

# Fencing Ont Politically Unpopular Groups from the Normal Political Processes: The Equal Protection Concerns of Colorado Amendment Two

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*To specially shield discriminatory practices from the normal political processes of change is no[t] consistent with the injunction of the Fourteenth Amendment that "No state shall deny to any person within its jurisdiction the equal protection of the laws.[""] In the circumstances, withdrawing the usual avenues of redress which the law provides in other cases works a serious inequality [W]e submit the State cannot so disadvantage the victims of invidious personal discrimination.  
-Thurgood Marshall<sup>1</sup>*

## INTRODUCTION

Election year 1992 produced mixed results for at least one politically unpopular group: gays, lesbians, and bisexuals. On one hand, the election of President Bill Clinton seemingly empowered an advocate for the rights of gays and lesbians.<sup>2</sup> Similar support came from voters in Oregon and Portland, Maine, who rejected referenda aimed at curtailing the rights of homosexuals, homosexuality itself, or both.<sup>3</sup> Still, the rights of gays, lesbians, and bisexuals were detrimentally affected by the passage of voter ballot initiatives in Tampa, Florida, and the State of Colorado, designed to limit homosexual rights.<sup>4</sup> While both initiatives directly repeal existing ordinances affording

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1. Brief for the United States as Amicus Curiae at 27, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483) (arguing as United States Solicitor General that California's proposition 14, which repealed existing laws protecting blacks from racial discrimination in housing, should be struck down as unconstitutional in violation of the Fourteenth Amendment).

2. President Clinton has been coined an "advocate of homosexual rights," having captured 72% of the vote of those individuals identifying themselves as homosexual or bisexual. Jeffrey Schmalz, *The 1992 Elections: The States—The Gay Issues; Gay Areas Are Jubilant over Clinton Victory*, N.Y. TIMES, Nov. 5, 1992, at B8. Many, however, now question President Clinton's commitment to homosexual rights in light of his recent adoption of the "don't ask, don't tell" policy, which permits homosexuals to serve in the military only if they do not engage in homosexual conduct and if they remain silent regarding their sexual preference. Thomas L. Friedman, *Gay Rights in the Military: Chiefs Back Clinton on Gay-Troop Plan: President Admits Revised Policy Isn't Perfect*, N.Y. TIMES, July 20, 1993, at A1.

3. An Oregon proposal sought to amend the state's constitution to officially declare homosexuality "abnormal, wrong, unnatural and perverse." Allison Carper, *Gays Win Some, Lose Some*, NEWSDAY, Nov. 5, 1992, at 29. The Oregon ballot measure failed with a vote of 56% to 44%. Similarly, in Portland, Maine, voters rejected a ballot initiative to repeal a previously enacted gay-rights ordinance. Schmalz, *supra* note 2.

4. Voters in Colorado passed Amendment Two, an initiative amending the state constitution to ban anti-discrimination laws aimed at protecting homosexuals while specifically repealing ordinances currently existing in Aspen, Denver, and Boulder. Meanwhile, voters in Tampa repealed a gay-rights

protection to homosexuals against discrimination in such areas as housing and employment, the Colorado amendment goes further and prohibits the adoption of future ordinances affording anti-bias protection.<sup>5</sup>

In essence, Colorado's Amendment Two insulates the rights of gays, lesbians, and bisexuals from the normal political processes in contravention of the Equal Protection Clause. Amendment Two forces homosexuals and bisexuals seeking legislative protection against invidious discrimination in housing and employment, to first amend the Colorado constitution repealing Amendment Two, and second to pass legislation affording protection—a nearly impossible task. As such, Amendment Two involves the State of Colorado in invidious discrimination. In light of a large body of federal case law prohibiting such actions on the part of the state, Amendment Two violates the Fourteenth Amendment's Equal Protection Clause.

This Note analyzes the implications of ballot initiatives, such as Colorado's Amendment Two, and discusses whether such initiatives violate the Equal Protection Clause of the Fourteenth Amendment. Part I of the Note provides an overview of modern equal protection law concerning the appropriate standard of review to be employed for classifications based on sexual orientation. Part II analyzes ballot initiatives that block access of disfavored groups, such as homosexuals, from the normal political processes. Part III assesses the constitutionality of Colorado's Amendment Two in light of the preceding equal protection analysis.

## I. EQUAL PROTECTION ANALYSIS—SEXUAL ORIENTATION

The Fourteenth Amendment to the United States Constitution commands that "[n]o state shall deny to any person within its jurisdiction the equal protection of the laws."<sup>6</sup> This directive rings hollow to gays, lesbians, and bisexuals, who daily suffer patent, invidious discrimination in areas of life which the balance of society takes for granted.<sup>7</sup> Homosexuals remain subject to the military's anti-gay exclusionary policy, though recently modified to the "don't ask, don't tell" policy,<sup>8</sup> they are subject to criminal prosecution for

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ordinance. Schmalz, *supra* note 2.

5. *Id.*

6. In simplistic terms, this has been construed to mean "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

7. For a discussion on the need to provide lesbians and gay men with legislative protections, as analyzed in the context of the constitutional concerns of Colorado Amendment Two, see Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905 (1993). The author of that Note devotes considerable thought to the development of gay rights laws, including an appendix of state and local gay rights laws currently in force. Although that author addresses equal protection arguments with respect to Amendment Two similar to those employed in this Note, that author relies more on empirical data and the unique status of homosexuals than on case law analysis of the status of politically unpopular groups. That author also makes a convincing free expression argument which is, however, beyond the scope of this Note.

8. Though not governed by the Fourteenth Amendment because the Federal Government is not deemed a "state" for equal protection purposes, the Supreme Court has nevertheless imposed a similar obligation on the Federal Government under the Fifth Amendment's Due Process Clause stating that "it

engaging in consensual adult sexual conduct,<sup>9</sup> and they are denied the right to marry under state law,<sup>10</sup> which, in essence, leads to the denial of family rights.<sup>11</sup> Despite this patent and invidious discrimination, gays, lesbians, and

would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (footnote omitted). In spite of this, the courts have often been willing to "defer to the judgment of the military" when reviewing fifth amendment concerns of military policies employing discriminatory tactics. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding the military's policy of interning American citizens of Japanese descent stating, "Korematsu was not excluded because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire." (emphasis in original)).

One result of the deference afforded to the military has been the adoption of various anti-gay policies. For various discussions of the military's anti-gay policies, see generally Kurt D. Hermansen, Comment, *Analyzing the Military's Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992); Troy R. Holroyd, Commentary, *Homosexuals and the Military: Integration or Discrimination?*, 8 J. CONTEMP. HEALTH L. & POL'Y 429 (1992); Chad S. Johnson, *Recent Development, A Judicial Blow to the Military's Anti-Gay Policies*: *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991), 27 HARV. C.R.-C.L. L. REV. 244 (1992); John C. Sims, *Moving Toward Equal Treatment of Homosexuals*, 23 PAC. L.J. 1543, 1562-73 (1992); Judith H. Stiehm, *Gender and Law Essay and Articles—Managing the Military's Homosexual Exclusion Policy: Text & Subtext*, 46 U. MIAMI L. REV. 685 (1992); and Thomas B. Stoddard, *Lesbian and Gay Rights Litigation Before a Hostile Federal Judiciary: Extracting Benefit From Peril*, 27 HARV. C.R.-C.L. L. REV. 555 (1992).

Although in January 1993, President Clinton reaffirmed his promise to lift the ban on gays serving in the military, John A. Farrell & Paul Quinn-Judge, *Clinton Faces Fight on Military Ban on Gays: Reaffirms Vow to End Policy*, BOSTON GLOBE, Jan. 26, 1993, at 1, his recent accord with the Pentagon in adopting the "don't ask, don't tell" policy has been criticized as doing little to end the blatant discrimination against gays serving in the armed forces. *See* Joseph P. Shapiro, *Facing the Legal Fight of Their Lives: Gays Take the Military Compromise to Court*, U.S. NEWS & WORLD REP., Aug. 2, 1993, at 31. For instance, although homosexuals are permitted to serve in the military under the policy, any revelation of homosexual orientation creates a rebuttable presumption that the "service member is engaging in homosexual acts," which could lead to dismissal from the armed forces. Friedman, *supra* note 2, at A16. As a result of the adoption of the new policy, the Lambda Legal Defense and Education Fund has filed a federal lawsuit challenging the constitutionality of the policy on free speech and equal protection grounds. Shapiro, *supra*, at 31.

