A Conservative Defense of *Romer v. Evans*†

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INTRODUCTION

A conservative *defense* of *Romer v. Evans*?[1] How could a conservative defend the U.S. Supreme Court's decision to strike down a Colorado state constitutional amendment repealing and prohibiting local gay civil rights laws? Wasn't the decision an unprincipled departure from the intentions of the Framers, the language of the Constitution, and the traditions of the nation? Wasn't it, in short, the very archetype of liberal judicial activism abhorred by conservatives?

Many conservatives, including conservative legal scholars, have apparently thought so. *Evans* has been blasted in the conservative opinion pages of the *National Review*[2] and the *Weekly Standard*,[3] among many other popular-press outlets.[4] Conservative legal scholars have launched a frontal assault on *Evans*, starting with an attack in the *Harvard Journal of Law & Public Policy*.[5] These writers have called *Evans* "a result in search of a reason,"[6] and "the most result-oriented decision issued by the U.S. Supreme Court since *Roe v. Wade*."[7] They even held out the threat that some people,

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1. 517 U.S. 620 (1996).

2. Listing what it regards as liberal-activist decisions in the 1990s, the magazine criticized the *Evans* Court for "impl[ying] that objective morality . . . cannot be the basis of legislation." *Judge Not*, NAT'L REV., Sept. 27, 1999, at 12, 12. Whether Amendment 2 amounted to the enactment of some "objective morality," and whether *Evans* held that "objective morality" could not be the basis of legislative action, are contested questions.

3. *See* David Frum, *The Courts, Gay Marriage, and the Popular Will*, WKLY. STANDARD, Sept. 30, 1996, at 30, 31 (criticizing *Evans* as "murky and undisciplined").

4. *See, e.g.*, George F. Will, Editorial, *"Terminal Silliness"*, WASH. POST, May 22, 1996, at A21.

5. *See* John Daniel Dailey & Paul Farley, *Colorado's Amendment 2: A Result in Search of a Reason*, 20 HARV. J.L. & PUB. POL'Y 215 (1996). Not every commentator has concluded that *Evans* is completely unconservative. Louis Seidman has argued that, "for all its implicit radicalism, *Romer* is . . . profoundly conservative." Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 70. Seidman suggests that *Evans* is the product of four Republican appointees (Justices Stevens, O'Connor, Kennedy, and Souter) who see themselves as part of the "endangered tradition" of moderate Republicanism. *Id.* at 71. Seidman also links *Evans* to Warren Court-era activism that, in conservative fashion, "serves to stabilize the system even as it destabilizes individual components of it." *Id.* at 120. Of course, the possibility that *Evans* "reviv[ed] Warren Court activism" is exactly what conservatives fear about it. *Id.* at 67.

6. Dailey & Farley, *supra* note 5, at 268.

7. *Id.* at 215.

frustrated with another countermajoritarian decision by the Court, might react violently to the decision: "Increasingly, . . . individuals who feel marginalized by unresponsive governments are seeking to make themselves heard through both violent and non-violent means."[8]

Justice Scalia himself, perhaps the most visible judicial conservative in America today, denounced the Court for imposing on the nation its elitist attitudes about sexual morality,[9] and for "tak[ing] sides in this culture war."[10] Scalia, and no doubt many conservative legal scholars, insisted that *Evans* "has no foundation in American constitutional law."[11] He maintained that holding the Colorado law unconstitutional "is an act, not of judicial judgment, but of political will."[12] This is the most serious charge a conservative can make against an opinion. Thus, Scalia drew on a recurrent theme of conservative constitutional jurisprudence: judges must not substitute their own political views for rigorous, interpretive analysis rooted in the text and history of the Constitution.[13]

Contrasted with these conservative critiques of *Evans*, this Article places the decision within the foundational strain of modern conservatism. This conservatism prefers an incremental method and pace of change, outcomes that permit and encourage the development of a deliberated consensus on contentious issues, and substantive results that both uphold the nation's highest traditions and answer the Framers' concern about factionalism. Thus, I begin to sketch an alternative conservative response to *Evans*, one that differs from the attack begun by self-described conservatives in the popular media and in legal journals.

I argue that *Evans* is itself a modest opinion, conservative both in tone and substance, upholding the nation's tradition of political equality, and answering certain anxieties the Framers of the Constitution and of the Fourteenth Amendment had about the nation's constitutional system. Thus, *Evans* can be defended as an originalist decision. This is a more flexible approach than a strict originalism that considers only the specific meaning the Constitution's authors ascribed to its provisions and attempts to recreate what their feelings, bound up in the understandings of an earlier era, would have been about an issue they could hardly have conceived. No reputable conservative legal scholar has adopted such a wooden approach to originalism.[14] At any rate, I doubt the stricter form of originalism is even

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8. *Id.* at 267-68.

9. Romer v. Evans, 517 U.S. 620, 636 (1996).

10. *Id.* at 652.

11. *Id.* at 653.

12. *Id.*

13. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

14. Bork, for example, recognizes the need for flexibility in applying the Framers' concerns to changed and unforeseen circumstances. *See id.* at 167-68 ("'It is the task of the judges in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know.'" (quoting Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring))).

> A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty. That duty, it is worth repeating, is

possible, much less capable of principled application to modern problems.

Throughout this Article, I use the word "conservative" in its Burkean sense[15] to mean a preference for adhering, whether in law or more broadly in government and culture, to traditional practices and mores. This distinguishes it from what is more properly thought of as libertarianism, rooted in the work of philosophers like John Stuart Mill, but often popularly called "conservative." A libertarian case might also be made for (or perhaps against) the outcome in *Evans*, but that is not my aim.

The conservative approach used here is also distinct from modern social (or religious) conservatism, which purports to have a fixed and immutable vision of society based on natural law (or religious principles) and hardly hesitates to impose that vision through compulsion of law. Burkean conservatism, as we shall see, favors traditional practices and mores but is not static and is not impervious to advances in the state of positive knowledge about a subject.[16]

I first outline the majority and dissenting opinions in *Evans* to identify what I take to be the decision's import. Next, I outline some of the main themes of conservative political and legal thought, concentrating especially on Edmund Burke. I argue in particular that the common conception of Burke as an intransigent defender of the status quo and of present traditions and practices is a misreading of him. Finally, I discuss the conservative underpinnings for *Evans* in light of this intellectual history, with an emphasis on the profoundly conservative instincts revealed in the Court's opinion and also on the ways in which *Evans* addresses fears expressed by the Framers, most notably James Madison.

I. *EVANS*'S LOGIC

In 1992, the voters of Colorado, by a margin of 53.4% to 46.6%,[17] passed an amendment to the state constitution. The law, popularly known as Amendment 2, was the subject of *Evans*. It is important to recall what the amendment said and did. This is what it said:

> 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.[18]

> to ensure that the powers and freedoms the founders specified are made effective in today's altered world. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint.

Id. at 169 (citing Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring))).

15. *See* discussion *infra* Part II.A.

16. For an application of Burkean thought to constitutional method, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

17. Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) (en banc).

18. COLO. CONST. art. II, § 30b (held unconstitutional in Romer v. Evans, 517 U.S. 620,

The effect of Amendment 2 was to repeal ordinances that had been adopted in Aspen, Boulder, and Denver protecting individuals from discrimination based on sexual orientation in employment, housing, and public accommodations.[19] The ordinances had protected homosexuals (and heterosexuals) from discrimination in hotels, restaurants, hospitals, dental clinics, theaters, banks, common carriers, travel and insurance agencies, and any other shops or stores dealing with goods or services of any kind. All these protections, insofar as they protected gays, vanished in the aftermath of Amendment 2.

