the right peaceably to assemble and petition government implies the ability of the duly elected representatives to respond, if so persuaded or predisposed."\textsuperscript{368} Yet, he argued, Amendment Two, if enacted, would have prevented the Colorado General Assembly, or any municipal legislative body, from adopting laws favorable to homosexuals.\textsuperscript{369} It would have "effectively denie[d] the right to petition or participate in the political process by voiding, \textit{ab initio}, redress from discrimination."\textsuperscript{370} In other words, if Amendment Two had become law, Justice Scott argues, lesbian, gay and bisexual people could have lobbied for the passage of gay-protective laws, but their legislators, however sympathetic, would have been powerless to respond.\textsuperscript{371}

Instead of arguing against this abridgement of their rights via the Equal Protection Clause, and encountering the hurdles presented by a three-tier process of review, the lowest of which almost inevitably results in a finding of constitutionality, the Justice suggested that the Privileges or Immunities Clause would have better protected gay rights.\textsuperscript{372} "The importance of the Privileges or Immunities Clause is that it does not require varying standards of review and that its protections are extended to every citizen."\textsuperscript{373} With a viable Privileges or Immunities Clause, lesbian, gay and bisexual people would have escaped the difficult argument that they comprise a class "worthy" of suspect or semi-suspect class designation. They would have escaped the argument that the Supreme Court has implicitly recognized a fundamental interest in \textit{Hunter} and its progeny—so difficult to win in the face of a Court that is reluctant to increase the number of rights deemed fundamental.\textsuperscript{374} They would have been able to level a simple and straightforward argument based on the Bill of Rights' protection of the right to peaceably assemble and to petition government for redress of grievances through the Privileges or Immunities Clause.

II. THE MORAL CONTEXT

The Equal Protection Clause guarantees that government will not create laws which irrationally classify citizens as eligible or ineligible for

\textsuperscript{366} Id. at 1356.
\textsuperscript{367} Id. at 1355.
\textsuperscript{368} Id.
\textsuperscript{369} Id.
\textsuperscript{370} Id.
\textsuperscript{371} See supra § I(A) (3).
\textsuperscript{372} Evans, 882 P.2d at 1355-56.
\textsuperscript{373} Id. at 1356.
\textsuperscript{374} Cain, supra note 9, at 1171.
the benefits and burdens of public life. Government legislation must further legitimate state interests and the means chosen to further those interests must reasonably relate to the desired ends. In addition, government cannot interfere with the exercise of, or access to, a fundamental right, unless it has a compelling interest in doing so. Thus, when a law targets a class of persons for different treatment, that class can challenge the law under the Equal Protection Clause. If the government has singled the challengers out from similarly situated individuals, the court must strike it down. But suppose a class singled out for different treatment by government legislation mounts an equal protection challenge and loses. Suppose further that the members of that group believe that the court has wrongly decided their case. Do they have an obligation to obey a law that they consider—perhaps correctly—to be unjust?

Philosophers have wrestled with that question for at least two thousand years and, with certain qualifications, have answered it in the affirmative. This Section, in order to provide a moral framework in which to discuss Romer v. Evans, begins by describing six theories by which scholars have sought to ground an obligation to obey the law.

A. SIX THEORIES OF POLITICAL OBLIGATION

Any thorough examination of political obligation should include a discussion of Plato’s Crito, written around 400 B.C. It presents a dialogue that takes place between Socrates and his friend Crito in the prison in which the former awaits his execution after a court has sen-

375 E.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that states can constitutionally criminalize oral and anal sexual relations between consenting adults of the same sex).

376 See infra § II(B).

377 For a moral account of homosexuality and the law antithetical to that presented here, see John M. Finnis, Law, Morality, and “Sexual Orientation,” 69 NOTRE DAME L. REV. 1049 (1994) (arguing that “[a] political community . . . can rightly judge that it has a compelling interest in denying that homosexual conduct . . . is a valid, humanly acceptable choice . . . and . . . can . . . discourage such conduct.”). Id. at 1070. Finnis believes that the Supreme Court overlooked “a sound and important distinction of principle” in extending the right to contraceptives to unmarried heterosexual couples. Id. at 1076. The only morally good sexual activity, according to Finnis, is that which occurs between a married heterosexual couple not using contraceptives. Martha C. Nussbaum, Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies, 80 VA. L. REV. 1515, 1525 & n.30 (1994) (quoting Finnis).

378 Anglo-American theorists often discuss the duty to obey the law in the context of something they term “political obligation.” CHAIM GANS, PHILOSOPHICAL ANARCHISM AND POLITICAL DISOBEDIENCE 8 (1992). To the degree that political obligation involves activities characteristic of good citizenship in general, however, the concept may encompass more than just obedience to law. Id. at 8-9. Nevertheless, because the duty to obey the law composes the “hard core” of political obligation, the terms are used synonymously in this Note. Id. at 9.

379 THE DIALOGUES OF PLATO (B. Jowett trans., 1937) [hereinafter PLATO].
tenced him to death for corrupting the minds of Athenian youth.\footnote{480}{Crito tried to persuade Socrates to escape, but Socrates refuses, arguing that such disregard for law would undermine the principles for which his life has stood.\footnote{381}{He explains his rationale by personifying the laws, by imagining what they would say to him upon escape: [H]e who disobeys us is . . . thrice wrong; first, because in disobeying us he is disobeying his parents; secondly, because we are the authors of his education; thirdly, because he has made an agreement with us that he will duly obey our commands; and he neither obeys them nor convinces us that our commands are unjust.\footnote{382}}}

\footnote{380}{“Socrates is a doer of evil, who corrupts the youth; and who does not believe in the gods of the state, but has other new divinities of his own.” \textit{Id.} at 407.}

\footnote{381}{\textit{Id.} at 430-38. In response to Crito's suggestion that he escape, Socrates replies: “the principles which I have hitherto honoured and revered I still honour, and unless we can at once find other and better principles, I am certain not to agree with you . . . .” \textit{Id.} at 430.}

\footnote{382}{\textit{Id.} at 435-36.}

\footnote{383}{\textit{GANS}, \textit{supra} note 378, at 42 n.1; \textit{see also infra} § II(A) (1)-(2).}

\footnote{384}{\textit{GANS}, \textit{supra} note 378, at 42 n.1.}

\footnote{385}{\textit{PLATO}, \textit{supra} note 379, at 434.}

\footnote{386}{\textit{Id.} at 437.}

\footnote{387}{For a list of these theories, \textit{see GANS}, \textit{supra} note 378, at 42-43.}

One can discern in this excerpt from \textit{Crito} the kernels of both the “gratitude” and the “consent” theory of political obligation.\footnote{383}{At other points in the dialogue, one can discern the “negative consequences” theory of political obligation, the proponents of which claim that obedience to law springs from the danger posed to the political system by disobedience.\footnote{384}{When the laws of Athens interrogate Socrates for his hypothetical escape from prison, for example, they ask: [A]re you not going by an act of yours to overturn us—the laws, and the whole state, as far as in you lies? Do you imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals?\footnote{385}{In other words, according to Socrates speaking for the laws of Athens, disobedience to law threatens a “well-ordered”\footnote{386}{society, and that threat gives rise to political obligation in the form of obedience to law. \textit{Crito} provides an appropriate launchpad, then, for a discussion of fidelity to law. This subsection introduces six theories of political obligation—that is, six arguments by which philosophers have attempted to ground an obligation to obey the law.\footnote{387}{It begins with the arguments from gratitude, from consent, and from negative consequences—presented in \textit{Crito}—and continues with the relatively new arguments from fairness and from the duty to support just institutions, presented for}}}}}

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the most part by H. L. A. Hart and John Rawls. It closes with the more recent argument from communal obligations, posited by Ronald Dworkin.

1. The Argument from Gratitude

Proponents of the argument from gratitude contend that those who benefit from the existence of a legal system owe a debt of gratitude to that system, and that this debt of gratitude gives rise to an obligation to obey the law. In *Crito*, for example, the laws compare themselves to Socrates’ parents. They ask him if he can deny that he is their “child and [their] slave,” given the fact that they “brought [him] into the world, and nurtured and educated [him], and [gave him] . . . a share in every good which [they] had to give . . . .” They admonish him for his hypothetical escape from prison, asking him whether he would pretend to “have any right to strike or revile or [to] do any other evil to [his] father or [his] master . . . because [he had] . . . been struck or reviled by him, or received some other evil at his hands?” The laws of a given state require obedience from the populace, according to *Crito*, because the laws provide lifelong benefits to the citizenry.

Critics of the argument from gratitude point to three fatal flaws in the theory. First, they contend that the recipient of a benefit must accept the goods intentionally, of her own free will, in order to engender a sense of gratitude. An individual who receives goods involuntarily owes no debt of gratitude to her benefactor. If a woman returns from work in the evening to find a freshly-painted house without having requested it, for instance, she may or may not experience a feeling of gratitude toward the painter. If she did not want her house painted or if she detests its new color, she may not feel grateful. She will not, in other

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388 *Id.* at 43 n.2. H. L. A. Hart introduced the argument from fairness during the 1950s; Rawls expanded the concept. Rawls’ *A Theory of Justice* may have been the genesis for the argument from the duty to support just institutions. *Id.*

389 RONALD DWORKIN, LAW’S EMPIRE 195-216 (1986) [hereinafter EMPIRE].


391 In addition, they compare themselves to Socrates’ educators, asking “Were not the laws, which have the charge of education, right in commanding your father to train you in music and gymnastic?” PLATO, *supra* note 379, at 434. Characterizing the laws as educators would also give rise to a debt of obligation.

392 *Id.* at 435.

393 *Id.*

394 *Id.*

395 In referring to the argument from gratitude and the argument from consent, Professor Gans writes “[t]he criticism aimed at the first two arguments is, in my opinion, fatal.” *GANS, supra* note 378, at 43.

396 *Id.* at 46.