9. Twenty-three states and the District of Columbia have statutes that criminalize sodomy. Rorie Sherman, *Gay Law No Longer Closeted: Family Issues Face Courts and Lawmakers*, NAT'L L. J., Oct. 26, 1992, at 1, 34. In 1986, the Supreme Court delivered a crushing blow to the gay and lesbian movement by upholding a Georgia sodomy statute, while noting that the Due Process Clause of the Fourteenth Amendment did not confer a fundamental right on homosexuals to engage in consensual sodomy between adults. *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Georgia sodomy statute provides:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than twenty years.

GA. CODE ANN. § 16-6-2 (Michie 1992). Though the legislature phrased the statute neutrally, the Court declared that its decision was based solely on the statute's application to homosexuals. *Hardwick*, 478 U.S. at 188 n.2.

10. Currently, no state statute permits the marriage of same-sex couples. *See* Sherman, *supra* note 9. However, suits challenging the question of same-sex marriages are currently being litigated in Hawaii and Washington, D.C.. *Id.* at 1. Recently, in a suit challenging the Hawaii marriage law, the Supreme Court of Hawaii held that "sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution." *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). In so holding, the court vacated and remanded the lower court's dismissal of the case in order to determine whether the state had met its burden under strict scrutiny. *Id.* at 68.

11. Deprivations of family rights have affected gays and lesbians in areas including child custody, adoption, and surviving partner benefits. Arthur S. Leonard, *Report From the Legal Front*, NATION, July 2, 1990, at 12, 14-15.

bisexuals have consistently been denied equal protection of the laws. In fact, the Supreme Court has expressed its apparent disfavor and discomfort with homosexuality, stating that it would be "facetious" to conclude that the Constitution, which extends a "right of privacy" to married couples to use contraceptives, similarly extends that protection to two adult homosexuals, engaging in consensual sex in the privacy of their home.<sup>12</sup>

### *A. Tripartite Equal Protection Analysis*

Modern equal protection analysis employs a tripartite standard of review when determining whether a particular public law or policy violates the protection mandated by the Equal Protection Clause.<sup>13</sup> Depending on the particular class of persons the law or policy isolates, the courts will review the law or policy under one of the following standards: "strict scrutiny," "intermediate scrutiny," or "rational basis review."<sup>14</sup>

Rational basis review is the least restrictive of the Court's standards. In describing rational basis review, the Court has stated that while no exact formula exists, the "Fourteenth Amendment permits the [s]tates a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the [s]tate's objective."<sup>15</sup> Thus, under the rational basis standard of review, legislation is presumed valid and sustained if the classification drawn by the statute is "rationally related to a legitimate state interest."<sup>16</sup> Under this standard of review, the Constitution presumes that even imprudent acts by the legislature will eventually be remedied by the processes of democracy.<sup>17</sup>

The rational basis standard of review, however, is said to "give[way]" when the classification created by the legislation is based on "race, alienage, or national origin."<sup>18</sup> Such classifications are subject to the strict scrutiny standard of review. Often when considering whether a particular classification calls for heightened scrutiny, that is, scrutiny more stringent than mere rational basis review, the Court will consider several factors—namely whether

12. *Hardwick*, 478 U.S. at 194.

13. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16 (2d ed. 1988).

14. *Id.*

15. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

16. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Duke*, 427 U.S. 297, 303 (1976); see also *McGinnis v. Royster*, 410 U.S. 263, 270 (1973) (stating that governmental regulation will be valid so long as it "rationally furthers some legitimate, articulated state purpose").

17. *City of Cleburne*, 473 U.S. at 440. This particular admission by the Court appears to create confusion when the democratic processes themselves deny certain minorities the use of the democratic process in rectifying discriminatory legislation, as in the case of Colorado's Amendment Two.

18. *Id.* Here the Court noted that these classifications are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id.*, see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (noting that "the Equal Protection Clause demands that racial classifications be subjected to the 'most rigid scrutiny'" (citation omitted)).

the disadvantaged group: 1) has been historically subjected to discrimination; 2) exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) is a "minority or [is] politically powerless."<sup>19</sup> However, when state laws infringe on fundamental rights guaranteed by the Constitution, the Court applies strict scrutiny irrespective of the classification drawn.<sup>20</sup> Believing that such legislation will not be rectified by the democratic processes, the Court will only sustain the legislation if it is "suitably tailored to serve a compelling state interest."<sup>21</sup>

Finally, the Court has carved out certain classifications that are afforded "quasi-suspect" status and thus subject to intermediate scrutiny. Typically, the classification in these cases provides no sensible ground for disparate treatment.<sup>22</sup> Classifications of this type generally include gender<sup>23</sup> and illegitimacy.<sup>24</sup> When this level of heightened or intermediate scrutiny is applicable, the classification will be declared invalid unless it is "substantially related to a sufficiently important governmental interest."<sup>25</sup>

### *B. Application of Heightened Scrutiny to Classifications Based On Sexual Orientation in Light of Bowers v Hardwick*

*Bowers v. Hardwick*<sup>26</sup> stands as the landmark case to date in the area of homosexual rights. Importantly, *Hardwick* was not decided under the Equal Protection Clause of the Fourteenth Amendment, but rather under the Amendment's Due Process Clause.<sup>27</sup> Prior to *Hardwick*, the Court had carved out zones of protection from government intrusion, known as "substantive" due process rights.<sup>28</sup> These are fundamental rights, though not explicitly

19. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

20. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing as fundamental certain constitutionally guaranteed rights to privacy and invalidating a statute prohibiting married couples from using contraceptives).

21. *City of Cleburne*, 473 U.S. at 440; *see also Graham v. Richardson*, 403 U.S. 365 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

22. *City of Cleburne*, 473 U.S. at 440-41.

23. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (stating that "what differentiates sex from nonsuspect statuses as intelligence or physical disability is that the sex characteristic frequently bears no relation to ability to perform or contribute to society").

24. Illegitimacy has been declared beyond an individual's control and thus bears "no relation to the individual's ability to participate in and contribute to society." *City of Cleburne*, 473 U.S. at 441 (quoting *Mathews v. Lucas*, 427 U.S. 495, 505 (1976)); *see also Mills v. Hahluetzel*, 456 U.S. 91, 99 (1982).

25. *City of Cleburne*, 473 U.S. at 441 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)); *Craig v. Boren*, 429 U.S. 190 (1976).

26. *Hardwick*, 478 U.S. 186 (1986).

27. Justice White, writing for the majority in *Hardwick*, made clear that the Court was deciding "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Hardwick*, 478 U.S. at 190. This distinction is crucial because the Court never addressed whether homosexuality was to be considered a "suspect" classification for federal equal protection purposes, or for that matter, whether a law, the effect of which was to discriminate against homosexuals, would have even passed the rational basis review of equal protection analysis. *See infra* text accompanying note 32.

28. As the *Hardwick* majority noted:

It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property

stated in the constitutional text.<sup>29</sup> The *Hardwick* Court nevertheless declined to extend the right of privacy to homosexuals engaging in acts of consensual sodomy.<sup>30</sup> This decision, however, has not gone without some cogent criticism.<sup>31</sup>

Some commentators have suggested that the decision in *Hardwick*, though failing to find a constitutional right to engage in homosexual sodomy under the Due Process Clause of the Fourteenth Amendment, left open the possibility of a challenge on equal protection grounds.<sup>32</sup> Often a distinction has been drawn between homosexual "orientation" or status and homosexual "conduct." Several lower federal court decisions, while failing to decide whether homosexual orientation is "suspect" when considering the appropriate standard of review, have, in a sense, drawn a line of demarcation indicating that homosexual "conduct" is not a suspect classification. These decisions apparently leave the door open to grant orientation "suspect" status in the future, or perhaps merely acknowledge that the Supreme Court's decision in *Hardwick* applied only to homosexual conduct (for instance, acts of sodomy).<sup>33</sup> This distinction between "status" and "conduct" draws further

is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language.

*Hardwick*, 478 U.S. at 191.