The amendment also swept aside an executive order protecting state employees from discrimination on the basis of sexual orientation.[20] It nullified a provision of the Colorado Insurance Code forbidding health insurance providers from determining insurability and premiums based on sexual orientation.[21] Further, it repealed policies prohibiting discrimination based on sexual orientation such as those at state colleges, including Colorado State University and the Metropolitan State College of Denver, which prohibited school-sponsored social clubs from discriminating in membership on the basis of sexual orientation.[22]

Not satisfied with repealing all existing civil rights protections for homosexuals, it declared that no such protections could be reenacted, short of seeking and obtaining an amendment to the state constitution.[23]

The campaign that preceded the vote was marked by an extraordinarily nasty series of verbal and physical attacks on gays in the state. On the eve of the election, supporters of the amendment passed out approximately 800,000 flyers asserting, among other things: "Sexual molestation of children is a large part of many homosexuals' lifestyle—part of the very lifestyle 'gay-rights' activists want government to give special class, ethnic status!"[24] Other campaign materials distributed by supporters of the amendment erroneously charged that "homosexuals commit between 1/3 and 1/2 of all recorded child molestations."[25] (Contrary to these charges, several studies have concluded that the overwhelming majority of child molestations are not committed by gays.)[26] An increase in anti-gay hate crimes in Colorado accompanied the campaign to pass the amendment.

635-36 (1996)).

19. Romer v. Evans, 517 U.S. 620, 624 (1996) (citing ASPEN, COLO., MUN. CODE § 13-98 (1977), BOULDER, COLO., REV. CODE § 12-1-1 to -11 (1987), and DENVER, COLO., REV. MUN. CODE art. IV, § 28-91 to -116 (1991)).

20. *Id.* at 626.

21. *Id.*

22. *Id.* at 627.

23. *Id.*

24. Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 459 n.28 (1997).

25. *Id.* at 460 n.30.

26. *See id.* at 460 n.32 (citing Kurt Freund et al., *Heterosexuality, Homosexuality, and Erotic Age Preferences*, 26 J. SEX RES. 107 (1989), A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 ARCHIVES SEXUAL BEHAV. 175, 181 (1978), and Carol Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 41 (1994)).

Opponents of Amendment 2 went to court to block its enforcement on the grounds that it violated the U.S. Constitution's Equal Protection Clause.[27] They secured an injunction, which was upheld by the Colorado Supreme Court on the grounds that Amendment 2 infringed the fundamental right of gays to participate in the political process by making them seek redress and protection at a higher level of governmental decisionmaking than others.[28] The U.S. Supreme Court affirmed, but on a different theory.

In considering how the Court reached its result, it is useful to recall the terms in which Justice Kennedy's majority opinion described the effect of Amendment 2 on the legal status of gays. The opinion described Amendment 2 as "[s]weeping and comprehensive";[29] "far reaching";[30] "exceptional";[31] "unusual";[32] "unprecedented" in our history and law;[33] having "severe consequence[s]";[34] placing a "special," "broad and undifferentiated disability" on homosexuals;[35] "singling out" gays;[36] putting gays in a "solitary class";[37] making gays "a stranger to [the state's] laws";[38] and ultimately, "irratioual."[39]

Contrast that rather dark picture of Amendment 2 to the benign one painted by Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas in dissent.[40] Scalia described Amendment 2 as a "modest attempt by seemingly tolerant Coloradans" to protect "traditional sexual mores" against the onslaught of "politically powerful" and wealthy homosexuals demanding "special" or "preferential" treatment.[41] Scalia argued that the hostility reflected by Amendment 2 toward homosexuals was "the smallest conceivable," and concluded that Amendment 2 was "an entirely" and "eminently reasonable" provision.[42]

This difference in description goes to the larger issue of why the Court struck down Amendment 2. In analyzing the law, the Court applied a rational basis test to determine whether it violated the equal protection of the laws as guaranteed by the Fourteenth Amendment.[43] This test is the least demanding level of scrutiny the Court applies to any law. It simply looks at whether the law bears a rational relationship to some legitimate purpose. In applying the test, the Court looks at both the means used and the end sought to determine whether the law conforms to the Constitution.

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27. Evans v. Romer, 854 P.2d 1270, 1272 n.2 (Colo. 1993) (en banc).
28. *Id.* at 1270.
29. Romer v. Evans, 517 U.S. 620, 627 (1996).
30. *Id.*
31. *Id.* at 632.
32. *Id.* at 633.
33. *Id.*
34. *Id.* at 629.
35. *Id.* at 631-32.
36. *Id.* at 633.
37. *Id.* at 627.
38. *Id.* at 635.
39. *Id.* at 632.
40. *Id.* at 636 (Scalia, J., dissenting).
41. *Id.* at 636, 638.
42. *Id.* at 644-45, 653.
43. *See id.* at 632.

But the Court did not address, let alone decide, the level of scrutiny to be given to laws that discriminate on the basis of sexual orientation.[44] Although many lower courts have assumed that rational basis scrutiny applies to classifications based on sexual orientation, that determination awaits some future case.[45]

In this case, the Court applied the least demanding constitutional standard—presumably on the theory that if Amendment 2 could not pass that standard then it would not pass any higher standard. Justice Kennedy's opinion held that "Amendment 2 fails, indeed defies, even this conventional [rational basis] inquiry" for two reasons.[46]

A. Means: Too Narrow and Too Broad

First, the Court said, "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group."[47] Note that the opinion describes the law as combining two features that, together, create an equal protection problem. On the one hand, its prohibitions were "broad and undifferentiated."[48] It barred a wide array of legal protections in everything from employment to insurance. On the other hand, the law targeted "a single named group," gays.[49] The Court said that this combination was an "exceptional and . . . invalid form of legislation."[50]

That conclusion suggests the Court may be recognizing a category of laws that per se violate the principle of equal protection, with no further consideration of "levels of scrutiny" or other analysis needed. How might such a per se unconstitutional law be identified? Justice Kennedy's description of Amendment 2 suggests an answer: "[Amendment 2] is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."[51] The opinion added that, "It is not within our constitutional tradition to enact laws of this sort."[52] Laws of what sort? Again, the opinion points to those laws that identify a single class of people and broadly deny that class legal protections.[53] The Court called this "a denial of equal protection of the laws in the most literal sense."[54]

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44. *See id.*

45. For an argument that legislation classifying on the basis of sexual orientation should receive strict scrutiny, see Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996).

46. *Evans*, 517 U.S. at 632.

47. *Id.*

48. *Id.*

49. *Id.* The laws, ordinances, and policies repealed and prohibited by Amendment 2 also protected heterosexuals from discrimination on the basis of sexual orientation. *Id.* at 626. But, Amendment 2 removed protections only from the group that needed them most, homosexuals. *Id.* at 627.

50. *Id.*

51. *Id.* at 633.

52. *Id.*

53. *Id.*

54. *Id.*

Justice Scalia characterized the Court's conclusion here as follows: "The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage . . . , it must have recourse to a more general and hence more difficult level of political decision making than others."[55] He added, "The world has never heard of such a principle."[56]

Scalia is right: The world has never heard of such a principle because that is not the principle the Court adopted in *Evans*. If it were as Scalia noted, multilevel decisionmaking in our republic, proceeding from state constitution to state legislature to counties to cities and down to departments, would be constitutionally unworkable since a decision made at any level above the bottom would cause a disadvantaged group to seek redress at a governmental level higher than the base.

However, I read the Court's opinion to mean that a broad denial of legal protections targeted at a single group is unconstitutional at whatever level of government the decision is made.[57] So, for example, a city would not be free under this reading of *Evans* to enact a sweeping denial of legal protections to a single class even within its own narrow jurisdiction.

This reading may help explain why the Court originally remanded a case in which a Cincinnati ordinance barred legal protections for gays from its city charter and ordered all city departments to end any nondiscrimination policies covering sexual orientation they may have adopted.[58] The Court vacated the opinion of the Sixth Circuit, which had upheld the ordinance, and remanded the case for reconsideration in light of *Evans*.[59] Justice Scalia dissented from the granting of certiorari, arguing that there was no reason for the Sixth Circuit to reconsider its opinion because *Evans* stands only for the proposition that a state cannot force homosexuals to seek protection through a state constitutional amendment.[60] Since a city is the "lowest electoral subunit" homosexuals are at no disadvantage recognized in *Evans*, according to Scalia.[61] If my reading of *Evans* is correct, however, Scalia missed the point. *Evans* may have a broader, and different, impact on laws targeting gays than he thinks.[62]

My reading also suggests an answer to Justice Scalia's reliance on *Bowers v.*

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55. *Id.* at 639 (Scalia, J., dissenting).