397 *Id.*
words, automatically approve of the choices made by her benefactor, and a debt of gratitude may or may not arise. Likewise, in a system of law, some citizens may object to the quality or distribution of legal benefits and burdens; and they may not approve of the concomitant obligation to obey the law. \(^{398}\) Some of the legal goods granted citizens "are in fact forced upon them." \(^{399}\) Thus, all citizens may not owe a debt of gratitude to the state. \(^{400}\) Second, obedience to law does not necessarily represent the only appropriate way in which one can express gratitude to law. \(^{401}\) The fact that a mother raises and educates her son, for example, giving rise to a debt of gratitude on the son’s part, does not mean that he must obey his mother’s every command, no matter how outrageous. \(^{402}\) He, like the subject of law, has many avenues through which he can demonstrate his gratitude, and certain commands may not bind the child because, by their very nature, they conflict with some other duty or obligation. \(^{403}\) Third, and perhaps most importantly, critics of the argument from gratitude contend that an "altruistic motivation on the part of the benefactor is a necessary condition for his or her right to the beneficiary’s gratitude." \(^{404}\) This criticism undermines the argument’s very applicability to the relations between the law and its subjects, for how can one ascribe altruistic motives to laws? "It is rather difficult," according to Professor Chaim Gans, "not because there is any evidence to the contrary, but because it is difficult to ascribe to them any intentions at all." \(^{405}\) In summary, the argument from gratitude fails because (1) a ben-

\(^{398}\) Id. ("Not all of the law’s subjects have good reason to prefer the situation combining the advantages and disadvantages of obedience and of the law’s existence, to one where neither exist.").

\(^{399}\) Id.

\(^{400}\) This objection “casts doubt upon the universality of this obligation’s applicability.” Id.

\(^{401}\) Id. at 46-47 (citing M.B.E. Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 YALE L.J. 950, 953-54 (1973)).

\(^{402}\) "A fifty-year-old son may have numerous duties toward his eighty-year-old parents, but they will all be duties to help them, not to obey them. No matter how grateful he is to them for their past services, he can have no duty to let them determine, for example, what hour he must come home at night or what foods he may eat.” Joel Feinberg, Civil Disobedience in the Modern World, HUMAN. IN SOC’Y, Winter 1979, at 37, 49.

\(^{403}\) David Lyons, Lectures in Resistance and Responsibility at Cornell Law School (Fall 1994).

\(^{404}\) Gans, supra note 378, at 44.

\(^{405}\) Id. at 45. In Crito, Socrates personifies the laws, thus giving them the characteristics of a parent and teacher who can in fact operate from altruistic motives. See supra text accompanying note 391-94. Thomas Hobbes, and later John Austin and Jeremy Bentham, describe the benefactor of the subjects’ gratitude as a sovereign: an individual or group in which valid laws originate. Instead of personifying the laws themselves, these writers argued that “in any society where there is law, there actually is a sovereign, characterized affirmatively and negatively by reference to the habit of obedience: a person or body of persons whose orders the great majority of the society habitually obey and who does not habitually obey any other person or persons.” H. L. A. Hart, THE CONCEPT OF LAW 49 (Tony Honore et al. eds., 10th ed. 1993) [hereinafter Hart, TCL]. Under this theory, then, one could ascribe altruistic mo-
eficiary must voluntarily accept goods in order to owe a debt of gratitude; (2) obedience to law may or may not represent the only way in which citizens can express their gratitude to law; and (3) a benefactor must operate from altruistic motives in order to deserve her beneficiary's gratitude.

2. The Argument from Consent

A second argument by which philosophers have attempted to ground an obligation to obey the law is the argument from consent. Historically, consent theory has captured the popular imagination perhaps more than any other theory of political obligation. According to John Simmons, the argument from consent "has provided us with a more intuitively appealing account of political obligation than any other tradition in modern political theory." In fact, contemporary political debates in the United States regularly appeal to the consent theory of governance. Think, for example, of the Republicans' "Contract with American" rhetoric.

Scholars have produced two important models of political obligation based on consent. According to the first model, a citizen must expressly act in order to indicate a commitment to abide by the laws of
her state. Express consent of this sort would “firmly and decisively” establish an obligation to obey the law. But because few citizens explicitly consent to obey the laws of their community, theorists have broadened the concept of actual consent such that consent can be implied from certain conduct. This “tacit consent” forms the core of the second model of consent theory. Under this view, continued residence in a given locality or voting for the legislators of a given community—or even, in some cases, silence—can constitute the necessary act. One infers actual consent to the laws of the community from conduct of this kind.

In Crito, when the laws chastise Socrates for “breaking the covenants and agreements which [he] made with” them, they assume quite plainly that his obligation to obey them is grounded on consent. Specifically, they base their argument from consent on Socrates' continued residence in Athens:

[W]e ... proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him. None of us laws will forbid him or interfere with him. ... But he who has experience of the manner in which we order justice and administer the state, and still remains, has entered into an implied contract that he will do as we command him.

John Locke and Jean Jacques Rousseau also treat continued residence in a given locality as evidence of consent to its laws. In The Second

410 See id. at 49.
411 See also Simmons, supra note 407, at 290 (“[C]onsent, be it tacit or express, may still be the firmest ground of political obligation (in that people who have consented probably have fewer doubts about their obligations than others) ... .”).
412 Two groups who do so in the United States are naturalized immigrants and state officials. GANS, supra note 378, at 49 n.14.
413 Even the proponents of consent theory, at least in modern times, have abandoned the idea that citizens expressly consent to be bound by the laws of their community. According to Simmons, “[s]ince the earliest consent theories, it has been recognized that ‘express consent’ is not a suitably general ground for political obligation.” Simmons, supra note 407, at 278.
414 GANS, supra note 378, at 49; Simmons, supra note 407, at 279.
415 PLATO, supra note 379, at 436.
416 “You, Socrates, are breaking the covenants and agreements which you made with us at your leisure ... after you have had seventy years to think of them ... .” Id.
417 Id. at 435.
418 John Locke is considered the main proponent of the tacit consent model of political obligation. GANS, supra note 378, at 49 n.15. According to Rousseau, “[w]hen the State is instituted, residence constitutes consent; to dwell within its territory is to submit to the Sovereign.” JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND THE DISCOURSES 105-06 (G.D.H. Cole trans., E.P. Dutton and Company, Inc., 1950) (1762).
Treatise of Civil Government, Locke states that “every man, that hath any possession, or enjoyment, of any part of the dominions of any government, doth thereby give his tacit consent, and is far forth obliged to obedience to the laws of that government.” For Locke, it seems, tacit consent is “quite independent of the consenter’s intentions or awareness that he is consenting;” a binding obligation to obey the laws can arise without the obligor’s knowledge.

John Simmons characterizes this assertion as “a patent absurdity.” He agrees with Locke that an obligation to obey the law can arise from the enjoyment of the benefits of civil society, but he criticizes Locke’s inference of a genuine consensual act from that enjoyment. The obligation arises instead, he claims, from “considerations of fairness or gratitude.” He disagrees with Locke’s grounding of such an obligation on consent instead of on the principle of fair play, on the principle of gratitude, “or under some other kind of principle of repayment.”

Critics of the argument from consent, then, contend that the theory mistakenly ascribes consent to citizens who have unknowingly “agreed” to obey the laws of their community. In particular, they argue that inferring consent from continued residence suffers from two weaknesses. First, empirical evidence indicates that long-term residents of a given locality do not regard their inhabitancy as indicating consent to law. Consent requires a conscious and intentional mental act. According to John Simmons, “tacit consent must meet the same fate as express consent concerning its suitability as a general ground of political obligation. . . . [I]t seems clear that very few of us have ever tacitly consented to the government’s authority in the sense” Locke described.

419 Simmons, supra note 407, at 281-82.
420 Id. at 281.
421 Id. at 282.
422 Id. at 288. He describes these items as “the benefits of the rule of law, police protection, protection by the armed forces, and so on.” Id.
423 “My suggestion is that none of Locke’s ‘consent-implying enjoyments’ is in fact a genuine consensual act.” Id.
424 Id.
425 Id. at 291.
426 These citizens may not only unknowingly “agree” to obey the law; they may affirmatively object to such obedience. See infra notes 459-61 and accompanying text.
427 For an argument against inferring consent from voting or political participation, see id. at 289.
428 GANS, supra note 378, at 52.
429 Id. Unintentional consent is generally not binding. Id. at 52-53 (discussing one case in which unintentional consent is binding) (citing Harry Beran, In Defense of the Consent Theory of Political Obligation and Authority, 87 Ethics 260-70 (1976-77)).
430 Simmons, supra note 407, at 290. Most citizens are neither aware of the possibility nor intend that their continued residence in a locality should indicate consent. Perhaps Austin
Second, critics argue, even if continued residence reliably indicated consent, that consent would not bind the resident because his tacit agreement to obey the laws of his locality occurs in the presence of duress or undue influence. Many scholars do not view the choice given in Crito, between continued residence in one's home, combined with potentially unwilling obedience, on the one hand, and emigration, on the other, as a free choice. David Hume, for example, described such a choice as follows:

Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.

According to John Simmons, when a citizen must choose between emigration and obedience, her “fundamental and necessary needs are being exploited.” Any consent she gives occurs in an atmosphere of duress and undue influence and is therefore invalid. Professor Gans argues furthermore that the entire emigration/obedience dichotomy begs the question. He asks “whether anyone, including the state, has a right to force us to choose either emigrating or staying and obeying.” One can only attribute such a right to the state if one accepts a prima facie obligation on the part of the citizenry to obey its commands. Most scholars con-

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431 GANS, supra note 378, 53-57.
432 See supra note 417 and accompanying text.
433 GANS, supra note 378, at 53 (quoting David Hume). Some people do not accept this criticism as fatal, claiming that the choice between emigration and continued residency combined with political obligation is, perhaps, a difficult choice, but is not a choice made under duress. Id. at 54 (describing the stance taken by Harry Beran). Still others, while accepting Hume’s criticism, believe that such a choice does not result in a binding commitment one way or the other. John Simmons, for example, does not characterize the choice between emigration and continued residence as duress, but does consider the choice to be one which is made under “undue influence.” Id. (citing A. John Simmons, Consent, Free Choice and Democratic Government, 18 GA. L. REV. 791, 811-13 (1984)).
434 Id.
435 Id. at 55.
436 Id. at 54-57. As for Hume’s example, he would modify it such that it would focus more on the objectionable choice faced by the man on the boat, rather than on the “insufferable difficulty of jumping into the oceans . . .” Id. at 55. The question Professor Gans would ask is whether or not the ship’s owner—who now demands the man’s obedience or departure—brought the man aboard in the first place, thus creating the situation in which he had to choose between the two. The man’s consent in this case is clearly not binding, according to Gans, because it was given both under undue influence and under duress. Id. at 55-57.
sider these criticisms to have fatally undermined the argument from consent. According to John Simmons, the obligations generated from the enjoyment of civil society do not “fall under principles of fidelity or consent.” Consent theory, in his words, “surely fails to give a suitably general account of our political obligations . . . .”