29. See generally *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (recognizing the right to decide whether to procreate via use of contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing the right to abort pregnancy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (recognizing the right to procreate); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the right to instruct one's child in foreign languages).

30. *Hardwick*, 478 U.S. at 192.

31. See, e.g., *TRIBE, supra* note 13 §§ 15-21; *Sims, supra* note 8, at 1549-56; Norman Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181 (1988) (criticizing the procedure ignored in *Hardwick*).

Recently, the decision in *Hardwick* has been questioned by the same Justice who cast the deciding vote in the five to four opinion. Retired Justice Lewis F. Powell, Jr., acknowledged that he probably made a mistake in voting with the majority in the *Hardwick* decision, indicating that the right of privacy should have been extended in that case. Linda Greenhouse, *When Second Thoughts in Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A14.

32. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). Professor Sunstein makes a persuasive argument that the Due Process Clause has typically been interpreted to protect traditional practices against current departures, while the Equal Protection Clause, working in contrast to the Due Process Clause, seeks to protect disadvantaged groups from discriminatory practices, even though such discrimination is firmly rooted in tradition. *Id.* at 1162 n.9. *Hardwick* can be further distinguished when the discrimination alleged is on the basis of homosexual status (orientation) rather than on homosexual conduct. *Id.* at 1165 n.9. Thus, Professor Sunstein concludes that courts may afford relief to victims of discrimination on equal protection grounds without contradicting *Hardwick*. But see *Sims, supra* note 8, at 1569 (asserting that Professor Sunstein's argument regarding the separation between due process and equal protection analysis fails in the end because the *Hardwick* Court "derailed the equal protection analysis which would have led to the application of heightened scrutiny to classifications based on sexual orientation").

33. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984), *aff'd by equally divided Court*, 470 U.S. 903 (1985); *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977).

credence from the Supreme Court's decision in *Robinson v. California*,<sup>34</sup> which struck down a statute making the status of narcotic addiction a criminal offense—even absent proof of possession, purchase, sale, or actual use—as violative of the Eighth Amendment.<sup>35</sup> Moreover, several recent court decisions have asserted that homosexual “orientation” is a classification demanding heightened scrutiny for equal protection purposes, noting that *Hardwick* was not dispositive of the issue.

For instance, the Ninth Circuit in *Watkins v. U.S. Army*,<sup>36</sup> stated that homosexuality is a classification subject to heightened judicial scrutiny for federal equal protection purposes.<sup>37</sup> In *Watkins*, the U.S. Army discharged Watkins, pursuant to a 1981 Army regulation mandating the discharge of all homosexuals, based on a prior admission of his homosexual orientation.<sup>38</sup> The court noted that “nothing in *Hardwick* suggests that the state may penalize gays for their sexual orientation.”<sup>39</sup> Furthermore, the *Watkins* court noted that it cannot “read *Hardwick* as standing for the proposition that government may outlaw sodomy only when committed by a disfavored class of persons.”<sup>40</sup> The court reiterated that the Equal Protection Clause commands “evenhandedness,” the role of which is defined in “perfecting, rather than frustrating, the democratic process.”<sup>41</sup>

Similarly, in 1991, a Kansas federal district court issued its opinion in *Jantz v. Muci*.<sup>42</sup> In *Jantz*, the plaintiff sought a teaching position in a public school but was denied the position based on the principal's perception that the applicant had “homosexual tendencies.”<sup>43</sup> The *Jantz* court found that “a governmental classification based on an individual's sexual orientation is inherently suspect”<sup>44</sup> and denied the defendant-principal's motion for summary judgment on the equal protection claim.<sup>45</sup> In so finding, the court

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34. *Robinson*, 370 U.S. 660 (1962).

35. *Id.* at 665-66.

36. *Watkins*, 847 F.2d 1329 (9th Cir. 1988), *opinions withdrawn and plaintiff's claim upheld on other grounds*, 875 F.2d 699 (1989) (en banc), *cert. denied*, 498 U.S. 957 (1990). The Ninth Circuit, sitting en banc for rehearing, later applied the doctrine of estoppel, avoiding having to decide the equal protection issue. The court held that the Army was equitably estopped from refusing to reenlist Watkins on the basis of his status as a homosexual because the Army had overlooked his homosexuality in the past. *Watkins v. United States Army*, 875 F.2d 699 (1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

37. *Watkins*, 847 F.2d at 1349, 1352.

38. *Id.* at 1330-32.

39. *Id.* at 1340. Here the court drew an analogy to *Robinson v. California*, 370 U.S. 660 (1962), which held that even though the state could criminalize the use of narcotics, criminalizing the status of narcotic addiction alone would be in violation of the Due Process Clause.

40. *Watkins*, 847 F.2d at 1340.

41. *Id.* at 1341. The court further noted that the driving force behind *Hardwick* “is the Court's ongoing concern with the expansion of rights under substantive due process, not an unbounded antipathy toward a disfavored group.” *Id.* at 1342.

42. *Jantz*, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993). The Tenth Circuit reversed the lower court granting summary judgment for the defendant-principal on the grounds of qualified immunity. The Tenth Circuit, while acknowledging the split over the effect of *Hardwick*, noted that it “need not decide how *Hardwick* affects equal protection claims.” *Jantz*, 976 F.2d at 629.

43. *Jantz*, 759 F. Supp. at 1543.

44. *Id.* at 1554.

45. *Id.* at 1551.

stated that the defendant's reliance on *Hardwick* was not relevant as *Hardwick* addressed only whether the Georgia sodomy statute violated due process, not equal protection.<sup>46</sup>

Finally, in the recent California superior court case of *Citizens for Responsible Behavior v. Superior Court*,<sup>47</sup> the court invoked the Equal Protection Clauses of both the federal and California constitutions in upholding the City of Riverside's refusal to place an initiative on the ballot that in part repealed city ordinances barring discrimination based on sexual orientation or AIDS affliction. In *Citizens*, the court noted that although the Supreme Court in *Hardwick* upheld the criminalization of homosexual sodomy as not protected as a fundamental right under the Due Process Clause, that holding never implied that homosexuals were not entitled to equal protection of the laws.<sup>48</sup> Here, however, the court stopped short of deeming homosexuality a suspect class for equal protection purposes, finding "the proposed ordinance invalid even under the less stringent 'rational basis' test."<sup>49</sup>

Not all courts have accepted the argument that *Hardwick* left open the possibility for an equal protection challenge to classifications based on sexual orientation. In fact, some courts have considered *Hardwick* dispositive of the equal protection issue, have denied heightened scrutiny to classifications based on sexual orientation on other grounds, or both. For example, in 1989, the Seventh Circuit issued its opinion in *Ben-Shalom v. Marsh*,<sup>50</sup> where the plaintiff, an Army Reserve sergeant, had challenged an Army regulation that barred her reenlistment on grounds that she was an admitted homosexual.<sup>51</sup> The district court sustained the plaintiff's challenge on grounds that the regulation violated the Equal Protection Clause as the regulation applied only to homosexual conduct and no evidence existed that the plaintiff had engaged in the same.<sup>52</sup> The Seventh Circuit, however, reversed, stating that as a result of *Hardwick*, "[i]f homosexual conduct may be constitutionally criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."<sup>53</sup> The

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46. *Id.* at 1546. The court in fact employed the *Hardwick* decision and the reasoning therein to bolster the argument in favor of heightened scrutiny, stating:

It is perfectly consistent to say that homosexual sodomy is not a practice so deeply rooted in our traditions as to merit due process protection, and at the same time to say, for example, that because homosexuals have historically been subject to invidious discrimination, laws which burden homosexuals as a class should be subject to heightened scrutiny under the equal protection clause. Indeed, the two propositions may be considered complementary: In all probability, homosexuality is not considered a deeply-rooted part of our traditions *precisely because* homosexuals have historically been subjected to invidious discrimination.

*Id.* (emphasis in original) (quoting *Watkins v. United States Army*, 875 F.2d 699, 719 (9th Cir. 1989) (Norris, J., concurring)).

47. *Citizens for Responsible Behavior*, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991).

48. *Id.* at 654.

49. *Id.* at 655. For further discussion of the court's application of rational basis review to a fact situation remarkably similar to Colorado's Amendment Two, see *infra* parts I.C, II.B, and III.