56. *Id.*

57. *See also* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).

58. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996).

59. *Id.*

60. *Id.*

61. *Id.*

62. Note that, on remand, the Sixth Circuit affirmed its original decision, largely on the grounds suggested by Justice Scalia's dissent from certiorari. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 297 (6th Cir. 1997). In rhetorical defiance of the Supreme Court, the Sixth Circuit persisted in describing nondiscrimination laws protecting gays as "special." *Id.* The Supreme Court then refused to grant review of the case. Equal. Found. of Greater Cincinnati v. City of Cincinnati, 525 U.S. 943 (1998). It's hard to know what significance to draw from the denial of certiorari. The denial could mean that Scalia's narrower reading of *Evans* is right. Or it could mean the Court is inviting lower courts to test the limits of the decision. Or it could mean nothing significant at all.

Hardwick,[63] the case that upheld a state's power to criminalize homosexual sodomy.[64] Scalia argued that it made no sense to permit a state to criminalize same-sex sexual relations, and yet forbid that state from withdrawing legal protections from the group that engages in those very relations.[65] According to Scalia, the greater power, to make criminals of gays, includes the lesser power, to deny them what he called "special protections."[66] Of course, Scalia may be right, and *Hardwick* may be the next casualty of *Evans*. The Seventh Circuit certainly seems to think so.[67]

On the other hand, *Hardwick* involved a criminal prohibition on specific conduct; it did not involve a sweeping denial of legal protections.[68] Although the criminal prohibition as validated in *Hardwick* focused on a single class—those who engage in same-sex sexual conduct—it did not withdraw that class generally from the protection of the law.[69] Thus, Scalia may have his "greater" and "lesser" powers exactly backward. The state lacks the greater power to enact a sweeping denial of rights but has the lesser power to focus its prohibitory efforts on discrete areas—like the specific conduct at issue in *Hardwick*.[70]

A similar response could be made to Scalia's fretting that polygamy may now be the law of the land.[71] That is, the state could outlaw the practice of polygamy (given a non-animus-based justification for doing so) but could not broadly withdraw legal protections from polygamists, not to mention withdraw such protections from people with a "polygamist orientation."[72]

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63. 478 U.S. 186 (1986).

64. Romer v. Evans, 517 U.S. 620, 640 (1996) (citing *Hardwick*, 478 U.S. at 186).

65. *Id.* at 640-41.

66. *Id.* at 641.

67. Nabozny v. Podlesny, 92 F.3d 446, 458 n.12 (7th Cir. 1996) ("[*Hardwick*] will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*." (citation omitted)).

68. *See Hardwick*, 478 U.S. at 188.

69. Superficially, the Georgia law did not even target a single status-defined class (homosexuals) since it also applied to opposite-sex sodomy. *See id.* at 188 n.1. *Hardwick*'s focus on same-sex sodomy, rather than the orientation of the participants, means Georgia could constitutionally prohibit same-sex sodomy committed by bisexuals and heterosexuals as well as by homosexuals. In this sense, unlike Colorado's Amendment 2 (which prohibited protection only for homosexual orientation), the Georgia law was not even targeted at a single class. On the other hand, like Amendment 2, the Georgia law fell especially harshly on homosexuals. Homosexuals have few other viable sexual outlets.

70. For a syllogistic critique of Scalia's argument, see Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 389-99 (1997).

71. *Evans*, 517 U.S. at 648.

72. For a comparison, see Robinson v. California, 370 U.S. 660 (1962) (holding states may criminalize use of drugs but may not criminalize person's status as a drug addict). Cass Sunstein has argued, "The fact that the underlying conduct can be criminalized is irrelevant to the [equal protection] problem; it is always immaterial to an equal protection challenge that members of the victimized group are engaging in conduct that could be prohibited on a general basis." 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, 1167 (1988).

Another distinction between polygamy and homosexual orientation is that, while a person can cease being a polygamist, the best available evidence supports the conclusion that

It is also worth noting that *Hardwick* was a substantive due process case; it did not involve an equal protection challenge.[73] The Court might well come to a different conclusion about the constitutionality of sodomy laws under an eqnal protection analysis, since equal protection analysis has been less rooted than due process in the vindication of historically recognized rights.[74]

This distinction of Amendment 2 from the sodomy and polygamy cases also suggests that a more narrowly drafted state constitutional amendment aimed at homosexuals or some other class of citizens might survive *Evans*, although it might suffer some other equal protection or constitutional infirmity. A more narrow denial of specific protections might work. For example, a statute that more narrowly withdrew legal protections from discrimination in housing in cases where a landlord claims some religious objection to homosexuality might well survive an *Evans* attack. After *Evans*, a city's specific nondiscrimination ordinance could be repealed by the state or by the city itself. A state is also free to rearrange the distribution of decisionmaking between itself and its constituent subdepartments (e.g., by requiring that certain kinds of decisions be made at the state level), but not in a way that broadly targets a specific group. Further, a measure that comprehensively withdrew statutory civil rights protections for *all* classes of citizens at any level of government might well survive my reading of *Evans*.

B. Ends: No Animus

The second constitutional infirmity with Amendment 2, according to the Court, was that it was adopted because of "animosity" towards gays.[75] "'[I]f the constitutional conception of 'equal protection of the laws' means anything,'" said the Court, "'it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'"[76] The Equal Protection Clause of its own force prohibits the government from pursuing certain ends that are otherwise constitutionally permissible. Thus, not only were the means chosen by Colorado unconstitutional,[77] the bare desire to harm gays was also unconstitutional.

The Court noted that laws serving broad and ambitious purposes could justify the imposition of incidental disadvantages on certain groups.[78] But that is just it: to have a constitutionally legitimate purpose, the disadvantage to the group must be incidental to the law, not the purpose of the law.

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homosexual orientation cannot be changed. *See* RICHARD A. POSNER, SEX AND REASON 101-06, 259-60 (1992). I want to thank Christopher Leslie for reminding me of this difference.

73. For a discussion of the differences between a due process analysis and an equal protection analysis as applied to *Hardwick*, see Sunstein, *supra* note 72, at 1161. *But see* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 142-43 (1999) (arguing that "due process tradition is not static," and in the 1970s was "more dynamic and forward-looking for gay people than equal protection cases were"); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000).

74. Sunstein, *supra* note 72, at 1161.

75. *Evans*, 517 U.S. at 634.

76. *Id.* (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

77. *See* discussion *supra* Part I.A.

78. *Evans*, 517 U.S. at 635.

How did the Court know that the purpose of Amendment 2 was to harm gays? No opinion polls were cited on the issue. No evidence of animus-based statements by citizens or even by the drafters of the Amendment were adduced, although such statements were certainly available if the Court had wanted to cite them.[79] Nothing except the law itself was offered by the Court to demonstrate the impermissible animosity.