3. The Argument from Negative Consequences

Proponents of the argument from negative consequences contend that an obligation to obey the law follows directly from the social danger inherent in disobedience to law. In Crito, the laws ask Socrates whether he thinks a state can endure when its legal decisions have no binding force. They urge him to submit to the sentence of death, even though he considers this sentence unjust, because negative consequences, according to the laws, will result from legal infidelity. So goes the argument from negative consequences: “[d]isobedience may encourage additional cases of disobedience, thus causing the deterioration of [the law’s] operation as a tool for determining and enforcing desirable conduct.”

Theorists have presented two criticisms of this argument. First, they point out that undesirable consequences do not flow from every act of disobedience. Thus the argument from negative consequences is insufficient to justify a general obligation to obey the law. At most, it can ground an obligation to obey a select group of laws. Second, they argue that grounding an obligation to obey the law in the negative consequences that flow from disobedience would serve only to assure compliance with “bad” laws. Citizens will obey “good” laws because they are good, not because of the damage disobedience causes the legal system. Thus, given that a citizen’s obligation to obey the law might lapse in the case of a morally repugnant law, “[i]t . . . turns out that in the only cases where the [argument from negative conse-

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437 Simmons, supra note 407, at 291; see also GANS, supra note 378, at 42-43.
438 See supra note 385 and accompanying text.
439 GANS, supra note 378, at 72. Note that the type of disobedience being discussed here is disobedience on the part of the law's subjects. Disobedience on the part of official actors has more serious ramifications. Id. at 71, 120-62. For a discussion of the two reasons why disobedience may encourage further disobedience, see id. at 72-73.
440 Running a red light at three o'clock in the morning on a deserted street, for example, does not automatically result in negative consequences. See Feinberg, supra note 402, at 54. Many people would consider violations of sodomy statutes to fall into this category. See Tribe, supra note 70, at § 15-21.
441 GANS, supra note 378, at 66.
442 Id. at 70.
443 Id.
444 See infra notes 463-67 and accompanying text.
quences] . . . could actually be of practical use, it is not available for such use.”

Regardless of these criticisms, proponents of the argument from negative consequences continue to believe that it forms a plausible ground for political obligation. It at least grounds an obligation to obey certain classes of laws, as even its critics concede. Furthermore, if the theory of political obligation based on negative consequences can explain only an obligation to obey morally repugnant laws, and not morally beneficial laws, as its detractors claim, then it has done its job. The central search in any exploration of political obligation is for an explanation of a citizen’s obligation to obey unjust laws. And such an obligation will not, in every case, lapse because of the moral inadequacy of a law. In a discussion of the grounds for legal obligation contained in *A Theory of Justice*, for example, John Rawls explains that “sometimes we have an obligation to obey what we think, and think correctly, is an unjust law; and . . . sometimes we have an obligation to obey a law even in a situation where more good . . . would seem to result from not doing so.” Thus the argument from negative consequences may provide a foundation upon which to position political obligation—especially in combination with the theories discussed below.

4. The Argument from Fairness

In John Simmons’ critical account of consent theory, he dismisses the argument from consent as “fail[ing] to give a suitably general account of our political obligations . . . .” At the same time, he writes that “[c]onsent theory . . . seems to point the way toward other avenues of inquiry which may prove more rewarding.” He has in mind, among other things, the principle of fair play embodied in the argument discussed in this subsection. Proponents of the argument from fairness

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445 GANS, *supra* note 378, at 70.
446 See e.g., *id.* at 77-78 (making this argument).
447 See *infra* text accompanying notes 463-67.
448 John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 5 (Sidney Hook ed., 1964) [hereinafter Rawls, *Obligation*]. Rawls makes this observation in the midst of a discussion in which he assumes that negative consequences would not flow from disobedience to law. The quote is used here only to illustrate that the central issue in scholarly debates on political obligation is whether or not citizens have an obligation to obey unjust laws.
449 Given the value placed on legal institutions as protectors of civil order, in the words of Professor Gans, “the bad consequences . . . [attendant to] many instances of disobedience . . . support a[n obligation] to obey the law.” GANS, *supra* note 378, at 77.
450 Simmons, *supra* note 407, at 291.
451 *Id.*
452 In analyzing the obligations that may arise from the enjoyment of civil society, according to Simmons, “we do not appeal to a principle of consent; rather, such obligations would arise, if at all, because of considerations of fairness or gratitude.” *Id.* at 288. “[S]ome of
contend that “[w]hen a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefitted by their submission.”453 Both H. L. A. Hart and John Rawls view this “principle of fairness”454 as a basis for an obligation to obey the law.455 Implicit in their theories is a notion of “distributive justice”456 in which the burdens of producing some common good are preferably borne equally by all of the consumers of that good.457 Adherence to a principle of fairness would minimize the exploitation of the producers and would mitigate the “free-rider” problem in which a non-cooperating individual accepts the benefits produced by the cooperating individuals.458

Critics of the fairness theory argue that it does not supply a ground for an obligation to obey the law.459 They point out that at least some citizens may not wish to consume the goods produced by the legal system, and do not do so willingly—yet they cannot opt out of the deal.460 The principle of fairness, they argue, cannot apply to goods consumed unwillingly.461

Locke's consent-implying enjoyments might in fact bind us to political communities under a 'principle of fair play' . . . or they might be thought to bind us under a principle of gratitude . . . or under some other kind of principle of repayment.” Id. at 291 (footnotes omitted).

453 GANS, supra note 378, at 57 (quoting H.L.A. Hart, Are There Any Natural Rights?, 64 Phil. Rev. 175, 185 (1955)). John Rawls named this “the principle of fairness” and developed it in first in Legal Obligation and the Duty of Fair Play, and later in A Theory of Justice. Id.; see RAWLS, supra note 27, at §§ 18, 52.

454 See RAWLS, supra note 27, at §§ 18, 52.

455 GANS, supra note 378, at 57; See, e.g., RAWLS, supra note 27, at 108-14.

456 GANS, supra note 378, at 58 & n.44.

457 Or at least “all of the consumers capable of participating in the production process.” Id. at 59.

458 The “free-rider” problem arises when an individual reasons that he need make no contribution to the group effort because the contributions of other group-members will suffice to bring about the common good. The free-rider thus benefits at the expense of other group-members. “Each person has his own share to do if all are to gain, but it is possible for a given person to cheat, not do his share, and thus take his benefit as ‘free’ only because the others are doing their shares. The ‘free rider’ doesn’t ‘play fair.’ He may not harm anybody directly, but by cheating he exploits the others’ cooperativeness to his own benefit.” Feinberg, supra note 402, at 53; see also DUKEMANN, supra note 178, at 51-52 & n. 27.

459 ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 90-95 (1974); SIMMONS, supra note 390, at 118-36.

460 These individuals are sometimes called “passive recipients.” David Lyons, Lectures in Resistance and Responsibility at Cornell Law School (Fall 1994).

461 Nozick illustrates an instance of unwilling consumption with the following example: Suppose some residents of a neighborhood agree to create an entertainment center in which music will be broadcast over a public address system. Suppose further that many residents have contributed toward the establishment and maintenance of the entertainment center. All of the residents enjoy its benefits upon opening their windows. Does a resident who has occasionally opened her window, and who has enjoyed the public address system, owe a contribution to the entertainment center? Not necessarily, according to Nozick. She does not owe a contribu-
Adherents of the argument from fairness respond to these criticisms by acknowledging that obligations must arise from voluntary and deliberate acts.\textsuperscript{462} Additionally, in a further refinement of the notion of voluntary behavior reminiscent of consent theory, they claim that "it is not possible to be bound to... institutions which exceed the limits of tolerable injustice."\textsuperscript{463} Thus an obligation to obey the law arising from the principle of fairness presupposes that the legal institutions at issue are "reasonably just"\textsuperscript{464} and that the individuals bound by the obligation have entered into it willingly.\textsuperscript{465} The argument from fairness would not characterize an obligation entered into under duress or undue influence as binding: "[a]quiescence in, or even consent to, clearly unjust institutions does not give rise to obligations."\textsuperscript{466} Many scholars consider the argument from fairness, so qualified, as a viable foundation upon which to ground an obligation to obey the law.\textsuperscript{467}

5. The Argument from Justice

In \textit{A Theory of Justice}, John Rawls offers an explanation for obedience to law that exists independently of the principle of fairness. According to Rawls, a duty to support just institutions requires that individuals "comply with and... do [their] share in just institutions when they exist and apply to [them]; and... assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to... [the individual]."\textsuperscript{468} Natural duties, including the duty to support just institutions, in contrast to obligations, "apply... without regard to [an individual's]... voluntary acts."\textsuperscript{469} Irrespective of whether or not an individual has committed herself, tacitly or otherwise, to refrain from harming others or to aid a person in jeopardy,\textsuperscript{470} she has a duty to do so.\textsuperscript{471} One cannot, for example, argue that a promise to refrain from killing "establishes a moral requirement where none already existed."\textsuperscript{472} A promise not to kill, according to Rawls, is "ludicrously redundant."\textsuperscript{473}

\textsuperscript{462} See supra § I(A) (1).
\textsuperscript{463} \textit{Rawls, supra} note 27, at 112 (parenthetical omitted). For a discussion of the principle of fairness incorporating many of the precepts of consent theory, see \textit{id.} at 113.
\textsuperscript{464} \textit{id.} at 112.
\textsuperscript{465} \textit{id.} at 343 ("we acquire obligations... by doing various things voluntarily... ").
\textsuperscript{466} \textit{id.}
\textsuperscript{467} See, e.g., \textit{id.} at 342-50; \textit{Gans, supra} note 378, at 57-66.
\textsuperscript{468} \textit{Rawls, supra} note 27, at 334.
\textsuperscript{469} \textit{id.} at 114.
\textsuperscript{470} She has a natural duty in this instance if she can aid the person without risking excessive injury or loss to herself. \textit{id.}
\textsuperscript{471} \textit{id.} at 114-15.
\textsuperscript{472} \textit{id.} at 115.
\textsuperscript{473} \textit{id.}
Furthermore, natural duties exist independently of any institutional framework: they "obtain between all [people] as equal moral persons." Thus the argument from justice, in contrast to the argument from fairness, does not depend on the existence of a cooperative social arrangement.