50. *Ben-Shalom*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

51. *Id.* at 456-57.

52. *Id.* at 463-64.

53. *Id.* at 464.



Seventh Circuit refused to acknowledge the distinction between orientation and conduct in noting that “[b]y admitting to being a lesbian, plaintiff admits to what the regulation prohibits.”<sup>54</sup> The *Ben-Shalom* court then held that the Army’s policy of discharging admitted homosexuals “clearly promotes a legitimate government interest sufficient to survive rational basis scrutiny”<sup>55</sup>

Likewise, in *High Tech Gays v. Defense Industrial Security Clearance Office*,<sup>56</sup> the Ninth Circuit stated that “if there is no fundamental right to engage in homosexual sodomy [as noted in *Hardwick*] it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Fifth Amendment.”<sup>57</sup> In *High Tech Gays*, the plaintiffs, a class of gay and lesbian applicants for employment positions requiring top secret security clearances by the Defense Department, challenged the Department’s expanded investigation for clearances of gay and lesbian applicants.<sup>58</sup> The court rejected the idea that homosexuality could be deemed a suspect or quasi-suspect class, asserting that even though homosexuals have a long history of discrimination, the characteristic of homosexuality is not immutable,<sup>59</sup> nor are homosexuals without political power.<sup>60</sup> The court then applied the rational basis standard, granting “[s]pecial deference” to the Defense Department’s opinion that homosexuals are “vulnerable to hostile intelligence efforts,” and upheld the policy.<sup>61</sup>

54. *Id.* The Seventh Circuit reasoned that, in being an admitted lesbian, the plaintiff must therefore also “‘desire[] bodily contact between persons of the same sex . . . with the intent of obtaining or giving sexual gratification.’” *Id.* (quoting the applicable Army Regulation, AR 140-111, Table 4-2).

55. *Id.* at 465. The court noted that the “particular classification is supported by military considerations and should be left to the Army.” *Id.* The position represents the traditional “deference to military decisions” the courts have traditionally employed when evaluating military policies that patently discriminate against certain classes of people. *See supra* note 8; *see also* discussion *infra* part I.C.

56. *High Tech Gays*, 895 F.2d 563 (9th Cir. 1990); *see also* *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.”).

57. *High Tech Gays*, 895 F.2d at 571 (citations omitted). The court found no distinction between orientation and conduct.

58. *Id.* at 565-66.

59. *Id.* at 573. The court specifically noted that homosexuality is “behavioral and hence fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classifications.” *Id.*, *accord* *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“[H]omosexuality is primarily behavioral in character.”). *But see* *Jantz v. Muci*, 759 F. Supp. 1543, 1547 n.3 (D. Kan. 1991) (recognizing that neither *High Tech Gays* nor *Woodward* offered “the slightest support or authority for the position that homosexuality is a mutable characteristic”).

60. *High Tech Gays*, 895 F.2d at 574. Homosexuals “have the ability to and do ‘attract the attention of the law makers,’ as evidenced by such legislation.” *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985)). In so stating, the court cited several states and municipalities that had enacted anti-discrimination legislation protecting homosexuals. *Id.* at n.10; *see also* *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (noting that “[h]omosexuals are not without political power,” and basing this conclusion in part on a magazine report that “one congressman is an avowed homosexual” (emphasis added)); *Steffan v. Cheney*, 780 F. Supp. 1, 7 (D.D.C. 1991) (stating that “homosexuals as a class enjoy a good deal of political power in our society”).

61. *High Tech Gays*, 895 F.2d at 577.

Each of these conclusions, however, is far from uncontroverted.<sup>62</sup> Colorado's amending of its constitution to effectively deny homosexuals access to the political process raises grave concerns regarding the denial of heightened scrutiny to classifications based on sexual orientation. Moreover, the apparent trend in moving the anti-homosexual campaign to the ballot box<sup>63</sup> enhances the argument that homosexuals are politically powerless. Thus, heightened scrutiny should be applied to classifications based on sexual orientation.

### C. Invocation of the "Active" Rational Basis Review

While some courts are apparently reluctant to grant homosexuality "suspect" or "quasi-suspect" status, other courts are beginning to apply a type of "active" rational basis test. For instance, in *Pruitt v. Cheney*,<sup>64</sup> the Ninth Circuit reversed and remanded the lower court's dismissal of an Army Reserve officer's equal protection challenge of an Army regulation mandating her discharge because she had acknowledged that she was homosexual.<sup>65</sup> The court indicated that even though classifications based on sexual orientation were subject to rational basis review, *City of Cleburne* demands a review of the regulation "to see whether the government had established on the record a rational basis for the challenged discrimination."<sup>66</sup> Thus, the court required an examination of the factual record to ensure the existence of a rational basis before dismissal could be granted.

The Supreme Court's recent decision in *Heller v. Doe*,<sup>67</sup> however, may have undermined the "active" rational basis test employed by the Court in *City of Cleburne*. In *Heller*, the Court upheld the distinctions drawn between mental illness and mental retardation in Kentucky's involuntary commitment proceedings statute as satisfying the rational basis test.<sup>68</sup> In so holding, the

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62. It should be noted that the Supreme Court, as pointed out in *Jantz*, 759 F. Supp. at 1548 n.5, has on several occasions omitted reference to "immutability" as a requirement for heightened scrutiny. See, e.g., *City of Cleburne*, 473 U.S. at 440-41; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

For a discussion of the influences of prejudice in the equal protection debate, see John C. Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C.L. REV. 375 (1990). For a model theory of including homosexuality in the boundary of suspectness, see Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

63. See *supra* notes 3-4 and accompanying text.

64. *Pruitt*, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992).

65. *Id.* at 1167.

66. *Id.* at 1166 (emphasis in original); see also *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (noting that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (emphasis in original).

67. *Heller*, 113 S. Ct. 2637 (1993).

68. *Id.* at 2647. In particular, the Kentucky statutory procedures for the commitment of the mentally ill versus the mentally retarded differ in two significant respects: 1) the applicable burden of proof in the mental illness proceeding is beyond a reasonable doubt whereas the standard in mental retardation proceedings is clear and convincing evidence; and 2) guardians and immediate family members of the subject of a mental retardation proceeding may participate as if parties to the proceeding. *Id.* at 2640.

Court in *Heller* made reference to *City of Cleburne* only once,<sup>69</sup> paying scant attention to the *Cleburne* Court's inquiry into the "record" to determine whether it reveals a rational relation to a legitimate government interest.<sup>70</sup> Rather, the *Heller* Court stated that "[a] State has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'"<sup>71</sup> This statement by the Court, however, appears aimed at defining the burdens of the respective parties because the *Heller* Court made extensive use of the record offered by Kentucky in determining that the distinction met the rational basis test.<sup>72</sup>

Most recently, though, the U.S. District Court for the Eastern District of California applied the rational basis test as stated in *Heller* to strike down the military's policy of excluding homosexuals as violative of the Fifth Amendment's Equal Protection Clause. In *Dahl v. Secretary of the United States Navy*,<sup>73</sup> the Navy discharged Dahl pursuant to its homosexual exclusion policy after Dahl had disclosed in an official interview that he was homosexual. The discharge came despite evidence of Dahl's "excellent service record and affidavits of support from [his] shipmates and superiors."<sup>74</sup> In addressing the *Heller* decision in the context of the proper standard for rational basis review, the *Dahl* court stated, "After *Heller* there can be no question that the burden is on the person challenging the policy to negate every conceivable rational basis for the legislative justification."<sup>75</sup> The court proceeded to observe that *Heller* did not disturb the notion that "a court must examine the record to determine whether the policymaker's proffered justifications for its policy are based on impermissible prejudice."<sup>76</sup>

In applying rational basis scrutiny to the Navy's homosexual exclusion policy, the court granted Dahl's motion for summary judgment and reinstated him in the Navy. The *Dahl* court declared the policy unconstitutional, as the

69. *Id.* at 2643. In fact, Justice Souter, in indicating that he would have struck down the disparity of treatment drawn by the Kentucky statute as not satisfying the rational basis test employed in *City of Cleburne*, stated, "While the Court cites *Cleburne* once, and does not purport to overrule it, neither does the Court apply it, and at the end of the day *Cleburne*'s status is left uncertain." *Id.* at 2652 (Souter, J., dissenting).

70. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) ("Because in our view the record does not reveal any rational basis for believing that the Featherston home [for the mentally retarded] would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.")

71. *Heller*, 113 S. Ct. at 2643 (citing *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2098 (1993)).

72. See generally *id.* at 2643-48.

73. *Dahl*, No. CIV.S.89-0351 MLS, 1993 WL 328364, at \*1 (E.D. Cal., Aug. 30, 1993). *Dahl* addresses the constitutionality of the Navy's homosexual exclusion policy intact at the time of Dahl's discharge in 1981. This decision does not address the recently adopted "don't ask, don't tell" policy.

74. *Id.* Dahl, however, denied having engaged in homosexual conduct subsequent to enlisting in the Navy. *Id.*

75. *Id.* at \*6. The court, however, indicated that this burden had always been present under rational basis review. *Id.* at \*20 n.10.

76. *Id.* at \*7 (emphasizing that "[t]he court in *Heller* made clear that the rational basis standard enunciated in that case was the same standard used in *Cleburne*").

Navy's justifications for the policy were either facially prejudicial or lacked any inference of legitimate basis in fact and were therefore based on prejudice.<sup>77</sup> In particular, the court found no legitimate basis for the policy, especially in light of the fact that the bulk of the Navy's proffered bases for the exclusionary policy undermined the policy itself. For instance, the court noted that the Navy's own studies of homosexuals in the military often produced evidence that the homosexual military personnel were equally, if not more, qualified personnel than their heterosexual counterparts.<sup>78</sup> In concluding, the court stated, "In sum, [the Navy's] rationales for the homosexual exclusion and the evidence offered in support of those rationales supports, rather than undermines, [Dahl's] argument and evidence that the exclusion policy is not based on any legitimate government interest."<sup>79</sup>

The active rational basis review has also recently been employed by the U.S. District Court for the Central District of California in issuing its opinion in the case of *Meinhold v United States Department of Defense*.<sup>80</sup> This decision came after the court had preliminarily enjoined the Department of Defense from discharging Meinhold, an acknowledged homosexual, and ordering the reinstatement of Meinhold until the case could be heard on the merits of the discharge.<sup>81</sup> The Navy had discharged Meinhold after twelve years of service following Meinhold's admission on a "national news program" that he was gay.<sup>82</sup> Meinhold's discharge came despite his rating in the "top ten percent of all Navy instructors," despite the Navy's own admission that Meinhold was "one of its very best airborne sonar analysts and instructors,"<sup>83</sup> and despite the fact that members of his naval unit knew of his sexual orientation prior to his appearance on television.<sup>84</sup>

In the trial on the merits, the court applied rational basis review in ruling that the Defense Department "is permanently enjoined from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States."<sup>85</sup> In so doing, the court declared that the military lacked a rational basis—that the justifications put forward by the military were "based on cultural myths and false stereotypes" and were "very similar to the reasons offered to keep the military racially segregated in the 1940s."<sup>86</sup> While it is unclear how sweeping the effect of *Meinhold* will be, the facts in *Meinhold* seemingly run afoul of the recently adopted "don't ask,

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77. *Id.* at \*13.

78. *Id.* at \*13-14 (stating that, for instance, homosexuals demonstrate lower levels of sexual interest than heterosexuals and pose no more security risks than heterosexuals).

79. *Id.* at \*17.

80. *Meinhold*, 808 F. Supp. 1453, 1455 (C.D. Cal. 1993).

81. *Id.* at 1454.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1458.

86. *Id.*

don't tell" policy.<sup>87</sup> Although the decision may accordingly lose its importance in the military context, it nonetheless provides a road map for the performance of the rational basis test in other areas of state discrimination against homosexuals.

The *Dahl* and *Meinhold* decisions are especially impressive because the courts found equal protection violations under a rational basis analysis despite the traditional deference afforded to the military.<sup>88</sup> Thus, when the government is not sheltered by "deference to the military," as in *Dahl* and *Meinhold*, the "active" rational basis test should be even more stringent.<sup>89</sup> While these cases are at most persuasive in terms of their command of the "law of the land," it would be premature to presume that the Supreme Court is ready to employ an "active" rational basis review to classifications based on sexual orientation. Furthermore, the Court's employment of "active" rational basis review may have been foreclosed by the decision in *Heller*.<sup>90</sup> Yet, regardless of the force of these decisions today, the enactment of laws affirmatively denying classes of people access to the political process raises different and more complex equal protection concerns.

## II. EQUAL PROTECTION AND STATE ACTIONS<sup>91</sup> INSULATING DISFAVORED GROUPS FROM THE NORMAL POLITICAL PROCESS

Professor Laurence Tribe has noted that the arm of equal protection extending from the Fourteenth Amendment has essentially two axes of application:<sup>92</sup> a horizontal axis, which mandates equality in state action in all branches of government,<sup>93</sup> and a vertical axis, which governs the method

87. The Justice Department has recently filed a brief, in the wake of the adoption of the "don't ask, don't tell" policy, appealing the *Meinhold* decision. The Government is arguing that the doctrine of separation of powers "requires the courts 'to defer to the political branches and permit them to make their own determination of the appropriate policy concerning homosexuals in the military.'" *U.S. Files Response on Moffett Sailor*, S.F. CHRON., July 31, 1993, at A7.

88. *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 64-68 (1981); *see also supra* note 8. This is similar to the reasoning employed in *Pruitt*, stating that the Army's policy "should not be held to be rational as a matter of law." *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

89. For an interesting discussion on the effect of the *Pruitt* decision, see Johnson, *supra* note 8.

90. *See supra* notes 64-66 and accompanying text.

91. While the concept of "state action" is normally a complex prerequisite to the establishment of a claim alleging violations under the Fourteenth Amendment, actions taken by a state in the form of a state constitutional amendment, commanding the force of state law, meet this requirement with relative ease. *See* TRIBE, *supra* note 13 § 18-3 (citing *Reitman v. Mulkey*, 387 U.S. 369 (1967), for the relative ease with which the state action element was satisfied, noting that in *Reitman*, "the state constitutional amendment at issue in that case discriminated against minority groups who sought the protection of fair housing legislation since, to achieve their goal, these groups would have to obtain repeal of the amendment, and then proceed through the legislative process, while groups seeking other legislation needed only to resort to the state legislature" (footnote omitted)).

92. *See* TRIBE, *supra* note 13 §§ 16-17.

93. *Id.* Professor Tribe notes that examples of the equal protection analysis on the horizontal axis have been applied to discriminatory legislation as well as discriminatory executive, administrative, and judicial behavior. *Id.* Moreover, such analysis has been applied on the basis of whether the discrimination was invidious or couched in facially neutral language. *See, e.g.*, *Yick Wo v. Hopkins*,

by which decision-making power may be allocated along the governmental hierarchy<sup>94</sup> Along the vertical axis, the Supreme Court has acted to remedy laws which prejudice certain classes in society while disguised as "instances of democratic redistributions of authority"<sup>95</sup>

The majority of cases in this area tend to fall under strict scrutiny as most actions of this type historically have related to redistributions of authority based on race.<sup>96</sup> There is a competing view that strict scrutiny has been applied in these cases because the right to participate in the democratic process is a "fundamental right." This Part of the Note first addresses cases providing the framework when the majority unilaterally strips the affected minority of the right to the normal democratic processes. Next, this Part discusses the concerns as applied under rational basis review

### A. Heightened Scrutiny

Perhaps the leading case in the area of applying heightened scrutiny to state actions that deprive affected minorities of their voice in the political process is the Supreme Court's decision in *Reitman v. Mulkey*<sup>97</sup> In *Reitman*, the Court invalidated California's proposition fourteen ballot initiative, which passed by popular vote in a statewide election, and amended the California Constitution to prohibit the State or any of its agencies from denying the right of people to sell their real property to any person they choose.<sup>98</sup> Not only did the amendment specifically forestall future state action which might carve out protection for those suffering from invidious discrimination in housing, but it overturned existing state laws that restricted a seller's right to discriminate in the housing market.<sup>99</sup> In affirming the California Supreme Court's invalidation of proposition fourteen, the *Reitman* Court adopted the

118 U.S. 356 (1886) (concluding that the effect of an ordinance that prohibited the construction of wooded laundries without a license, though facially neutral, denied all Chinese applicants licenses to construct laundry facilities).