Colorado never agreed Amendment 2 was an exercise in gay bashing. Instead, the state said the Amendment was meant to protect the associational rights and religious liberties of landlords or employers who have personal or religious objections to homosexuality.[80] It also cited its desire to conserve resources to fight discrimination against other groups.[81]

But the Court found that the statute was so broad in relation to these purported purposes that it is "impossible to credit them."[82] To the Court, if these limited claimed purposes were truly behind the Amendment, the effect was to take a sledgehammer to a gnat, where a fly-swatter would do. Instead, Amendment 2, said the Court, "is a classification of persons undertaken for its own sake, . . . classif[ying] homosexuals not to further a proper legislative end but to make them unequal to everyone else."[83] Recall the Court reached that conclusion on the strength of Amendment 2's text, not on the strength of any extrinsic evidence, despite the claims of the state that legitimate ends justified its adoption.[84]

That conclusion may have the most lasting effect on our constitutional landscape as it regards classifications that affect gays. A tension courses through the majority and dissenting opinions. The same tension has coursed through the political and cultural wars on the place of gays in American society. That tension is on the question of whether the types of legal protections from discrimination that gays sought in Colorado accord "special" rights, or merely give substance to the promise of equality in the law. Throughout his dissent, Justice Scalia characterized Amendment 2 as doing nothing more than repealing "special" rights.[85] The Court countered that the legal protections repealed by Amendment 2 are not at all special.[86]

Whether a given right or protection can be characterized as "special" depends on the baseline used to distinguish a "special" right from an "equal" right; in other words, all rights given above the baseline are special while all those protected below it ensure simple equality. Scalia clearly believes all legal protections that specifically prohibit discrimination in any area on the basis of sexual orientation are special rights granted to homosexuals. On the other hand, the enforcement of general laws and policies that prohibit arbitrary discrimination may also prohibit discrimination on the basis of homosexual conduct, on Scalia's view, without conferring special benefits on homosexuals. These protections do not constitute special treatment and so fall below Scalia's baseline. They fall below it because they are a part of generally

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79. *See supra* text accompanying notes 24-26.
80. *Evans*, 517 U.S. at 635.
81. *Id.* at 630-31, 635.
82. *Id.* at 635.
83. *Id.*
84. *See id.*
85. *Id.* at 636-53 (Scalia, J., dissenting).
86. *Id.* at 631.

applicable laws.

Nondiscrimination policies, on Scalia's account, afford special protection because they single out homosexuals for protection.[87] But that distinction is untenable. As the Court argued, even generally applicable laws must at some point draw lines around the kinds of matters they will or will not address.[88]

Take, for example, a law that prevented "arbitrary discrimination" by an agency of the state. For Scalia, that would be a generally applicable law and thus not a special protection for homosexuals or any other class. But at some point, the agency or a court reviewing the agency's action must determine whether discrimination against homosexuality is or is not arbitrary discrimination. At the moment it does, it will have announced a policy protecting homosexuals from discrimination. It would then be a special or preferential right Scalia says the state is free to withdraw.

This is not a purely hypothetical exercise. The courts reviewing Amendment 2 did not resolve the question whether it withdrew the protection of generally applicable laws from homosexuals. But it might easily have been read that way. And, on Scalia's conception of special rights, a holding that Amendment 2 passed constitutional muster would be a short step away from holding constitutional a law that withdrew from homosexuals the protection of otherwise generally applicable laws, since every generally applicable law could be recast as a special protection once it was applied to prohibit discrimination against a homosexual on the basis of sexual orientation. There is simply nothing in Scalia's analysis of Amendment 2 that would prevent this monstrous result.

Perhaps in an attempt to avoid that difficulty, the Court implicitly suggested a baseline of equal rights for gays somewhat higher than Scalia's. The amendment, said the Court, did not deprive homosexuals of "special rights."[89]

> We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[90]

By that statement, six justices of the U.S. Supreme Court effectively moved the baseline for gays to a higher plane—one that recognizes that gays need the protections abolished by Amendment 2 simply in order to participate in ordinary civic life in our society. That recognition marks a dramatic shift in basic outlook from the Court that decided *Hardwick* ten years before. And it is a shift that surely informed the Court's judgment that Amendment 2 was based on nothing more than animus against homosexuals. After all, if Amendment 2 withdrew only special rights, it could hardly be thought of as an act of pure animus. That was Scalia's view.[91] But withdrawing measures that guarantee only equal rights raises more troubling suspicions about the true purpose behind the law. Thus, the Court reached a different

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87. *See id.* at 640-43 (Scalia, J., dissenting).
88. *See id.* at 631.
89. *See id.*
90. *Id.*
91. *See generally id.* at 636-53 (Scalia, J., dissenting).

conclusion than Scalia about what truly lay behind the law.

The implications of this new baseline may be more hortative than substantive. The new baseline does not mean, for example, that to comply with equal protection a state or municipality *must* protect gays from private discrimination. A state or city may repeal its own gay civil rights protections after *Evans* as long as the repeal has a non-animus-based justification. Such a justification would be easier to find in a narrow repeal than in the kind of sweeping enactment at issue in *Evans*.

On the other hand, this new baseline may signal the Court's judgment that the perceived social harm of homosexuality is not a legitimate concern of government, as Scalia feared.[92] The perceived social harm of homosexuality itself, unadorned by other justifications unrelated to that perceived harm, may now be understood as nothing more than animus against gays. This could mean that mere moral objections to homosexuality are no longer sufficient to justify legislation directed at gays. Indeed, it is hard to see how a court that implicitly worries that gays need protection from discrimination to lead ordinary lives could conclude otherwise.

This could lead to a kind of unstated heightened scrutiny of legislative purposes where classifications affecting homosexuals are concerned—a "souped-up" rationality review.[93] It is not enough, after *Evans*, for the state to offer morality-based arguments alone for policies targeted at gays. And the broader the enactment the greater the distrust of the state's facially non-animus-based justifications (e.g., landlords' religious liberty). This is considerably less deferential than what is usually considered rationality review. It is a heightened scrutiny that dare not speak its name.

The judgment that morality alone is not enough to sustain laws targeting homosexuals may have implications down the road for other legislative enactments that disadvantage gays, such as criminal sodomy laws, the ban on gays in the military, employment discrimination, anti-gay adoption laws, and even the ban on same-sex marriages.[94] Even if these laws are reviewed only under the rational basis test, as applied in *Evans*, they may still be viewed as the legislative enactments of animus: an impermissible purpose to disadvantage homosexuals as a class or to curb the perceived social harm of homosexuality itself. On the other hand, each of these classifications, taken alone, is arguably narrower than Amendment 2. The state may have other plausible interests in these particular classifications affecting homosexuals, such as administrative or litigation costs, that do not arise from animus.

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92. *See id.* at 640.

93. One commentator has called this heightened rationality review "rational basis with bite." Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

94. *See generally* Kevin H. Lewis, Note, *Equal Protection After* Romer v. Evans*: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 204-23 (1997) (arguing that *Evans* could be used to challenge the constitutionality of the federal anti-gay marriage law, state anti-gay adoption laws, and state anti-gay sodomy laws).

II. CONSERVATIVE TRADITIONS

So is the sky falling on conservatives? Is *Romer v. Evans* a radical class revolution favoring the knights and the templars against the common peasants, as Justice Scalia thinks? Can the decision be justified on any conceivable conservative principles of government or jurisprudence? To determine whether it can, we must review some conservative intellectual history.

A. Incrementalism as a Conservative Method

A venerable principle of conservatism, rooted in the work of Edmund Burke, T.S. Eliot, Russell Kirk, and many other conservative thinkers, is that we should respect tradition and history. This strain of conservatism generally prefers stability to change, continuity to experiment, and the tried to the untried.

Burke was a British statesman and political philosopher who served in the House of Commons before, during, and after the American Revolutionary War. His famous attack on the excesses of the Jacobins in *Reflections on the Revolution in France* is "the single most influential work of conservative thought published from his day to ours."[95] Burke's *Reflections* "called into being that which we have for two centuries understood to be the Right."[96] Largely based on this single work, Burke is widely considered the father of the traditionalist strain of modern conservatism. No single person before or since has had a deeper impact on the contours of traditional conservatism. As one political scientist put it, "[a]ll the analysts of conservatism . . . unite in identifying Edmund Burke as the conservative archetype and in assuming that the basic elements of his thought are the basic elements of conservatism."[97]

Understanding Burke's philosophy, then, is key to understanding a Burkean conservative's take on Amendment 2 and *Evans*. Three aspects of Burke's thought—his faith in the possibility of slow progress, his willingness to depart from an original design, and his defense of unpopular groups—are especially relevant.