Rawls explains that individuals may be bound to political institutions in several different ways. They may have an obligation to obey the law based in fairness, as described in the previous subsection; they may have a duty to comply with the law based on the argument from justice described in this subsection; and they may be politically bound in other ways as well. As between the principle of fairness and the duty to support just institutions, the latter "is the more fundamental, since it binds citizens generally and requires no voluntary acts in order to apply." Those citizens who hold public office or who experience a position of relative privilege probably have an obligation as well as a duty to obey the law because they receive public goods produced by the cooperation of their fellow citizens more readily than do others. Disadvantaged minorities, who may only minimally benefit from their community's joint enterprise, probably do not have an obligation to obey the law based in fairness. Fidelity to law may be required of them, however, because of their duty to support just institutions. "If the basic structure of society is just, or as just as it is reasonable to expect in the circumstances," Rawls comments, "everyone has a natural duty to do his part in the existing scheme. Each is bound to these institutions independent of his voluntary acts, performative or otherwise."

Critics point to two weaknesses in the argument from justice: first, individuals have difficulty determining when institutions "apply to them." Second, a natural duty to support just institutions "does not tie political obligation sufficiently tightly to the particular community to which those who have the obligation belong; it does not show why [the British] have any special duty to support the institutions of Britain." Some scholars have suggested overcoming the first criticism by referring to social custom to determine when certain institutions "apply to" individuals. Others have suggested eliminating the phrase entirely. Resort.

474 Id.
475 Id. at 116.
476 Id.
477 Id.
478 See id. ("The principle of fairness . . . binds only those who assume public office, say, or those who, being better situated, have advanced their aims within the system.").
479 Id. at 115.
480 See GANS, supra note 378, at 78.
481 EMpnm, supra note 389, at 193.
482 GANS, supra note 378, at 79.
to custom seems the preferable alternative, since omitting the challenged phrase would mean that the duty to support just institutions recognizes no geographic borders and thus might become an "impractically heavy" burden. Additionally, it seems intuitively plausible that individuals might determine when an institution applies to them in the same way that they discern connections with certain religious, educational or financial institutions—that is, through the customary practices of their family and community.

As for the second criticism, Ronald Dworkin has supplied, in the argument from community, another potential ground for political obligation that more directly acknowledges the special relationship between an individual and her government.

6. The Argument from Community

Dworkin argues that the obligations usually thought to attach to familial relationships and to friendships do not arise from free choice. "Even associations we consider mainly consensual, like friendship, are not formed in one act of deliberate contractual commitment, the way one joins a club . . . ." He sees the obligation to obey the law as deriving from the same source as do these communal obligations and advances two arguments in anticipatory defense of this "argument from community." First, he contends that communal obligations do not require emotional ties or personal relationships between obligor and obligee. They require only a group ethic in which members "see these responsibilities as flowing from a more general responsibility each has of concern for the well-being of others in the group." Thus, the members of a political community, like the members of a family, may have communal obligations toward one another. Second, Dworkin argues that basing political obligation on community does not necessarily raise the specter of nationalism or racism. Although he recognizes that people often develop communal sentiments towards persons with whom they share cultural or other similarities (to the exclusion of those with whom they do not), he explains that "communal obligations . . . are limited by the requirements of justice." In other words Dworkin, like Rawls, believes that individuals have natural duties towards justice and that those duties would over-ride any communal obligation in contravention to justice. With that

483 Id. at 80 (discussing SIMMONS, supra note 390, at 153).
484 EMPIRE, supra note 389, at 197.
485 Id. at 199-200.
486 GANS, supra note 378, at 85.
487 Id.
proviso, Dworkin contends, "the more wholesome ideals of national community" need not be given up.\textsuperscript{488}

7. Summary

According to Joel Feinberg, "[t]he venerable quest for a perfectly general ground of political obligation can be abandoned."\textsuperscript{489} Each of the six arguments described in the preceding subsections has received serious scholarly criticism; perhaps one cannot successfully ground political obligation on any of them. But what if several of the arguments were combined? At least one theorist has suggested that the arguments from fairness and from justice, when combined with the arguments from negative consequences and community, do provide a sufficient ground for fidelity to law.

It turns out that a single complex combining all four arguments supplies the firmest and most successful basis for political obligation. The argument from [negative] consequences, the argument from fairness and the argument [from justice] ... clarify just why obeying the law is the central component of ... [political obligation]. The argument from fairness and, to a larger extent, the argument from [community] ... clarify just why this duty is ... a unique and intimate duty owed by citizens to the specific communities of which they are members. The argument from [negative] consequences and the argument from [justice] ... demonstrate why [political obligation] ... is not [merely owed to one's own community] ... .\textsuperscript{490}

But regardless of the accuracy, or lack thereof, of Feinberg's observation, each of the six theories described above, and any hybrid of these theories, contemplates an obligation to law that is merely a prima facie,

\textsuperscript{488} EwE, supra note 389, at 205; see also id. at 202-06.
\textsuperscript{489} FeINBErg, supra note 402, at 58.
\textsuperscript{490} GANS, supra note 378, at 89 (using the terms "argument from consequences," "argument from the duty to support just institutions," and "argument from communal obligations"). Note also that the arguments from fairness and from justice both include an embedded version of the argument from negative consequences. See id. at 72-74. They assign to individuals an affirmative obligation to support beneficial social arrangements because lack of support for such arrangements might result in undesirable consequences for everyone. Stated conversely, they require obedience to law because disobedience will potentially cause undesirable consequences. Id. at 80-81. Additionally, Rawls' conception of fairness and of the duty to support just institutions owes a debt to consent theory. See Rawls, supra note 27, at 118-95. Finally, Rawls seems to acknowledge obligations based on community, claiming that people engaged in a group effort to advance a political cause "assume obligatory ties to one another." Id. at 377. He would, however, distinguish those ties from any responsibility based on the duty to support just institutions. Id.
or defeasible, obligation. Such an obligation would allow for "justified rule departures," or circumstances in which the duty to obey the law would lapse. A debt of gratitude to one's teacher, for example, might entail obedience to her classroom instructions, but would not include obedience to an order to hit a classmate. An obligation based on consent, likewise, can become void; even in the law of contracts, where parties have given formal and express consent to a certain distribution of rights and duties, one party's obligation may evaporate if, for instance, the contract was negotiated in a situation involving duress or undue influence. The same is true for an obligation based on fear of negative consequences or on principles of fairness, justice and community. The next subsection—in its examination of John Rawls' theory of justice (which explicitly incorporates the arguments from fairness and from the duty to support just institutions, and implicitly incorporates those from negative consequences and from community)—will explore the conditions under which obligations to the law evaporate.

B. ORDERED LIBERTY & JUSTIFIED RULE DEPARTURES: JOHN RAWLS' A THEORY OF JUSTICE

A federal court will characterize an interest as "fundamental" for purposes of equal protection if it views that interest as "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it] were sacrificed." This subsection considers whether equal participation in the political process satisfies that standard. In order to do so, it utilizes John Rawls' vision of a well-ordered society as expressed in A Theory of Justice. It provides the reader with a brief introduction to Rawls' social vision; discusses justified rule departures in that context; and concludes that civil disobedience would have been a justifiable response to the enactment into law of an anti-gay initiative like the one struck down in Romer.

1. A Vision of Ordered Liberty

Rawls restricts his treatment of political obligation to a hypothetical, nearly just society governed by two principles. The first principle—the liberty principle—requires that each person have "an equal right to the most extensive liberty compatible with a like liberty for all." It insists that an unequal distribution of social goods, like wealth, free speech and association, and "the bases of self-respect" occur only when that distribution advantages everyone. The second principle—the principle of

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491 Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937); see supra § I(B) (4).
492 Rawls, Obligation, supra note 448, at 11.
493 Rawls, supra note 27, at 62.
494 Id.
equal opportunity—requires (1) that social and economic inequalities exist only if they most benefit the least advantaged members of society (the “difference principle”) and (2) that such inequalities attach only to positions open to everyone under conditions of equal opportunity (the “open offices principle”).

A society governed by these two principles necessarily has some form of democratic government in which members of the community enjoy the benefits of a constitution that secures the freedom of their person, protects free thought and establishes equal incidents of citizenship for all through devices such as suffrage. Additionally, citizens in such a society necessarily utilize some type of majority rule in their decision-making process. In doing so, they forfeit some modicum of justice in order to foster the overall efficiency of the legal system.