94. See *TRIBE*, *supra* note 13 §§ 16-17.

95. *Id.*

96. For a discussion of heightened scrutiny applicable to race, see generally *supra* part I.A.

97. *Reitman*, 387 U.S. 369 (1967). For a detailed analysis of *Reitman*, see Charles L. Black, *The Supreme Court, 1966 Term-Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

98. *Reitman*, 387 U.S. at 370-71. The pertinent part of the text of the ballot initiative provided as follows:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

*Id.* at 371.

99. *Id.* at 374 (citing the conclusions of the California Supreme Court in *Mulkey v. Reitman*, 413 P.2d 825, 829 (Cal. 1966), which initially struck down the amendment as violative of the equal protection clause). Specifically, proposition 14 was designed to repeal the effect of the Civil Rights Act of 1964, which prohibited racial discrimination by business establishments (and encompassed the activities of real estate brokers and any business selling or leasing real estate), and the Rumford Fair Housing Act, which prohibited racial discrimination in the sale or rental of private dwellings containing more than four units. *Reitman*, 387 U.S. at 374.

lower court's conclusion that it established "a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."<sup>100</sup> Although the Court acknowledged that the State could remain neutral with respect to private racial discrimination, it pointed out that significant involvement by the State in private racial discrimination could render the state action unconstitutional.<sup>101</sup> In so doing, the Court accepted the California Supreme Court's conclusion that "the State had taken affirmative action designed to make private discriminations legally possible."<sup>102</sup> The *Reitman* Court was careful to limit its holding by expressing that it was not precluding a state from placing in statutory form a policy which expresses neutrality with regard to private discriminations.<sup>103</sup> It noted that the California court "quite properly undertook to examine the constitutionality of [proposition fourteen] in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to enactment.'"<sup>104</sup>

The Court's reasoning in *Reitman* was similarly expressed in *Hunter v. Erickson*,<sup>105</sup> where the Court again struck down legislation blocking minorities from access to the normal political process. In *Hunter*, the Court declared that a "[s]tate may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."<sup>106</sup> The *Hunter* Court found unconstitutional a city charter amendment which had been approved by referendum. The amendment provided that the City Council of Akron, Ohio, could pass no ordinance affording relief from discrimination in housing based on race, color, religion, national origin, or ancestry, without approval by the majority of the ballots

100. *Reitman*, 387 U.S. at 374 (emphasis in original).

101. *Id.* at 374-75 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)). In *Burton*, the Court found state action and a violation of the Equal Protection Clause of the Fourteenth Amendment where a publicly owned automobile garage refused to serve a patron solely on the basis of his race. *Burton*, 365 U.S. at 716. The Court further declared that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." *Id.* at 722. See also *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that state court enforcement of private racially restrictive covenants amounts to state action and therefore denies equal protection of the laws).

102. *Reitman*, 387 U.S. at 375. In *Mulkey v. Reitman*, 413 P.2d 825, 834 (Cal. 1966), *aff'd*, 387 U.S. 369 (1967), the California Supreme Court stated that:

[T]he state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted. We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it was encouraged

103. *Reitman*, 387 U.S. at 376.

104. *Id.* at 373.

105. *Hunter*, 393 U.S. 385 (1969).

106. *Id.* at 393 (citation omitted).

cast in the city<sup>107</sup> The Court reasoned that although the law was facially neutral, "the reality is that the law's impact falls on the minority"<sup>108</sup> Accordingly, the amendment violated the Equal Protection Clause because the disparate impact was a product of unjustified and official distinctions based on race, a suspect classification.<sup>109</sup> Thus, the Court held that the amendment to the city charter "discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws."<sup>110</sup>

The Court extended *Reitman* in *Washington v. Seattle School District No. 1*,<sup>111</sup> where the Court cogently expressed the disproportionate burdens placed on minorities in the wake of legislation isolating them from the democratic process. In *Seattle School District*, a local school district challenged the constitutionality of a statewide ballot proposal, initiative 350, designed to prohibit school boards from requiring students to attend schools other than one geographically near the student's residence.<sup>112</sup> Here, the Court struck down the ballot initiative as violative of the Fourteenth Amendment's Equal Protection Clause "because [initiative 350] does 'not attempt[t] to allocate governmental power on the basis of any general principle.'"<sup>113</sup> The *Seattle School District* Court further noted that initiative 350 "imposes direct and undeniable burdens on minority interest. 'If a governmental institution is to be fair, one group cannot always be expected to win,' by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage."<sup>114</sup> Finally, the Court dismissed the notion that *Hunter* had been effectively overruled by *Washington v. Davis*<sup>115</sup> and its progeny,<sup>116</sup> which stand for the proposition that "[t]he central purpose of the Equal Protection Clause is the prevention of official conduct discriminating on the basis of race."<sup>117</sup>

The *Seattle School District* Court acknowledged that when facially-neutral legislation is the subject of an equal protection attack, *Davis* mandates an inquiry into the intent of the legislation to determine whether it was designed to produce a disparate impact on a racial minority<sup>118</sup> "But when the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar

107. *Id.* at 386.

108. *Id.* at 391. The Court noted that "[t]he majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Id.*

109. *Id.* at 391-93.

110. *Id.* at 393. In dicta, the Court further noted that "a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment." *Id.* at 392.

111. *Seattle School Dist.*, 458 U.S. 457 (1982).

112. *Id.* at 462.

113. *Id.* at 470 (quoting Justice Harlan's concurrence in *Hunter*, 393 U.S. at 395).

114. *Id.* at 483-84 (quoting Justice Harlan's concurrence in *Hunter*, 393 U.S. at 394).

115. *Davis*, 426 U.S. 229 (1976).

116. *See, e.g.*, *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

117. *Davis*, 426 U.S. at 239.

118. *Seattle School Dist.*, 458 U.S. at 484-85.



and disadvantageous treatment, the government action plainly 'rests on distinctions based on race.'<sup>119</sup>

The legacy of *Reitman*, *Hunter*, and *Seattle School District* appears dispositive, at least in terms of invalidating voter ballot initiatives that seek the repeal of legislation designed to afford disparate impact relief to racial minorities.<sup>120</sup> These situations produce clear calls for strict scrutiny, especially due to the Court's sensitivity to disparate impact classifications based on race. Yet another interpretation of the holdings in these decisions is founded on the view that the right to participate in the democratic process is a fundamental right, demanding application of a strict scrutiny standard of review irrespective of the classification drawn.<sup>121</sup>

The view that the right to participate in the democratic process is a fundamental right was implicitly acknowledged in the Supreme Court's decision in *Gordon v. Lance*.<sup>122</sup> In *Gordon*, the Court expanded its holding in *Hunter* by indicating that the heightened scrutiny applied in *Hunter* was not based solely on racial discrimination. *Gordon* involved the constitutionality of a West Virginia statute prohibiting political subdivisions of the State from incurring bonded indebtedness without the approval of sixty percent of the voters in a referendum election.<sup>123</sup> The sixty percent vote requirement was challenged as violative of the Fourteenth Amendment.<sup>124</sup> The *Gordon* Court held that the statute did not violate the Fourteenth Amendment.<sup>125</sup> In so holding, the Court declared the voting requirement applied equally "to all bond issues for any purpose, whether for schools, sewers, or highways," and thus did not implicate the concerns expressed in *Hunter*.<sup>126</sup> In distinguishing *Hunter*, where the class singled out "was clear—those who would benefit from laws barring racial, religious, or ancestral discriminations,"<sup>127</sup> the *Gordon* Court found no similarly identifiable class.<sup>128</sup> In contrast to *Hunter*, the Court in *Gordon* stated, "we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing.

119. *Id.* at 485 (emphasis in original) (citations omitted); see also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

*Seattle School District* is distinguishable from its companion case, *Crawford v. Board of Education of L.A.*, 458 U.S. 527 (1982). In *Crawford*, California voters ratified proposition one, which prohibited California state courts from ordering desegregation busing remedies "except to remedy a specific violation of the Equal Protection Clause of the 14th Amendment and unless a federal court would be permitted under federal decisional law to impose [a remedy]." *Id.* at 532. The *Crawford* Court concluded that, unlike initiative 350 in *Seattle School District*, proposition one did not constitute an impermissible shift in political structure but rather a permissible change in substantive legal rights. *Id.* at 540. For a criticism of *Crawford*, see TRIBE, *supra* note 13, §§ 16-17.