1. Slow but Well-Sustained Progress

Burke has often been identified as a defender of existing practices and traditions against innovation.[98] There is much in Burke's writings and speeches to support this view. "When ancient opinions and rules of life are taken away, the loss cannot

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95. Jerry Z. Muller, *Introduction to Edmund Burke, Reflections on the Revolution in France*, *in* CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT 78, 78 (Jerry Z. Muller ed., 1997).

96. Mark C. Henrie, *Edmund Burke and Contemporary American Conservatism*, *in* EDMUND BURKE: HIS LIFE AND LEGACY 198, 202 (Ian Crowe ed., 1997).

97. Samuel P. Huntington, *Conservatism as an Ideology*, 51 AM. POL. SCI. REV. 454, 456 (1957).

98. Cass Sunstein, for example, argues that "the Due Process Clause is associated with the protection of traditionally respected rights from novel or short-term change." Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994). From this, he concludes that the clause "is largely Burkean and backward-looking." *Id.*

possibly be estimated," Burke wrote in *Reflections*.[99] "From that moment we have no compass to govern us."[100] Burke argued that a set of "just prejudices" in a people was healthy for society.[101]

> [I]nstead of casting away all our old prejudices, we cherish them to a very considerable degree, and, to take more shame to ourselves, we cherish them because they are prejudices; and the longer they have lasted and the more generally they have prevailed, the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.[102]

Burke urged caution on all projects to reform society: "[I]t is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes."[103]

However, the common reading of Burke as simply a defender of tradition often misses the richness and subtlety of his philosophy. He did not oppose all evolution of a society's mores, traditions, and values. Rather, he counseled deliberation and patience in reform.

This side of Burke's philosophy is clear even in *Reflections*, easily his most prominent and full-throated defense of tradition. For Burke, the operation of change should be "slow and in some cases almost imperceptible."[104] He urged forbearance and consensus building.[105] He defined a statesman as having "[a] disposition to preserve and an ability to improve."[106] He believed deeply in the possibility of "a slow but well-sustained progress."[107] In other words, Burke supported incremental change rather than the convulsive social upheavals he saw in events like the French Revolution.

2. The Inevitability of Change in the Original Design

Burke also saw that the original design of an institution would inevitably undergo change. For example, he observed that the American colonies had created their own assemblies that were originally nothing more than municipal corporations with no legislative authority.[108] Yet over time these assemblies had developed into lawmaking

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99. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 89 (Thomas H.D. Mahoney ed., Bobbs-Merrill Educ. Publ'g 1981) (1790).

100. *Id.*

101. *Id.* at 99.

102. *Id.* at 98-99.

103. *Id.* at 70.

104. *Id.* at 197.

105. *Id.*

106. *Id.* at 181.

107. *Id.* at 198.

108. Letter from Edmund Burke to John Farr and John Harris, Esqrs. Sheriffs of the City of Bristol on the Affairs of America (Apr. 3, 1777), *in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 186, 205 (Peter J. Stanlis ed., 1963) [hereinafter Letter to the Sheriffs].

bodies with forms, functions, and powers similar to parliaments. Burke noted that British critics of these assemblies claimed accurately that the assemblies had not been intended, at their creation, for that broad purpose.[109]

Burke's response to this criticism is a challenge for anyone who thinks that conservative political or legal theory consists of being strictly faithful to some original design: "[N]othing in progression can rest on its original plan," wrote Burke.[110] "We may as well think of rocking a grown man in the cradle of an infant."[111] To him, "it was natural" that the assemblies should grow in importance as the colonies themselves grew and prospered.[112]

3. Defense of Unpopular Minorities

Further, to some extent Burke has been seen as an apologist for existing power arrangements and privileges—even as an advocate for a return to feudalism. His strong attack on the French Revolution and staunch defense of the French monarchy, for example, have been seen as examples of a desire to bolster the powerful at the expense of the downtrodden.[113] This view, it turns out, is even more suspect than the notion that Burke was invariably a defender of the status quo.

Burke was quite willing to defend unpopular causes, people, and interests. For example, as will be seen in greater detail shortly, Burke defended the American colonists in their uprising against the British on the ground that the king and Parliament had imposed unprecedented taxes on the Americans and trampled their rights. Indeed, he so forcefully defended the colonists that he was virtually accused of treason.[114] He was also critical of British rule in India for its oppression of Hindus.[115] Although a staunch establishmentarian, he defended the rights of religious minorities—especially Irish Catholics—against the power and prestige of the Church of England.[116] He did not mince words criticizing Louis XIV's persecution of Protestants, a minority in France.[117] He also strongly opposed slavery, resisted seating American representatives in Parliament because they would necessarily have included slaveowners, and drafted a Negro Code that would have gradually granted freedom to American slaves.[118]

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 505-15 (1998).

114. Burke retorted: "I am charged with being an American. If warm affection towards those over whom I claim any share of authority be a crime, I am guilty of this charge." Letter to the Sheriffs, *supra* note 108, at 198.

115. RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT 36 (1960).

116. *See, e.g.*, Edmund Burke, Fragments of a Tract Relative to the Laws Against Popery in Ireland (1765), *in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES, *supra* note 108, at 210, 210-27 [hereinafter Tract on Popery Laws].

117. Burke said that Louis XIV's revocation of the Edict of Nantes, which had granted some measure of tolerance to the Huguenots, was an "act of injustice" that cast "a cloud over all the splendor of a most illustrious reign." *Id.* at 217.

118. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and*

Consider especially Burke's sustained and controversial critique of Britain's war against the American colonies. Burke believed that the crown infringed traditional American liberties and, in the prosecution of the war, English liberty as well. In an effort, for example, to intimidate the colonists, "we wholly abrogated the ancient government of Massachusetts"[119] by removing the colony's governor, its public council, judges, and executive magistrates. The purpose of these actions was to scare Americans with the possibility of anarchy—life without British administration. But after a year of this mistreatment Massachusetts had not dissolved into chaos.

From this, Burke drew a valuable lesson about the fallibility of human reliance on supposed venerable beliefs and the need to reexamine those beliefs in the light of experience. On March 22, 1775, he articulated this lesson in a famous speech to Parliament:

> Our late experience has taught us that many of those fundamental principles formerly believed infallible are either not of the importance they were imagined to be, or that we have not at all adverted to some other far more important and far more powerful principles which entirely overrule those we had considered omnipotent.[120]

This passage reveals two important components of Burke's philosophy of conservatism. First, what we presently regard as "fundamental principles" are not immune to critique and revision based on the lessons derived from experience. Second, experience may reveal that our operating principles are subordinate to even more fundamental principles that should overrule them. This is hardly a static philosophy of governance. It is one that does not shy from drawing lessons from experience that cause us to revise even our deepest notions of right and wrong. Burke's words here have been called a "succinct formulation of the fundamental, intrinsic dilemma of conservatism: When does experience demand a change in the order of institutional priorities?"[121]

Burke learned another important lesson from his country's treatment of colonial America. Britain's willingness to trample Americans' liberties, he believed, had hurt the cause of *British* liberty. This was manifested in very practical ways. In an effort to silence critics of the war, for example, Parliament passed a bill to partially suspend the Habeas Corpus Act in Britain. Burke denounced this as an act of "deep[] malignity."[122]

Constitutional Interpretation, 72 N.C. L. REV. 619, 654 (1994).

119. Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), *in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES, *supra* note 108, at 147, 164 [hereinafter Speech on Conciliation].

120. *Id.*

121. Jerry Z. Muller, *Afterword: Recurrent Tensions and Dilemmas of Conservative Thought*, *in* CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT, *supra* note 95, at 421, 425.

122. Letter to the Sheriffs, *supra* note 108, at 188. Burke also denounced Parliament's decision to try American patriots for high treason in England, rather than in America, where they would have access to witnesses, friends, and money. "To try a man under that act is, in effect, to condemn him unheard." *Id.* at 190. He continued, in a ringing pre-echo of the realist critique of legal formalism: "such a person may be executed according to form, but he can

But something even more important was being lost in the prosecution of the war: it undermined the very principle of liberty itself.