The liberty principle and the difference principle, according to Rawls, represent a fair and impartial basis upon which to organize human affairs. He derives them from an imaginary “original position” in which individuals have no perception of the personal characteristics that might prejudice them for purely selfish reasons in favor of a particular social order. They have no knowledge, for example, of their social status, their race, their gender or their conception of the good. They do not know the quality of their natural abilities or even “their special psychological propensities.” In addition, they “do not know the particular circumstances of their own society.” Rawls calls this a “veil of ignorance,” the presence of which guarantees that “no one is advantaged or disadvantaged in the choice of principles. . . . Since all are similarly

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495 Id. at 302.
496 See Rawls, Obligation, supra note 448, at 5; Rawls, supra note 27, at 382 (“I assume that the society in question is one that is nearly just; and this implies that it has some form of democratic government.”); John Rawls, The Justification of Civil Disobedience, in Civil Disobedience: Theory and Practice 244 (Hugo Adam Bedau ed., 1969) [hereinafter Rawls, Disobedience] (“the best constitution is some form of democratic regime affirming equal political liberty and using some sort of majority . . . rule.”). For a discussion of the two purposes of social institutions (justice and efficiency) and the necessity of majority rule, see id. at 241.
497 He does not think of this original position as an “actual historical state of affairs” or a “primitive condition of culture.” Rawls, supra note 27, at 12. He thinks of it merely as an idealized, hypothetical situation. Id.; see also Id. at 120 (“It is clear, then, that the original position is a purely hypothetical situation.”).
498 Note that these individuals are also presumed to be rational decision-makers. For a discussion of the original position, generally, see Reading Rawls 1-80 (Noam Daniels ed.,1975); Jonathan Wolff, Robert Nozick: Property, Justice and the Minimal State, 119 (1991).
499 Rawls, supra note 27, at 12. “Nor . . . does anyone know . . . the special features of his psychology such as his aversion to risk or liability to optimism or pessimism.” Id. at 137.
500 Id. In discussing possible disagreement between generations, Rawls even observes that persons in the original position would not know to which generation they belong; he notes that “the question of a reasonable genetic policy” might arise. Id. He does not explain this statement, but it would probably not do his work too much damage to analogize this situation to the situation of lesbian, gay and bisexual people who have been and continue to be subjected to abuse disguised as treatment to “cure” their unnatural propensities. See supra note 111.
situated and no one is able to design principles to favor his particular condition, the [two] principles of justice are the result of a fair . . . bargain."

Citizens in a nearly just society governed by those principles act under a prima facie duty to obey the law grounded in either the principle of fair play or in the natural duty to promote justice, or in both. "[T]he better-placed members of society are more likely than others to have political obligations as distinct from political duties," however, since "by and large it is these persons who are best able to gain political office and to take advantage of the opportunities offered by the constitutional system." Their obligation stems from the principle of fair play; they have, hypothetically, entered into a social contract in which the mutual benefits of their cooperative endeavor obtain only if nearly everyone participates. But even members of disadvantaged groups operate under a duty to support just institutions and, thus, in a nearly just society, under a duty to comply with the law. In summary, in Rawls' words, "[c]itizens generally are bound by the duty of justice, and those who have assumed favored offices and positions, or who have taken advantage of certain opportunities to further their interests, are in addition obligated to do their part by the principle of fairness."

But does this obligation or duty extend even to unjust laws? Yes, according to Rawls—at least within certain limits:

The injustice of a law is not, in general, a sufficient reason for not adhering to it any more than the legal validity of legislation . . . is a sufficient reason for going along with it. When the basic structure of society is reasonably just . . . we are to recognize unjust laws as binding provided that they do not exceed certain limits of injustice.

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501 Rawls, supra note 27, at 12.
502 The principle of fair play is based on the notion that when people submit to limitations on their liberty in order to conduct a joint enterprise, all those who have submitted have a right to a similar submission from those who benefit from the enterprise. See supra § III(A) ((4). Rawls considers the principle of fairness, along with the natural duty to support just institutions (or the duty to promote justice) to be a basis for the obligation to obey the law. Thus in a nearly just society, the prima facie obligation to obey the law would rest on both a principle of fairness and on a duty to support just institutions. For a discussion of the principle of fairness, see Rawls, supra note 448, at 5; Rawls, supra note 27, at 342-50.
503 Id. at 344.
504 Id. at 342.
505 "[A] society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair." Id. at 13.
506 Id. at 350.
507 Id. at 350-51.
Thus, although a duty—or for some, an obligation—to comply with laws enacted by the legislative majority exists, it is not absolute. Rawls contends that even in a nearly just society “some serious violations of justice nevertheless do occur.” A citizen’s natural duty to oppose injustice will therefore sometimes trump her obligation to obey the law. The behavior demanded by the law and the behavior demanded by justice may come into conflict. When this occurs, and when the conflict is severe, civil disobedience and conscientious objection, or even militant resistance, may become appropriate.

2. Justified Rule Departures

Even in Rawls’ nearly just society, then, some injustice, resulting from the necessity of majority rule, inevitably arises. When the delegates to a hypothetical constitutional convention, sitting in the original position, adopt the principle of majority rule, they “agree to put up with unjust laws.” But they do so only within the limitations imposed by the two principles of justice: permanent minorities that bear the burden of injustice for many years, and those who sympathize with them, need not acquiesce in a denial of basic liberties, exemplified by an unjust law, since individuals in the original position would not have understood such acquiescence as a necessary adjunct to majority rule.

But given a prima facie obligation (or duty) to obey even unjust laws, how does one determine when disobedience to law is appropriate? Although Rawls admits that every person confronted with an unjust law “must ... settle this question for himself,” he nevertheless offers three criteria by which to guide the analysis. First, justified civil disobedience protests a serious breach of the liberty principle or a blatant violation of the principle of equal opportunity. Second, it usually occurs only after normal appeals to the political majority, made in good faith, have failed. And third, it allows those similarly situated to protest similarly without jeopardizing the survival of mutually beneficial institutions. A

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508 Laws might also be enacted by an executive or by some other body subject to the constraints of majority rule decision-making.
509 Rawls, supra note 27, at 363.
510 Id. at 376.
511 Id. at 349.
512 Id. at 351.
513 Id. at 355.
514 Id.
515 Rawls, Disobedience, supra note 496, at 254. Note that Rawls does not intend these three criteria to be exhaustive: “These conditions are not, I think, exhaustive but they seem to cover the more obvious points ...” Id. at 251-52.
516 Note that “[t]his conditions is, however, a presumption. Some cases may be so extreme that there may be no duty to use first only legal means of political opposition.” Rawls, supra note 27, at 373.
protester establishes her right to justifiably disobey the law by satisfying these three criteria.\(^{517}\)

a. Anti-Gay Initiatives Violate the First Principle of Justice

If enacted, Amendment Two and other anti-gay initiatives would have satisfied the first of these criteria; they would have seriously breached the liberty principle by preventing lesbian, gay and bisexual people from participating equally in the political process.\(^{518}\) This subsection presents two arguments in support of this conclusion.

First, anti-gay initiatives like Amendment Two would have placed obstacles in the path of those seeking to eliminate certain, specified injustices. In the communities in which these initiatives became law, lesbian, gay and bisexual people would have had no legal recourse from discrimination in housing, employment and other areas. They would have been able to secure the passage of gay-protective legislation only by first amending their state constitution; in order to do so, they would have needed to either obtain a supermajority of votes in their state legislature, hold a constitutional convention, or appeal through the initiative process to the same democratic body that had truncated their rights in the first place. Other groups would have been able to secure the passage of protective legislation by garnishing the support of a simple majority of their legislators—a much easier task.\(^{519}\) These initiatives, therefore, quite literally would have “obstruct[ed] the path to removing . . . injustices.”\(^{520}\) And they would have done so, furthermore, by “publicly incorporat[ing themselves] into . . . the letter, of social arrangements.”\(^{521}\) According to Rawls, citizens may legitimately use civil disobedience to protest a measure that does such things.\(^{522}\) This type of measure must, then, by necessary corollary, violate at least one of the principles of justice.

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\(^{517}\) She must still ask herself, however, whether wisdom and prudence counsel restraint in her particular circumstances. That is, will civil disobedience further her ends?

\(^{518}\) Amendment Two may, additionally, violate the principle of equal opportunity. The social and economic inequalities experienced by lesbian, gay and bisexual people as a result of housing and employment discrimination do not somehow benefit the least advantaged members of society. In fact, one could characterize lesbian, gay and bisexual people as among the lesser advantaged members of the community. See supra § I(A). Because Amendment Two tacitly endorses, and perhaps even fosters, such discrimination, it may thus constitute a violation of the second principle of justice. This Note will, however, examine Amendment Two primarily in the context of the first principle of justice.

\(^{519}\) See supra footnotes 100-04 and accompanying text (discussing the obstacles that Amendment Two would place in the way of lesbian, gay and bisexual voters, as compared to the obstacles faced by other members of the Colorado community).

\(^{520}\) RAWLS, supra note 27, at 372.

\(^{521}\) Id.

\(^{522}\) Id.
In fact, Rawls specifically discusses a “principle of (equal) participation” in the political process in the context of the first principle of justice. He describes it as follows: “[t]he principle of equal liberty . . . requires that all citizens . . . have an equal right to take part in, and to determine the outcome of . . . the . . . process that establishes the laws with which they are to comply.” This brings to light the second reason that anti-gay initiatives, if enacted, would have violated the liberty principle: they would have created constitutions—or other legal frameworks—which would have denied to one group an equal opportunity to influence the political process. According to Rawls, a constitution must underwrite a fair opportunity to take part in and to influence the political process.

. . . All citizens . . . should be in a position to assess how proposals affect their well-being and which policies advance their conception of the public good. Moreover, they should have a fair chance to add alternative proposals to the agenda for political discussion. The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation. In due time they are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances.

The Colorado Constitution, as altered by Amendment Two, would have failed in at least two ways to underwrite a fair political opportunity

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523 Id. at 221.
524 Id. The quote actually reads: “The principle of equal liberty . . . requires that all citizens . . . have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply.” Id. (emphasis added). Although Rawls discusses political participation in the context of constitutional conventions and amendments in this section of A Theory of Justice, I believe that his conception of political participation is broader, extending also to the legislative process in which citizens are more typically involved. One could argue that the initiative process which resulted in Amendment Two’s potential alteration of the Colorado Constitution satisfies Rawls’ definition of equal political participation quoted above. Lesbian, gay and bisexual people, and their supporters, had, after all, as much ability as any other citizens to cast their ballots against Amendment Two. But its alteration of the framework of political liberty in Colorado would produce a situation in which Rawls’ version of equal political participation would not, in regards to the usual legislative process by which laws are created, exist.
525 Id. at 224-225 (footnote omitted).
as described by Rawls. First, it would have prevented lesbian, gay and bisexual people from having a "fair chance to add alternative proposals to the agenda for political discussion." As the State of Colorado itself argued, Amendment Two would have created a "provisional resolution of controversial issues . . ." by "[r]emoving [them] . . . from concentrated local majorities . . ."526 It would have decided, in other words, essentially once and for all, whether communities should provide their lesbian, gay and bisexual citizens with protection from such things as housing and employment discrimination. Alternative viewpoints would have had only a minimal chance of becoming law.