120. See *supra* notes 18-19 and accompanying text.

121. For a discussion of heightened scrutiny applicable to fundamental rights guaranteed by the Constitution, see generally *supra* part I.A.

122. *Gordon*, 403 U.S. 1 (1971).

123. *Id.* at 2.

124. *Id.*

125. *Id.* at 4.

126. *Id.* at 5.

127. *Hunter v. Erickson*, 293 U.S. 385, 391 (1969).

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

Consequently, no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote."<sup>129</sup> Accordingly, the Court acknowledged that when an independently "identifiable group," as opposed to a "suspect classification," is "fenced out" from the franchise, the heightened scrutiny as applied in *Hunter* is implicated.

The language in *Gordon* has prompted at least one court to suggest that *Hunter* is to be afforded broad application beyond that of pure racial discrimination. This interpretation was recently put forth by the Colorado Supreme Court in *Evans v Romer*,<sup>130</sup> where the court upheld the trial court's granting of a preliminary injunction enjoining the enforcement of Amendment Two pending a trial on the merits. The Colorado Supreme Court supported the broad application of *Hunter*, as interpreted in *Gordon*, on two grounds. First, the *Gordon* Court felt compelled to compare and contrast *Hunter* beyond a cursory dismissal that *Hunter* involved impermissible classifications based on race whereas *Gordon* did not.<sup>131</sup> And second, the *Gordon* Court limited the dissimilarity of *Hunter* to the absence of a group of voters that was "'independently identifiable' apart from the group created by the statute itself."<sup>132</sup> Thus, the Colorado Supreme Court in *Evans* concluded that the "Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny"<sup>133</sup>

Although the *Evans* court thought the *Gordon* interpretation of *Hunter* expanded the arena of fundamental rights, mandating strict scrutiny, it had greater difficulty distinguishing the Supreme Court's decision in *James v. Valtierra*.<sup>134</sup> In *James*, the Court declined to extend *Hunter* to invalidate a California constitutional amendment that required majority approval in a community election for any construction of low-rent housing, as the amendment was not "aimed at a racial minority"<sup>135</sup> The *Evans* court concluded that *James* "is best understood as a case declining to apply suspect status to the poor, and not as a limitation of *Hunter*"<sup>136</sup> This conclusion, however, appears to underscore the *Hunter* Court's reliance on the classification being "suspect" rather than merely identifiable because the poor are certainly an independently identifiable class of persons.

Yet, in the end, the court in *Evans* makes a convincing argument that the real directive in *Reitman*, *Hunter*, and their progeny lies not in a constitutional disfavor cast upon classifications based on race, but rather in a fundamental

129. *Id.*

130. *Evans*, 854 P.2d 1270 (Colo. 1993).

131. *Id.* at 1282.

132. *Id.*

133. *Id.* (footnote omitted).

134. *James*, 402 U.S. 137 (1971).

135. *Id.* at 141.

136. *Evans*, 854 P.2d at 1282 n.21.

right to participate equally in the democratic process.<sup>137</sup> The *Evans* court was quick to point out that had *Reitman*, *Hunter*, *Seattle School District*, and *Gordon* merely represented "race cases," "the Supreme Court would have been required to do nothing more than note that the legislation at issue drew a classification that was inherently suspect . . . and apply strict scrutiny to resolve those cases."<sup>138</sup> Rather, in each case, the Court consistently reiterated "the paramount importance of political participation."<sup>139</sup>

As the above analysis indicates, strong arguments abound for subjecting to strict scrutiny state actions that insulate disfavored groups from access to the normal political process. Although the Supreme Court has not addressed this proposition in the context of classifications based on sexual orientation, prior Court decisions lead logically to the conclusion that the impingement upon a fundamental right to participate equally in the political process implicates strict scrutiny regardless of whether the Court considers homosexuality a suspect classification.

### B. Rational Basis Review

Notwithstanding the argument pertaining to a fundamental right to participate in the democratic process and despite the obvious distinction between the issues of race and sexual preference, *Reitman* and its progeny similarly provide insight as to how to approach Colorado's Amendment Two under rational basis review. For example, a recent California Court of Appeal decision has applied the law as stated in *Reitman*, *Hunter*, and *Seattle School District* to a case remarkably similar to that presented by Colorado's Amendment Two.<sup>140</sup> In *Citizens for Responsible Behavior* ("*Citizens*"), the court upheld the City of Riverside's refusal to place an initiative on the local ballot.<sup>141</sup> The proposed voter initiative sought, in part, to repeal "existing ordinances evidencing the City's concern for discrimination against homosexuals and those infected with the HIV virus, and which require[d] any future ordinances prohibiting discrimination on the basis of sexual orientation or AIDS . . . to be submitted to the voters for approval."<sup>142</sup>

137. *Id.* at 1282.

138. *Id.* at 1283.

139. *Id.* at 1278.

140. *Citizens*, 1 Cal. App. 4th 1013 (Cal. Rptr. 2d. 1991).

141. *Id.* at 1019.

142. *Id.* at 1026. The court set forth the primary provisions of the initiative as follows:

- 1) Homosexuality and bisexuality have never been recognized as fundamental human rights by the United States Supreme Court, and the City does not so recognize them.
- 2) AIDS and its related medical conditions are national and statewide problems and should not be addressed by the City.
- 3) City shall not enact any policy or law which "defines homosexuality, bisexuality, sexual orientation, affectional preference, or gay or lesbian conduct as a fundamental human right", "Classifies AIDS or homosexuality as the basis for determining an unlawful discriminatory practice and/or establishes a penalty or civil remedy therefor", "provides preferential treatment or affirmative action on the basis of sexual orientation or AIDS", or "promotes, encourages, endorses, legitimizes or justifies homosexuality."

The court in *Citizens*, though quick to point out that *Hunter* was a "strict scrutiny" case, made it clear that the proposed ordinance would be invalid even under the less stringent "rational basis" test.<sup>143</sup> The court stated two reasons for its conclusion. First, in *Hunter*, the Court rejected the defendants' arguments with relative ease.<sup>144</sup> And second, no "rational basis justify[ed] the distinctions drawn by the proposed ordinance with respect to the limitations placed on the City's legislative power to enact protective or corrective legislation regarding homosexuals [or] bisexuals"<sup>145</sup>

Furthermore, the *Citizens* court, while acknowledging that *Reitman* was "based on a finding that the actual intent of the provision challenged was to foster and promote discrimination, and this finding was held to justify the decision,"<sup>146</sup> noted that the intent factor was also present in *Citizens* as the "proposed initiative ordinance is plainly designed to encourage discrimination which was previously forbidden by city council-enacted legislation."<sup>147</sup> The court stated further that "[e]ven insofar as the initiative may appear facially neutral in those provisions which treat all sexual orientations similarly, the claim of actual neutrality as to effect must be rejected."<sup>148</sup> The court supported this contention with the fact that the "Notice of Intent to Circulate," which was required by the Election Code to set forth the reasons for the petition, made the true intent of the initiative crystal clear in that all the proposed initiative was lacking was "a sack of stones for throwing."<sup>149</sup> Accordingly, the court in *Citizens* held that the proposed initiative was constitutionally deficient in that the classifications it sought to draw resulted in "real, substantial and invidious denial of the equal protection of the laws."<sup>150</sup>

4) The portion of the ordinance set forth in (3), *supra*, may be affected only by an ordinance adopted pursuant to the initiative procedure.

5) "No City monies may be used directly or indirectly to fund any individual, activity or organization which promotes, encourages, endorses, legitimizes or justifies homosexual conduct."

6) An existing ordinance including sexual orientation as a subject to be addressed by a community relations commission is amended to delete the reference to sexual orientation

*Id.* at 1019-20.

143. *Id.* at 1026.

144. *Id.*

145. *Id.* at 1027.

146. *Id.* at 1029.