> For, in order to prove that the Americans have no right to their liberties, we are every day endeavoring to subvert the maxims which preserve the whole spirit of our own. To prove that the Americans ought not to be free, we are obliged to depreciate the value of freedom itself; and we never seem to gain a paltry advantage over them in debate, without attacking some of those principles, or deriding some of those feelings, for which our ancestors have shed their blood. . . .[123]

This is not the voice of an inveterate defender of the status quo, or a champion of the interests of the powerful against the powerless. Rather, it is the voice of a thinker who is sensitive to the serious damage that can be done to important principles when a powerful force overwhelms and persecutes a disfavored group in the interest of denying that the group even *has* a place in the polity.

Burke also had a remarkably tolerant attitude toward sodomy for a person of his time and culture. He strongly defended the legal rights of men accused of engaging in sodomy, a crime punishable by pillory, imprisonment, and, depending on the circumstances, death in Burke's England. In 1774, for example, Burke publicly intervened on behalf of a lieutenant of the Royal Artillery who had been sentenced to death for sodomy.[124] He argued that the evidence against the lieutenant was weak and that his character was otherwise unblemished.[125] As a result of Burke's pleas, the man was spared on condition that he leave Britain.[126]

In the spring of 1780, during a time of national crisis, Burke "did not hesitate to inflict upon the House of Commons an impassioned harangue on the subject of sodomy."[127] Although he condemned sodomy—as any person wishing to be taken seriously in politics in his age would have had to do[128]—Burke zealously argued for more leniency in the punishment of it. He especially abhorred the practice of placing those convicted of sodomy in a public pillory. In Burke's time, several men punished in this way had been pelted to death by angry mobs before they could be released.[129] This, in particular, enraged Burke.

So passionately did he publicly defend men accused of sodomy that a "whispering campaign" against Burke himself began, laying him open to the "grossest charges," including "reports that he was mentally unstable," according to one biographer.[130] The press mercilessly attacked Burke's defense of sodomites, going so far as to question

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never be tried according to justice." *Id.*

123. Speech on Conciliation, *supra* note 119, at 164.

124. STANLEY AYLING, EDMUND BURKE: HIS LIFE AND OPINIONS 53-54 (1988).

125. *Id.*

126. *Id.*

127. SIR PHILIP MAGNUS, EDMUND BURKE: A LIFE 55 (1939).

128. I do not mean to suggest that Burke's stated opposition to sodomy was mere political expedience. I only claim that if he did question the utility of sodomy laws he would have had to keep that uncertainty quiet.

129. MAGNUS, *supra* note 127, at 148-50.

130. *Id.* at 55.

his moral character and "accus[e] him of sympathy with homosexual practices."[131] The insinuation that Burke himself might be a sodomite was clear. The press became so vituperative on this point that Burke sued one publication for libel.[132]

In short, Burke "defended the liberties of Englishmen against their king, and the liberties of Americans against king and parliament, and the liberties of Hindus against Europeans."[133] On almost every great issue of his time, Burke sided with unpopular, powerless groups against the designs of the overbearing and powerful. He defended them precisely because their rights were based on larger principles rooted in the historic rights secured by the unwritten British constitution.[134] Burke clearly saw that present practices, no matter how popular or how ancient their origins, might have to be abandoned in light of experience or to give way to higher principle.

4. T.S. Eliot and Russell Kirk

Conservatives since Burke have shared his passionate faith in the possibility of incremental change and his willingness to defend unpopular groups.

Like Burke, T.S. Eliot, the English poet and literary critic who has been called "a chief conservative thinker in our time,"[135] distrusted change for the sake of change. "Every change we make is tending to bring about a new civilisation of the nature of which we are ignorant, and in which we should all of us be unhappy," he wrote in *Notes Toward the Definition of Culture*.[136]

Yet Eliot acknowledged that society must not be static. It would have to make room for new traditions and practices.

> So of society we can only say: "We shall try to improve it in this respect or the other, where excess or defect is evident; we must try at the same time to embrace so much in our view, that we may avoid, in putting one thing right, putting something else wrong."[137]

Eliot specifically warned against the danger of "petrifaction" in conservatism.[138] "Conservatism is too often conservation of the wrong things," he observed.[139]

Even in his advocacy of an explicitly Christian-dominated society, Eliot recognized the presence and value of dissenters to the governing moral heritage. "I cannot foresee any future society in which we could classify Christians and non-Christians simply by their professions of belief, or even, by any rigid code, by their behaviour," Eliot wrote in *The Idea of a Christian Society*.[140] "And perhaps there will always be

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131. *Id.* at 148-50.

132. AYLING, *supra* note 124, at 54.

133. RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT 21 (1960).

134. *Id.* at 21-22.

135. *Id.* at 544.

136. T.S. ELIOT, CHRISTIANITY AND CULTURE: THE IDEA OF A CHRISTIAN SOCIETY AND NOTES TOWARDS THE DEFINITION OF CULTURE 13 (1968).

137. *Id.* at 92.

138. *Id.* at 13.

139. KIRK, *supra* note 133, at 544 (quoting T.S. Eliot).

140. ELIOT, *supra* note 136, at 34.

individuals who, with great creative gifts of value to mankind, and the sensibility which such gifts imply, will yet remain blind, indifferent, or even hostile [to the dominant Christian culture]. That must not disqualify them from exercising the talents they have been given."[141]

Burke's leading modern American disciple, Russell Kirk—a prominent conservative intellectual in his own right—took a similar approach to social change. "Society must alter," Kirk wrote in his seminal work, *The Conservative Mind*, "for slow change is the means of its conservation, like the human body's perpetual renewal . . . ."[142] In his reverent analysis of Burke, Kirk noted:

> Does the observance of prejudice and prescription, then, condemn mankind to a perpetual treading in the footsteps of their ancestors? Burke has no expectation that men can be kept from social change, or that a rigid formalism is desirable. . . . *Even ancient prejudices and prescriptions must sometimes shrink before the advance of positive knowledge* . . . . The perceptive reformer combines an ability to reform with a disposition to preserve; the man who loves change is wholly disqualified, from his lust, to be the agent of change.[143]

Drawing perhaps on the lesson of Burke's brave stand in defense of the rights of the American colonists and the Hindus, Kirk added: "Conservatism never is more admirable than when it accepts changes that it disapproves, with good grace, for the sake of a general conciliation . . . ."[144]

Kirk, too, defended unpopular groups and causes against encroachments on traditional rights. For example, he derided the military draft as "slavery" and was critical of both big business and big labor.[145] He was also furious at the confinement of Japanese Americans in internment camps shortly after Pearl Harbor.[146]

The source of Kirk's defense of these unpopular causes was his abiding belief in a body of principles that must, in his view, override current practices or prejudices. Kirk identified strongly with Burke's willingness to protect, "above all, a body of *principles*, a tradition of thought that transcended the 'epiphenomena' of eighteenth-century England."[147] He believed, as did Burke, that a conservative could "be both a traditionalist and a rational man."[148]

None of this has stopped conservatives from opposing political trends that, although bold in their time, now enjoy broad mainstream support. Conservatism's most regrettable moments in recent years have come when conservatives failed to recognize the need to change present practices in light of experience or in the interest of some higher principle, like America's traditions of equality and individual liberty. For example, at the height of the African-American civil rights struggle, many conservatives defended segregation in the South. Some even argued against suffrage

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141. *Id.* at 34-35.

142. KIRK, *supra* note 133, at 8.

143. *Id.* at 50-51 (emphasis added).

144. *Id.* at 52.

145. GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA 71 (1976).

146. *Id.*

147. *Id.* at 165.

148. *Id.*

rights for African-Americans.[149] Many opposed the Civil Rights Act of 1964 on grounds that suggested a lingering racism.[150] Others defended the excesses of McCarthyism[151] and opposed equal rights for women.