Second, it would have reduced the value of political participation for the queer community by explicitly weighing the future votes of lesbian, gay and bisexual people lower than the average vote.527 In addition, although the proponents of Amendment Two may not have possessed financial resources greater than those of its opponents, they did benefit from the privileged status of their presumed heterosexuality—and they used that privilege to control the course of public debate in Colorado.528 One could argue that this privileged position allowed them to "acquire a preponderant weight in settling [a] social question[ ]" and to create a law favoring their circumstances. This state of affairs opened the door for a law that reflected a vision of justice adhered to by only the dominant class. And such a vision, according to Rawls, is "in many cases clearly unjust."529

b. Anti-Gay Initiatives’ Violation of the Liberty Principle Cannot be Justified

Assume momentarily that the analysis above correctly concludes that Amendment Two and other anti-gay initiatives, if enacted, would have created inequalities in liberty. One could still justify the existence of such initiatives by showing that these laws “[made] everyone better

527 Rawls contends that “the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines.” RAWLS, supra note 27, at 204. He observes that “political liberty is unequal . . . if the votes of some are weighted much more heavily, or if a segment of society is without the franchise altogether.” Id. at 247. If Amendment Two became law, the lesbian, gay and bisexual community would need to amend their state constitution in order to enact pro-gay legislation. They would need a supermajority in their state legislature to do so. Thus, one pro-gay vote would be worth less than a normal vote.
529 Rawls, supra note 27, at 352.
off than in [the] ... hypothetical starting situation.”

In order to do so, one would have to assess the scheme of liberty they produced “from the standpoint of the representative equal citizen.” One would have to ask whether a rational person in the original position would choose a scheme of liberty in which lesbian, gay and bisexual people suffered a limitation on their ability to participate in the political process.

According to Rawls, an individual in the original position would accept a limitation on liberty only if that limitation would result in broader protection for the liberty in question or for another liberty. She would accept a limitation on liberty, in other words, only in order to achieve the best total system of liberties. This subsection presents and refutes several arguments of this type in favor of anti-gay initiatives.533

An initial objection to the analysis presented above (and to the conclusion that Amendment Two would have violated the first principle of justice) might center on the difficulty of identifying breaches of the liberty principle. How can members of the community—with their varying approaches to justice—agree on what constitutes a violation of the liberty or equal opportunity principles? Rawls admits that one cannot always easily determine whether any given law satisfies the principles of justice. The first clause of the second principle (the difference principle) is subject to theoretical and speculative beliefs regarding the best way to satisfy its requirement that inequalities advantage everyone. Consequently, the community may have difficulty in reaching a consensus on the question of whether a violation of the difference principle has occurred. Certain violations of the liberty principle and of the open offices clause of the second principle, however, are easily detected. Denying a minority the right to vote, or restricting its members’ access to political offices are obvious violations, according to Rawls. When civil disobedie-

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530 Id. at 62. In the hypothetical starting situation, each individual possesses an equal share of social goods such as liberty. Id.
531 Id. at 204.
532 Id. “liberty is represented by the complete system of the liberties of equal citizenship . . .” Id.
533 Note that the State of Colorado offered six arguments in favor of Amendment Two. First, it argued that Amendment Two would “protect[ ] the sanctity of personal, familial, an religious privacy.” Appellants-Defendants' Opening Brief at 23, Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (Nos. 94-SA-048 and 94-SA-128 (consolidated)), aff'd, 116 S. Ct. 1620 (1996). Second, it argued that Amendment Two would “preserve[ ] the ability of the State to remedy discrimination [sic] against suspect classes.” Id. at 27-28. Third, it argued that the amendment would “allow[ ] the People Themselves to Establish Public Social and Moral Norms.” Id. at 36. Fourth, it argued that the amendment would “prevent[ ] the government from supporting the political objectives of a special interest group.” Id. at 43. Finally, it argued that the amendment would “Deter Factionalism Through Ensuring That [sic] Decisions Regarding Special Protections for Homosexuals and Bisexuals Are [sic] Made at the Highest Level of Government.” Id. at 44. This subsection does not analyze these arguments specifically.
ence is limited to these types of injustices, differences in opinion about the best method by which to effectuate first principles do not cloud the discourse.

A second argument in favor of Amendment Two might center on the benefits of the plebiscite process. Many people would characterize that process, and the principle of majority rule which it incorporates, as representing democracy at its best. If immersed in Rawls’ theories, they might point out that one must, in evaluating the justness of any given law, view that law in the larger context of the rights and duties established by the major social institutions. One does not look at each specific liberty, but at “the system of liberty as a whole . . . .” They might argue that, in the case of anti-gay initiatives, two liberties are in conflict. On the one hand resides the liberty represented by the principle of majority rule; on the other resides the liberty represented by equal participation in the political process. Perhaps Amendment Two would have struck the best balance between competing liberties, from the standpoint of the original position.

This argument fails for three reasons. First, majority rule for its own sake will not overcome the necessity for background justice, including the “freedom to take part in public affairs and to influence by constitutional means the course of legislation—and the guarantee of the fair value of these freedoms.” This is, according to Rawls, “a fundamental part of the majority principle . . . .” In a homogeneous society, he observes, “the various sectors . . . [would] have reasonable confidence in

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534 Charlow, supra note 65, at 528.
535 Rawls, supra note 27, at 63.
536 Id. at 203.
537 In fact, supporters of Amendment Two could even attempt to marshall Rawls’ definition of equal political participation in their favor by noting that, according to Rawls, “the main variation in the extent of equal political liberty [defined by the principle of participation] lies in the degree to which the constitution is majoritarian.” Id. at 224. Under this view, if the Supreme Court prevents the majority from making this decision regarding gay rights it will have limited equal political liberty. But Rawls words really only expose the stark competition between the liberty principle embodied in majority rule and the liberty interest embodied in equal participation in the political process. He contends, for example, that “[w]henever the constitution limits the scope and authority of majorities, either by requiring a greater plurality for certain types of measures, or by a bill of rights restricting the powers of the legislature, and the like, equal political liberty is less extensive.” Id. Amendment Two would require a greater plurality for measures designed to protect the interests of lesbian, gay and bisexual people; thus, Amendment Two would, according to Rawls, reduce the scope of equal political liberty. But if the Supreme Court strikes down Amendment Two as violative of the Equal Protection Clause, the federal Bill of Rights will have restricted the power of state legislatures and electorates, likewise reducing the scope of equal political liberty. The question this subsection examines, of course, is which scheme of limitations comports best with the principles of justice.

538 See id. at 203.
539 Id. at 356.
540 Id.
one another and share a common conception of justice . . . ."\(^{541}\) Simple majority rule may, therefore, in such a society, operate fairly well. But in a heterogeneous society, like the United States, majority rule may not result in fair outcomes. To the extent that members of a community fail to share a common conception of justice, "the majority principle becomes more difficult to justify," Rawls observes, "because it is less probable that just policies will be followed."\(^{542}\) He notes specifically that "[s]poradic and unpredictable tests of public sentiment by plebiscite . . . do not suffice for a representative regime."\(^{543}\) As demonstrated above, Amendment Two did not, on its faces, leave lesbian, gay and bisexual people with the same power to influence the lawmaking process as other citizens possess. At a minimum, it attempted to create a political scheme in which queer political participation would not be fairly valued.

Second, a rational delegate to a (hypothetical) constitutional convention, cloaked in a veil of ignorance and guided by the two principles of justice, would probably refuse to ratify a law that made it more difficult for a subjected minority to receive governmental redress for its suffering. Such a delegate would, in fact, accept the political inequality created by an anti-gay initiative only if "similar restrictions appl[ied] to everyone and . . . [its] constraints . . . [would be] likely over time to fall evenly upon all sectors of society."\(^{544}\) Amendment Two would fail this test. Its mandate would have affected only the lesbian, gay and bisexual community. Only that community, in seeking to enact gay-protective legislation, would have had to surmount its hurdles. Only that community would have had to hold a constitutional convention, direct an initiative at a constituency with an expressed hostility to its interests, or achieve a supermajority in the state legislature in order to pass the laws favored by its members. No other community would have faced such obstacles in its attempt to enact favorable laws.\(^{545}\) The political inequality that anti-gay initiatives would have created most decidedly would not have fallen equally upon all segments of society and, therefore, a rational person in the original position would not agree to such a measure.