147. *Id.*

148. *Id.*

149. *Id.* at 1031. The Notice of Intent to Circulate listed numerous diseases which it said was endemic among homosexuals, described homosexual conduct including "oral-anal sex, group orgies, bondage, engaging in fisting, rimming, ingesting urine and feces, and gerbling").

150. *Id.* at 1027 (quoting *Hunter*, 393 U.S. at 393).

### III. COLORADO AMENDMENT TWO AND THE EQUAL PROTECTION CLAUSE

On November 3, 1992, the Colorado voters passed Colorado Amendment Two, a state ballot measure which amends article 2 of the state constitution to include section 30, reading as follows:

Neither the State of Colorado through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This section of the Constitution shall be self-executing.<sup>151</sup>

The effect of Amendment Two is two-fold. Immediately, the amendment repeals existing anti-bias ordinances in the towns of Aspen, Boulder, and Denver. These ordinances protect gays, lesbians, and bisexuals from discrimination.<sup>152</sup> Prospectively, the amendment prevents the enactment of future anti-bias legislation.

While perhaps at least some in Colorado feel this type of amendment is a valid exercise of the majority's rights in a democracy,<sup>153</sup> the amendment cuts against an abundance of federal precedents in the area of state-authorized discrimination, the effect of which denies a particular group equal access to the political process.<sup>154</sup> As stated by then Solicitor General Thurgood Marshall, while speaking to the concerns raised in *Reitman*, "by sheltering the right to discriminate in its constitution, the State has accorded it a unique insulation from the normal political processes, both locally and at the State level [As such, this] violates the constitutional command of strict neutrality . . ."<sup>155</sup>

Although enforcement of this specific amendment has been enjoined pending a trial on the merits,<sup>156</sup> the Supreme Court will soon have the opportunity to hear and decide the constitutionality of Amendment Two.<sup>157</sup>

151. *Evans v. Romer*, No. 92-CV-7223, 1993 WL 15174, at \*4 (D. Colo. Jan. 15, 1993).

152. Louis Sahagun, *Colorado Seeks to Stave Off Tourism Boycott by Gays*, L.A. TIMES, Nov. 10, 1992, at A1.

153. Jana Mazanec, *Colorado to Appeal Gay-Rights Decision*, USA TODAY, Jan. 18, 1993, at 10A. "No matter what we do, the majority vote is taken away. [I]t's as if we don't count, as if this isn't a democracy." *Id.* (quoting Colorado Springs resident Ron Heim on his reaction to the Colorado District Court Judge Bayless' decision to preliminarily enjoin Amendment Two from taking effect).

154. See *supra* part II.

155. Brief for the United States as Amicus Curiae at 26, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483).

156. Passed by voter initiative on November 3, 1992, the amendment was scheduled to take effect on January 15, 1993. Since then, however, Denver District Court Judge Jeffrey H. Bayless has preliminarily enjoined its enforcement. *Evans v. Romer*, No. 92-CV-7223, 1993 WL 15174, at \*12 (D. Colo. Jan. 15, 1993). The decision to enjoin enforcement of the amendment was later affirmed on appeal by the Colorado Supreme Court on July 19, 1993. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

157. On July 20, 1993, Governor Romer, the named defendant in the suit challenging the constitutionality of the amendment, announced plans to appeal the ruling of Colorado's Supreme Court

Assuming certiorari is granted, this eventual appeal to the Supreme Court will provide the Court with an opportunity to clear the confusion regarding the proper standard of review to apply to classifications based on sexual orientation.<sup>158</sup> For instance, although several lower courts have recently held that classifications based on sexual orientation are subject to strict judicial scrutiny, each case was later affirmed or reversed on other grounds, thereby avoiding the inevitable question of which standard of review to use.<sup>159</sup> Likewise, an appeal will allow the Court to declare a fundamental right to participate equally in the normal political process, irrespective of the classification drawn.

As for the merits on appeal, the Court will be presented with several options for striking down Amendment Two as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. First, the Court could declare the amendment unconstitutional because it draws a classification for disparate treatment that is not rationally related to a legitimate government interest. This rational basis determination could be reached in light of *City of Cleburne*, as modified, if at all, by *Heller*.<sup>160</sup> Moreover, the Court could support such a conclusion through applying the law of *Reitman* and its progeny,<sup>161</sup> as brought to life in the area of state-authorized invidious discrimination against homosexuals by the *Citizens* court.<sup>162</sup> Such invalidation could be further supported by the decisions in *Pruitt*, *Dahl*, and *Meinhold*,<sup>163</sup> as no "truly" rational basis could exist for excepting this class of citizens from the equal protection of the laws.

Second, the Court could proclaim that *Hardwick* was not dispositive of whether sexual orientation was a suspect classification for equal protection purposes.<sup>164</sup> Here, the Court would acknowledge that, in reality, the effect of Amendment Two renders the defined class without voice in seeking legislative protection. Thus, support for the application of heightened scrutiny is found in the fact that Amendment Two negates the processes of democracy which would otherwise provide the remedy for imprudent acts by the legislature, the people, or both. Accordingly, the built-in system of checks addressed in *City of Cleburne v. Cleburne Living Center*,<sup>165</sup> which often justifies the Court's employment of rational basis review, has been denied to the affected class by this amendment. As a result, homosexuals and bisexuals, at least in Colorado, have become politically powerless, disabled by a state ballot initiative which denies them legislative redress. Consequently,

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to the United States Supreme Court. *Appeal Planned in Anti-Gay Controversy; Colorado Supreme Court Bars Amendment Voiding Homosexual Rights*, WASH. POST, July 21, 1993, at A12.

158. See *supra* part I.B. for a discussion of the application of heightened scrutiny to classifications based on sexual orientation.

159. See *supra* notes 36-46 and accompanying text.

160. See *supra* part I.C.

161. See *supra* part II.A.

162. See *supra* part II.B.

163. See *supra* part I.C.

164. See *supra* part I.B.

165. See *supra* notes 15-17 and accompanying text.

Amendment Two is not "suitably tailored to serve a compelling state interest."<sup>166</sup>

Finally, the Court could delay the question of the proper standard of review to be applied to classifications based on sexual orientation by simply declaring that Colorado Amendment Two violates a fundamental right to participate equally in the political process irrespective of the class drawn by the amendment. The Court could reach this decision with relative ease as Amendment Two does more than strip members of the affected class of anti-bias protections; the amendment specifically denies the class its voice in the political process. Enactment of this amendment on the part of the state is "designed to make private discriminations legally possible."<sup>167</sup> As such, the amendment "constitutes a real, substantial, and invidious denial of the equal protection of the laws."<sup>168</sup> The amendment subjects homosexuals and bisexuals to a "debilitating and often insurmountable disadvantage."<sup>169</sup> Accordingly, the Court could adopt the Colorado Supreme Court's reasoning in *Evans*<sup>170</sup> and strike down the amendment as it impinges upon a fundamental right to participate equally in the normal political process.

In short, Colorado Amendment Two constitutionalizes the private biases of the majority at the expense of the rights of specific minorities, namely homosexuals and bisexuals in Colorado. Not only do the amendment and legislative actions of this type insulate homosexuals and bisexuals from the right to engage in normal political processes, they directly involve the state in impermissible and unconstitutional invidious discrimination.

### CONCLUSION

Ballot initiatives like Colorado's Amendment Two leave little doubt of the grave concerns raised in light of the apparently increasing intolerance of alternative lifestyles in this country. The majority's fencing out of a politically unpopular group and denying it access to and protection from the very political processes that had previously enacted legislation for its protection mandates that courts subject classifications based on sexual orientation to a higher standard of scrutiny. Yet, regardless of whether heightened scrutiny afforded to the classification in this situation is forthcoming, Amendment Two should fail because it directly infringes upon a fundamental right to participate equally in the normal political process. The State's desire to deny a particular group the ability to seek legislative protection from invidious discrimination cannot be said to constitute a compelling government interest. "[T]he State cannot so disadvantage the

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166. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); see also *supra* notes 18-21 and accompanying text.

167. *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967); see also *supra* part II.A.

168. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

169. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484 (1982).

170. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993); see *supra* notes 130-39 and accompanying text.

victims of invidious personal discrimination.”<sup>171</sup>

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171. Brief for the United States as Amicus Curiae at 27, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483).