Still, the most enduring conservative voices—in the mold of Burke, Eliot, and Kirk—have taught reverence for tradition while warning against slavish adherence to a lost or outmoded past. "There cannot be a return to the Middle Ages or the Old South under slogans identified with them,"[152] wrote University of Chicago Professor Richard Weaver, a conservative fan of southern agrarian culture. "The principles must be studied and used, but in such presentation that mankind will feel the march is forward."[153] Thus, the popular image of the conservative as the person who stands "athwart history yelling 'Stop!'"[154] needs to be amended. Rather, the dominant strain of conservatism has stood athwart history yelling, "Slow down!"

B. Recovering a Conservative Tradition: The Meaning of Political Equality

So far, I have presented the conservative view of the pace at which political and legal change should occur. I have also discussed the conservative theory by which longstanding principles should be revised or abandoned in favor of new understandings based on experience or higher principles. It remains to be seen what direction, for a conservative, that change should move. That, in turn, requires a substantive conservative idea of what the Constitution is meant to achieve and what problems it is meant to forestall. That is the subject of the next two sections, which address conservatives' understanding of political equality and the Framers' concerns about faction-driven, nondeliberative decisionmaking.

Burke, as usual, is a fountainhead for couservative philosophy in the area of political equality under the law. As will be seen, the parallels between Burke's views, on the one hand, and those of James Madison and the sponsors of the Fourteenth Amendment, on the other, are sometimes striking. For a person seeking insight into the meaning and importance of political equality to a traditionalist conservative, an understanding of Burke's views is indispensable.

Inveighing against Parliament's decision to suspend habeas corpus only for those who had traveled abroad during a specified time, Burke stressed the importance of

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149. *Id.* at 200.

150. *Id.* at 277. There is, of course, a powerful libertarian and nonracist argument to be made against laws prohibiting discrimination in private employment. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

151. In this, at least one closeted gay person famously joined them. Roy Cohn, who later died of AIDS, was an aide to, and served as legal counsel for, Senator Joseph McCarthy (R-Wis.) during McCarthy's infamous 1954 hearings to investigate alleged communist infiltration of the U.S. Army. The hearings convinced even many fervently anticommunist conservatives that McCarthy had gone too far. He was censured by the Senate later that year and his political career never recovered.

152. RICHARD M. WEAVER, THE SOUTHERN TRADITION AT BAY: A HISTORY OF POSTBELLUM THOUGHT 394-95 (George Core & M.E. Bradford eds., 1968).

153. *Id.* at 395.

154. NASH, *supra* note 145, at 338.

equal application of the law.

> For the first time a distinction is made among the people in this realm. Before this act, every man putting his foot on English ground, every stranger owing only a local and temporary allegiance, even negro slaves who had been sold in the colonies and under an act of Parliament, became as free as every other man who breathed the same air with them. Now a line is drawn, which may be advanced further and further at pleasure . . . .[155]

This passage shows Burke's insight that, although society might recognize classes of people (temporary visitors and slaves, for example), the law had to treat those classes the same "as every other man who breathed the same air with them."[156] Burke was also concerned about the precedent such a law would set. He worried that partial erosion of the principle of equality in the law might lead to further erosion.

But Burke's concern about the partial suspension of habeas corpus went even further than that. To him, it struck at the very idea of a political community: "There is no equality among us; we are not fellow-citizens, if the mariner who lands on the quay does not rest on as firm legal ground as the merchant who sits in the counting-house. *Other laws may injure the community; this dissolves it.*"[157]

This is surely one of the most striking passages in all of Burke's writing on law. For Burke, equal application of the law was not only right, and not only prudent, but it made the political community *possible.* Where other intrusions on tradition might harm the polity; intrusion on the equality principle threatened to destroy it.

In Burke's view, the security of liberty rested in the general applicability of the laws. As we shall see, he believed that if a majority could fence out a particular group, there was no protection for liberty, for liberty's final refuge was in the requirement that what the majority inflicted on others it had also to inflict upon itself. Legal equality, then, was a safeguard of all other liberty. This emphasis on equality highlights a powerful, if rarely invoked, aspect of traditionalist conservative thought. It sees equality as the necessary support for all else in the legal regime.

Conservative legal scholars have, of course, long been critical of judicial activism thought to serve the interests of political liberalism.[158] Many have been particularly critical of the U.S. Supreme Court since its 1954 decision to outlaw segregation in *Brown v. Board of Education.*[159] These conservative criticisms have focused on the need to base judicial decisionmaking in the Constitution's text and history, in accordance with the understanding of the Framers.

Nevertheless, even as conservatives have been critical of the Court's perceived activism, they have recognized a role for the judiciary in squaring tradition and original principle with subsequent experience. Robert Bork, for example, believes the framers of the Fourteenth Amendment thought legal segregation was consistent with the amendment they adopted.[160] Yet he defends the result in *Brown*, which held that

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155. Letter to the Sheriffs, *supra* note 108, at 192.

156. *Id.*

157. *Id.* (emphasis added).

158. *See, e.g.*, BORK, *supra* note 13, at 17.

159. NASH, *supra* note 145, at 215-16.

160. BORK, *supra* note 13, at 82. Whether it is true that the framers of the Fourteenth Amendment thought segregation was constitutionally acceptable is another matter. Michael W.

segregation violated the Fourteenth Amendment, because "[b]y 1954, when *Brown* came up for decision, it had been apparent for some time that segregation rarely if ever produced equality."[161] The constitutional text had not changed, the basic principle of equality adopted in 1868 had not changed (at least as it was written into the Constitution), no transformative history of the adoption of the Fourteenth Amendment had been unearthed, yet Bork agrees that the principle of equality the Fourteenth Amendment's authors adopted could trump their specific intentions (supporting segregation).[162] How so? The reason, for Bork, is that experience since the adoption, including the advance of positive knowledge about the effects of segregation, had demonstrated that equality could not coexist with segregation.[163] One had to give way. "The purpose that brought the [F]ourteenth [A]mendment into being was equality before the law, and equality, not separation, was written into the text," he concludes.[164]

C. The Madisonian Tradition and the Danger of the Majority Faction

The countermajoritarian critique of political inequality has roots in the views of the Framers, as well as in the text and history of the Fourteenth Amendment's guarantee of the "equal protection of the laws."[165]

In *The Federalist*, James Madison warned against measures that limit a group's ability to bring about change through ordinary political processes.[166] Madison worried about the development of "factions" animated by hostility.[167] Consider his comments in *The Federalist No. 10*:

> By a faction, I understand a number of citizens, *whether amounting to a majority or a minority of the whole*, who are united or actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[168]

The Constitution was intended to correct an intolerable situation that had arisen under the Articles of Confederation, Madison contended. "[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[169] He continued: "To secure the public good and private rights against . . . such a [majority] faction, and at the same time to preserve the spirit and the form of popular government, is then the

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McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953-54 (1995) (arguing that the actions of the Reconstruction Congress contradict the consensus view that the framers of the Fourteenth Amendment supported segregation).

161. BORK, *supra* note 13, at 82.

162. *Id.* at 81-82.

163. *Id.*

164. *Id.*

165. U.S. CONST. amend. XIV, § 1.

166. THE FEDERALIST NO. 51, at 161-62 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966).

167. THE FEDERALIST NO. 10, at 16-20 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966).

168. *Id.* at 17 (emphasis added).

169. *Id.* at 16.

great object to which our inquiries are directed."[170] The object of the Constitution was, in Madison's view, to render the majority "unable to concert and carry into effect schemes of oppression."[171]

Madison distrusted direct democracy—of which Colorado's referendum adopting Amendment 2 is an instance—because it offered no hope of tempering the passions of a majority aroused against the interests or rights of a minority. "Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."[172]

Madison was particularly wary of pure democracy at the smaller and lower level of state or local government. Deciding policy matters affecting the rights of minorities at the national level, on the other hand, makes it

> less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.[173]

Madison trusted that the sheer size of the new republic would hinder the development of oppressive factions.