Finally, if a conflict between two liberties—majority rule and political participation—does exist, the principles of justice favor the latter. In other words, a person occupying the original position would accept an Equal Protection Clause that prevented majorities from enacting anti-gay initiatives. According to Rawls, the principles of justice allow both substantive and procedural limitations on majority rule as long as those limi-

\(^{541}\) Id. at 231.
\(^{542}\) Id.
\(^{543}\) Id. at 222.
\(^{544}\) Id. at 224.
\(^{545}\) See supra § I(A)(3).
tations fall equally upon everyone.\textsuperscript{546} The necessity of majority rule might in fact, in a nearly just society, require these constraints in order to safeguard the liberty interests of minority groups:

Unlimited majority rule is often thought to be hostile to . . . [various] liberties. Constitutional arrangements [such as separation of powers with judicial review] compel a majority to delay putting its will into effect and force it to make a more considered and deliberate decision. In this and other ways procedural [and substantive] constraints are said to mitigate the defects of the majority principle. The justification appeals to a greater equal liberty.\textsuperscript{547}

A third argument in favor of Amendment Two might focus on the allegedly perverse nature of homosexuality. Proponents of this argument might contend that lesbian, gay and bisexual persons suffer from a sickness manifested by their sexual orientation. They might argue that a rational delegate to an original constitutional convention would accept a law limiting the ability of homosexuals to enact legislation favoring their community. Under this theory, pro-gay legislation would, after all, only exacerbate homosexuals' disorders and prevent them from seeking a cure.\textsuperscript{548} Proponents might analogize to the criminal law, noting that Rawls explains the existence of that body of law as follows:

\textit{[It is . . . rational for . . . [persons in the original position] to protect themselves against their own irrational inclinations by consenting to a scheme of penalties that may give them a sufficient motive to avoid foolish actions and by accepting certain impositions designed to undo the unfortunate consequences of their imprudent behavior.}\textsuperscript{549}

He calls such laws "paternalistic,"\textsuperscript{550} explaining that delegates to an original constitutional convention would accept them in order to "protect themselves against the weakness and infirmities of their reason and will in society."\textsuperscript{551} Paternalistic laws, in fact, encompass more than just criminal laws. They include laws such as those that circumscribe the legal

\textsuperscript{546} See Rawls, supra note 27, at 228.
\textsuperscript{547} Id. at 229.
\textsuperscript{548} Of course, according to the American Psychological Union, homosexuality is not a mental defect or illness.
\textsuperscript{549} Rawls, supra note 27, at 249.
\textsuperscript{550} Id.
\textsuperscript{551} Id.
capacity of children. Term limits, prohibitions on gambling, and state limitations on abortion funding might also qualify as "paternalistic."  

But a person in the original position would not ratify paternalistic laws designed to discourage lesbian, gay and bisexual people from embracing their sexual orientation as healthy and normal—or a law, like Amendment Two, designed to prevent them from passing legislation that favors their community—because the proponents of such laws could not convincingly "argue that with the development or the recovery of his rational powers the individual in question . . . [would] accept . . . [the] decision on his behalf and agree . . . that . . . [it was] the best thing for him." Heterosexuals have already subjected lesbian, gay and bisexual people to an arsenal of treatments designed to cure their alleged deviancy. Reputable health professionals now condemn such techniques as both ineffective and inhumane. It is unlikely, then, that a lesbian would, after undergoing such treatment and ultimately rejecting her sexual attraction to women (or, from the point of view of proponents of anti-gay laws, upon "recovering her rational powers") characterize the laws that caused that rejection as the "best thing" for her. On the contrary, even if her heterosexual benefactors convinced her that homosexuality was deviant, she would probably nevertheless feel a sense of loss and of awkwardness in her new heterosexual role.

But even supposing that this analysis is wrong, and a person would, after having undergone such treatment, embrace heterosexuality both as a part of her identity and as the only normal sexual orientation, a rational person occupying the original position would not condone anti-gay laws such as Amendment Two. She could only endorse such paternalistic laws if the object of those laws (lesbian, gay and bisexual people and, perhaps, their supporters) lacked the capacity for reason. "[P]aternalistic intervention must," in other words, "be justified by the evident failure or absence of reason and will; and it must be guided by the principles of justice and what is known about the subject's more permanent aims and preferences . . . ." A rational delegate to a hypothetical constitutional convention, sitting in the original position could not, therefore, justify anti-gay initiatives because, first, such initiatives ignore the long-term aims and preferences of lesbian, gay and bisexual people and because, second, lesbian, gay and bisexual people possess the ability to reason.

552 See supra § I(C) (2) (d) (differentiating laws that discriminate against, say, gamblers, from those that discriminate against lesbian, gay and bisexual people). This analysis may provide guidance for determining which laws single out "identifiable groups" and which laws do not.

553 Rawls, supra note 27, at 249.

554 Id. at 250.
In regard to the first proposition—that anti-gay initiatives ignore the long-term aims and preferences of lesbian, gay and bisexual people—consider the following hypothetical offered by Rawls:

[I]magine two persons in full possession of their reason and will who affirm different religious or philosophical beliefs; and suppose that there is some psychological process that will convert each to the other’s view, despite the fact that the process is imposed on them against their wishes. In due course, let us suppose, both will come to accept conscientiously their new beliefs. We are still not permitted to submit them to this treatment.\[555\]

Subjecting the individuals described in the hypothetical to the treatment at issue would amount to an attack on their personal integrity and beliefs. Rawls counsels against such attacks, warning that “[p]aternalistic principles are a protection against our own irrationality, and must not be interpreted to license assaults on one’s convictions and character by any means so long as these offer the prospect of securing consent later on.”\[556\] Thus, if some method existed by which doctors could transform homosexuals into heterosexuals—and if those persons so transformed would appreciate and understand and even endorse paternalistic laws designed to protect them against their own “unnatural” predilections—one could still not conclude that anti-gay laws would justifiably reduce the individual liberty of lesbian, gay and bisexual people. Treatments and laws designed to turn queer people into straight people do not satisfy the precepts of justice.

In regards to the second proposition—that paternalistic anti-gay laws fly in the face of lesbian, gay and bisexual people’s capacity for reason—consider a variation on this third argument in favor of Amendment Two that takes the notion of homosexuals-as-deviants even further. Proponents of this argument might contend that a lesbian’s (or gay man’s or bisexual’s) need to engage in same-sex erotic activity, like a homicidal maniac’s pathological need to murder, is so immoral that it would justify a deprivation of liberty in the form of laws discouraging homosexuality—even from the perspective of the original position. This argument would fail because lesbian, gay and bisexual people, in contrast to homicidal maniacs, possess the capacity for moral decision-making. According to Rawls,

\[555\] Id. at 249-50. This example is chillingly reminiscent of the inhumane treatments to which lesbian, gay and bisexual persons have been, and still are, subjected. See supra note 111.

\[556\] RAWLS, supra note 27, at 250.
the sufficient condition for equal justice, the capacity for moral personality, is not at all stringent. When someone lacks the requisite potentiality either from birth or accident, this is regarded as a defect or deprivation. There is no race or recognized group of human beings that lacks this attribute. . . . Provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice.\(^{557}\)

In order to entirely lack the capacity for moral decision-making, then, an individual must suffer from a mental defect, such as mental retardation, autism, or a pathological disease such as homicidal mania, that would render her incapable of having (1) a conception of the good exemplified by a rational plan of life and (2) a sense of justice. The overwhelming majority of individuals fall outside this category; presumably only animals (other than humans) uniformly lack these capacities.\(^{558}\) Moral beings, furthermore, owe one another a duty of respect, according to Rawls, and they can express that duty of respect “in several ways: in . . . [their] willingness to see the situation of others from their point of view, from the perspective of their conception of their good; and in . . . [their] being prepared to give reasons for . . . [their] actions whenever the interests of others are materially affected.”\(^{559}\) They must offer these reasons in good faith, such that someone disadvantaged by their actions would reasonably “accept the constraints on his conduct.”\(^{560}\) Again, lesbian, gay and bisexual people would not likely accept the constraints on their conduct represented by laws like Amendment Two.

A fourth argument in favor of Amendment Two might, like the second argument above, focus on an alleged conflict between two liberties. Proponents of this argument might contend that Amendment Two struck the appropriate balance between participatory liberties and religious and other liberties by permitting discrimination based on sexual orientation in housing and employment. This argument also fails. A person in the original position, unaware of her race, her gender or her sexual orientation, would not, for at least two reasons, accept the balance struck by Amendment Two. First, one cannot, according to Rawls, “justify . . . [infringements of liberty] on the ground that the disadvantages of those in one position are outweighed by the greater advantages of those in another.”\(^{561}\) The fact that Amendment Two would have resulted in

\(^{557}\) Id. at 506-07.
\(^{558}\) Id. at 505.
\(^{559}\) Id. at 337.
\(^{560}\) Id. at 338.
\(^{561}\) Id. at 64-65.
greater religious and other freedoms for employers and landlords is, therefore, irrelevant.

Second, the liberty principle requires that each person have a co-equal right to the most extensive liberty feasible. Amendment Two would have circumscribed the liberty of lesbian, gay and bisexual citizens. In order to justify that circumscription, the ability of the Colorado community to enjoy maximum liberty would have had to practically necessitate Amendment Two. But Amendment Two did not assure every individual a co-equal right to the most extensive liberty feasible; maximum liberty does not, in other words, require an anti-gay initiative. Consider the following illustration. Imagine the social goods guaranteed by the Colorado Constitution as together constituting a layer cake.\(^5\) Assuming that equally-sized pieces of that cake would represent a fair division of social goods, and assuming that, in order to encourage a fair division, the person cutting the cake must take the last piece, that person “will divide the cake equally, since in this way he assures for himself the largest share possible.”\(^6\) The citizens who voted for Amendment Two did not, however, act in this manner. They cut the cake unequally and they failed to take the last piece. In fact, they selected for themselves the largest piece of cake (or at least a piece larger than that reserved for the lesbian, gay and bisexual community). The layer cake example indicates that a procedure which would guarantee just outcomes exists. One can evaluate the results of Amendment Two independently from the substance of those results; one can simply look to the procedure embodied in Amendment Two and see that it is not fair.

This subsection has presented several arguments on behalf of anti-gay initiatives like Amendment Two. It has demonstrated that each of those arguments fails. Amendment Two and other anti-gay initiatives, if enacted, would have violated the principles of justice. Their proponents could have justified these laws only if they would have resulted in broader protection for the liberty in question or in broader protection for an entirely different liberty. Moreover, they would have had to direct this justification at the lesbian, gay and bisexual community:

\[\text{an inequality in the basic [political] structure must always be justified to those in the disadvantaged position. This holds whatever the primary social good and especially for liberty. Therefore... [one must] show that the inequality of right would be accepted by the less favored in return for the greater protection of their other liberties that results from this restriction.}\]

\(^5\) This example is based on one presented by Rawls. See Id. at 85.

\(^6\) Id.

\(^5\) Id. at 231.
The proponents of Amendment Two and laws like it could not have accomplished this task. They could not have demonstrated that limitations on lesbian, gay and bisexual political participation would have created the best total system of liberties because, in fact, they would have done the opposite. By barring protective legislation for homosexuals, these laws would have done damage to the idea of co-equal liberty.

3. **Equal Political Participation is Implicit in the Concept of Ordered Liberty**

This subsection argues that equal political participation is implicit in the concept of ordered liberty such that its elimination would threaten liberty and justice. If enacted, anti-gay amendments, as breaches of the liberty principle—or as breaches of the basic building-blocks of ordered liberty—would have undermined the obligation or duty to obey the law. The lesbian, gay and bisexual community could have justifiably responded to such laws with civil disobedience. Such behavior would not in itself have necessarily threatened liberty and justice. But the behavior of the majority, if it ignored the queer community's plea for relief, would have threatened the rule of law and, by extension, liberty and justice. The *Romer* Court ruled correctly, therefore, giving voice to a principle of equal political participation even while avoiding a discussion of fundamental rights.

a. **Justified Civil Disobedience**

Recall the criteria by which one must decide whether one's prima facie obligation (or duty) to obey even unjust laws has ceased to exist. A serious breach of the liberty principle or a blatant violation of the principle of equal opportunity must have occurred and normal appeals to the political majority, made in good faith, must have failed.\(^{565}\) A protester establishes her right to justifiably disobey the law by satisfying these criteria. The previous subsections demonstrated that Amendment Two, if enacted, would have satisfied the first requirement: its results would have represented a serious and indefensible breach of the liberty principle. If the Supreme Court had upheld Amendment Two, concluding that it did not offend the Equal Protection Clause, the second requirement would have been satisfied: the normal means of redress—resort to the ballot and to an independent judiciary—would have failed. Thus the lesbian, gay and bisexual community would have met the prerequisites to justified civil disobedience laid down by Rawls.\(^{566}\)

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\(^{565}\) *See supra § II(B) (2) (b).*

\(^{566}\) Citizens of a nearly just society should, according to Rawls, only rarely resort to civil disobedience. They should, for example, in the usual case, practice civil disobedience only
b. The Rule of Law

One should not view civil disobedience as an irrational or emotional response to perceived injustice. On the contrary, it evidences a basic acceptance of the rule of law and provides a tool of last resort to those seeking to correct a departure from justice. Rawls argues that legitimate, properly exercised civil disobedience, guided by the criteria above, would in fact serve to stabilize a nearly just society. "[O]nce society is interpreted as a scheme of cooperation among equals," in contrast to a sovereign backed by the natural order of God’s will, according to Rawls, those injured by serious injustice need not submit. Indeed, civil disobedience . . . is one of the stabilizing devices of a constitutional system, although by definition an illegal one. Along with such things as free and regular elections and an independent judiciary . . ., civil disobedience used with due restraint and sound judgment helps to maintain and strengthen just institutions. By resisting injustice within the limits of fidelity to law, it serves to inhibit departures from justice and to correct them when they occur. A general disposition to engage in justified civil disobedience introduces stability into a well-ordered society, or one that is nearly just.\textsuperscript{567}

When the majority ignores such pleas, endorsing departures from justice—and perpetuating situations in which the duty to obey the law is after they have made attempts to change the law in keeping with the procedures of the existing system. In Rawls’ words, civil disobedience should occur only after the normal appeals to the political majority have already been made in good faith and . . . have failed. The legal means of redress have proved of no avail. . . . Attempts to have the laws repealed have been ignored and legal protests and demonstrations have had no success. Since civil disobedience is a last resort, we should be sure that it is necessary. Rawls, supra note 27, at 373. But, although protestors must request change through the normal political processes, they need not exhaust those legal means. Id. “[I]f past actions have shown the majority [to be] immovable or apathetic,” according to Rawls, “further attempts may reasonably be thought fruitless, and a second condition for justified civil disobedience is met.” Id. In some cases, in fact, citizens can justifiably utilize civil disobedience, or even militant resistance, without first appealing to the majority through normal political channels:

Some cases may be so extreme that there may be no duty to use first only legal means of political opposition. If, for example, the legislature were to enact some outrageous violation of equal liberty, say by forbidding the religion of a weak and defenseless minority, we surely could not expect that sect to oppose the law by normal political procedures. Indeed, even civil disobedience might be much too mild, the majority having already convicted itself of wantonly unjust and overtly hostile aims. Id.

So, in the case of Amendment Two, at least civil disobedience is justified, and possibly even more drastic means of political protest.\textsuperscript{567} Id. at 383.
absent—its behavior threatens the rule of law. And because the stability of a nearly just society depends at least partially on fidelity to law, a threat to the rule of law itself threatens the stability of the society. The responsibility for the resulting instability rests not with the protester but with the majority's refusal to adhere to the principles of justice. For if the majority responds to the protesters by rectifying the departure from justice, the rule of law and the two guiding principles of the nearly just society are safe. Civil disobedience thus "helps to maintain and strengthen just institutions." It functions prophylactically to check the tyranny of majority rule. According to Rawls, anarchy would result from civil disobedience only if members of the majority prove unreceptive to this call to their consciences. If civil disobedience threatened the peace, the responsibility, according to Rawls, would fall "not so much on those who protest as upon those whose abuse of authority and power justifies such opposition."

In the process of stabilizing society, civil disobedience also advances political equality. It ensures, among other things, that each citizen has an equal voice in the communal decision-making process. It enhances individual self-esteem and the "political competence of the average citizen." According to John Stuart Mill, "this education to public spirit is necessary if citizens are to acquire an affirmative sense of political duty and obligation . . . ." Thus the constitution of a democracy like the United States should provide protection for political equality; it should ensure that citizens have a civic consciousness that gives rise to a sense of fidelity to law. "Without these more inclusive sentiments," according to Rawls,

568 Id.
569 Rawls, Disobedience, supra note 496, at 255.
570 Rawls, supra note 27, at 233.
571 Id. at 234. "[P]ublic recognition of the two principles gives greater support to men's self-respect and this in turn increases the effectiveness of social cooperation. Both effects are reasons for choosing these principles. It is clearly rational for men to secure their self-respect. A sense of their own worth is necessary if they are to pursue their conception of the good with zest and to delight in its fulfillment. Self-respect is not so much a part of any rational plan of life as the sense that one's plan is worth carrying out. Now our self-respect normally depends upon the respect of others. Unless we feel that our endeavors are honored by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing. Hence for this reason the parties would accept the natural duty of mutual respect which asks them to treat one another civilly and to be willing to explain the grounds of their actions, especially when the claims of others are overruled. Moreover, one may assume that those who respect themselves are more likely to respect each other and conversely. Self-contempt leads to contempt of others and threatens their good as much as envy does. Self-respect is reciprocally self-supporting," Id. at 178-79 (citations omitted). "[T]he central place of the primary good of self-respect and the desire of human beings to express their nature in a free social union with others." Id. at 543.
572 Id. at 234 (quoting Mill).
men become estranged and isolated in their smaller associations, and affective ties may not extend outside the family or a narrow circle of friends. Citizens no longer regard one another as associates with whom one can cooperate to advance some interpretation of the public good; instead, they view themselves as rivals, or else as obstacles to one another's ends. . . . Equal political liberty is [therefore] not solely a means. . . . [It] strengthen[s] men's sense of their own worth, enlarge[s] their intellectual and moral sensibilities, and lay[s] the basis for a sense of duty and obligation upon which the stability of just institutions depends.  

CONCLUSION  

Amendment Two, if enacted, would have violated the first principle of justice by giving to one class of persons a greater liberty than it gave to another. The Supreme Court correctly recognized, therefore, in Romer v. Evans, that this law offended the Constitution. In striking down Amendment Two, the Court applied a rational basis test with bite in the tradition of Metropolitan Life, Logan, Cleburne, and Moreno. And the Court's decision undoubtedly fits very comfortably within this line of cases. In addition, the Court's invalidation of Amendment Two in the context of a test that almost inevitably results in the opposite outcome represents a strong statement regarding constitutional constraints on majority rule with respect to the gay, lesbian and bisexual citizens of this country.

But the Romer decision would have fit equally comfortably within the Hunter, Washington and Davis line of cases. Perhaps the Court situated its decision in the Moreno line—and refused to embrace the fundamental rights analysis offered by the Colorado Supreme Court—because it wanted to avoid entering the substantive due process quagmire. Perhaps it wanted to avoid such a holding in the context of a gay rights case, either out of animosity towards queers or out of a prudent desire to avoid fueling the flames of the no-special-rights-for-gays argument. Or perhaps the members of the Court just believe that substantive due process has gotten out of hand. Whatever their individual or collective reasons, and despite their rejection of the rationale below, a close reading of the Romer decision reveals that the majority demonstrated an apprecia-

573 Id.
574 Id. at 203.
575 See supra § I(B) (2).
576 See supra § I(C).
tion for the very same principles that underlie the Colorado court's analysis.

And well it should have. As this Note has demonstrated, equal participation in the political process represents an interest fundamental to our system of government.\textsuperscript{577} The principles of justice advanced by such an interest are, from a jurisprudential standpoint, "[c]entral . . . to the . . . rule of law and to our own Constitution's guarantee of equal protection . . . "\textsuperscript{578} As Justice Kennedy wrote, laws that prevent government from remaining open to all who seek its assistance are "not within our constitutional tradition."\textsuperscript{579}

The lesbian, gay and bisexual community has suffered discrimination throughout its history in this country, beginning in the days of the Mattachine Society and the Daughters of Bilitis, continuing through a period of growing public presence after the Stonewall Rebellion, and concluding, for the time being, with the viciously anti-gay opinion in \textit{Bowers v. Hardwick}.\textsuperscript{580} If the citizens of the United States truly want a just society, and if the Constitution of the United States provides the machinery for creating that just society, then the Supreme Court correctly seized the opportunity, in its decision in \textit{Romer v. Evans}, to take stock of this history and of its own case law and to strike down Amendment Two.

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\textsuperscript{577} "It may be . . . that in a well-ordered society the two principles of justice are used by courts to interpret those parts of the constitution regulating freedom of thought and conscience, and guaranteeing equal protection of the laws." \textit{Id.} at 349 (citing Ronald Dworkin, \textit{The Model of Rules}, 35 U. Chi. L. Rev. 14, 21-29 (1967)).


\textsuperscript{579} \textit{Id.}

\textsuperscript{580} See supra § I(A).