Burke, writing roughly contemporaneously with the Framers, also warned of the dangers of majoritarian power in a democracy. "Of this I am certain," he wrote, "that in a democracy the majority of the citizens is capable of exercising the most cruel oppressions upon the minority whenever strong divisions prevail in that kind of polity, as they often must . . . ."[174] Minorities so targeted by a majority "are deprived of all external consolation," he observed.[175] "They seem deserted by mankind, overpowered by a conspiracy of their whole species."[176]

Like Madison, Burke believed that representative government was not merely the exercise of raw power. It was also not simply the expression of popular will. Rather, he saw representative government as a matter requiring the interaction of the popular will and the legislators' own independent judgment. As he explained to his Bristol constituents in his acceptance speech upon election to Parliament in October 1774: "If government were a matter of will upon any side, yours, without question, ought to be superior. *But government and legislation are matters of reason and judgment, and not of inclination* . . . ."[177]

Further, Burke posited the existence of a general welfare upon which representatives had a duty to act. He therefore shared Madison's disdain for faction-

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170. *Id.* at 19-20.

171. *Id.* at 20.

172. *Id.*; *see also* Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 YALE L.J. 1931, 1954-56 (1999) (discussing the difficulties of ratifying the Constitution).

173. THE FEDERALIST NO. 10, *supra* note 167, at 22.

174. BURKE, *supra* note 99, at 143-44.

175. *Id.* at 144.

176. *Id.*

177. Letter to the Sheriffs, *supra* note 108, at 187 (emphasis added).

dominated politics.[178] In his acceptance speech, Burke characterized his vision of the deliberative role of government in a fashion that Madison would have understood and approved:

> Parliament is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but *Parliament is a deliberative assembly of one nation, with one interest, that of the whole*—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.[179]

By the middle of the nineteenth century it was clear that the original constitutional design had failed to prevent the majority from effecting "schemes of oppression" against minorities, especially the enslaved African-American population in the South. The Civil War, and the constitutional amendments that followed it, arose partly from a desire to correct this abuse of power.

Addressing the concerns of Madison and others about the abuse of power by aroused majorities, the Fourteenth Amendment explicitly forbids states to "deny to any person . . . the equal protection of the laws."[180] In a proposed joint resolution for the Fourteenth Amendment, Charles Sumner argued that the amendment would abolish "oligarchy, aristocracy, caste, or monopoly" with particular privileges and powers.[181] Senator Howard (R-Mich.), floor manager of the Fourteenth Amendment, argued that it would "abolish all class legislation . . . and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."[182]

Even conservative legal defenders of Amendment 2 have acknowledged that part of our constitutional tradition is a bar against state actions based on a "bare . . . desire to harm a politically unpopular group,"[183] "unreasoned antipathy,"[184] "mere negative attitudes," and "unsubstantiated 'fear' toward a class of people."[185] They simply deny that Amendment 2 fits in any of those categories.

Political equality, then, is our inheritance. It is part of the nation's tradition, rooted deeply in its history, in its legal texts, and thus necessarily in the heart of any Burkean

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178. Madison and Burke would likely have disagreed on how to discourage unreasoned factionalism. Burke was an early advocate of political parties, which Madison distrusted. For his part, Burke would have been dubious of Madison's mechanistic system of checks and balances. I am indebted to Ernest Young for pointing out these differences.

179. Letter to the Sheriffs, *supra* note 108, at 187 (emphasis added).

180. U.S. CONST. amend. XIV, § 1.

181. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2348 (1997) (quoting the CONG. GLOBE, 39th Cong., 1st Sess. 674 (1866)).

182. *Id.* (quoting the CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)). For a more complete discussion of the history of the Fourteenth Amendment, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION 74-75 (1992).

183. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973) (Brennan, J.), *quoted in* Dailey & Farley, *supra* note 5, at 229-30.

184. Steffan v. Perry, 41 F.3d 677, 708 (1994) (Wald, J., dissenting), *quoted in* Dailey & Farley, *supra* note 5, at 229-30.

185. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (White, J.), *quoted in* Dailey & Farley, *supra* note 5, at 229-30.

conservative living in America.

III. *EVANS*'S CONSERVATISM

Evans is a product of America's constitutional tradition—both in substance and in its incremental method—and is thus consistent with mainstream conservative thought. This can be seen in three ways.

First, although conservatives defend tradition, there is always an initial question that must be answered: what tradition is to be defended? In *Evans* as in other legal decisions and political controversies affecting gays, competing traditions vie for conservatives' loyalty. The higher tradition should be chosen by the Burkean conservative. I argue that the higher tradition at stake in *Evans* favors the outcome reached by the Court. Second, conservatives have embraced political equality against majoritarian decisionmaking. Although some forms of discrimination are permissible for a conservative, the most extreme and unprecedented forms—those that politically fence out a particular group—are not. *Evans* fits squarely within this conservative tradition. Finally, *Evans* addresses Madison's nightmare—a faction comprising the majority of voters aroused against the rights and interests of a minority—and vindicates the principle of "equal protection" enshrined in the language and history of the Constitution. Thus, *Evans* is defensible as an originalist and textual matter.

A. Competing Traditions: Evans *and the Higher Principle*

In its defense of tradition, conservatism is often confronted with a dilemma: What tradition must be defended? In the case of Amendment 2, as in other contexts, two competing traditions seem in direct conflict.

On the one hand, America has an undeniable tradition of defending conventional sexual morality against claims by gays, and others, for equality. Part of that defense has been to allow legislatures the power to regulate sexuality for moral ends. This tradition includes a history of sodomy laws, bans on same-sex marriage, prohibitions on military service by gays, and a host of other legal disabilities placed on homosexuals. Disapproval of gay sex has been widespread and is shared by most major Western religions to some degree. Chief Justice Burger, voting to uphold Georgia's sodomy law in *Hardwick*, noted: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[186] Justice Scalia, in his *Evans* dissent, invoked the desire of Coloradans to protect traditional sexual mores against the advances made by advocates of gay equality.[187] Amendment 2 might appear to be well within this tradition.

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186. Bowers v. Hardwick, 478 U.S. 186, 197 (Burger, J., concurring). At least as applied to oral sodomy, Burger's and the Court's legal history is arguably wrong. Although every state had "sodomy" laws (variously appearing as laws against "buggery" and "crimes against nature") at the time of the adoption of the Fourteenth Amendment in 1868, these laws were not explicitly understood to prohibit oral sex. ESKRIDGE, *supra* note 73, at 157-61. In 1879, Pennsylvania became the first American jurisdiction to define "sodomy and buggery" as including oral sex. *Id.* at 158.

187. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

On the other hand, America has a traditional commitment to protecting political equality against encroachments by aroused and impassioned majorities. Conservatives, too, have adopted this commitment. It is now unquestioned in conservative circles, for example, that the state cannot segregate the races or prohibit women from practicing law. Yet these were controversial propositions in their time, presenting conservatives with a choice between defending existing practices and defending the tradition of equality.

This equality tradition does not mean that everyone must be treated the same. Felons, for example, are an unpopular group who are justifiably not treated just like everyone else for all purposes. But the equality tradition does mean at least three things. First, the state must have non-animus-based reasons to support its measures against the group.[188] The broader the disability the less trustworthy the state's asserted purpose. Second, reasons once thought to express a permissible moral judgment may, by the advance of positive knowledge about the group, be recast as impermissible animus. Third, for Burkean conservatives, measures that broadly fence out a particular group politically present a threat to the very idea of political community.[189]

In the case of felons, the state has ample justifications aside from simple spite to take measures that disadvantage the group. The advance of positive knowledge about felons has not exposed moral disapprobation of them as mere animus. Finally, discrimination against felons does not undermine the basis for political community; such discrimination defends the community from actions by felons that would undermine it (through violence and theft, for example).

Under this conception of political equality, broad discrimination against gays of the type present in Amendment 2 is suspect. The very breadth of Amendment 2 suggests animus. The advance of positive knowledge about gays—recognized even by prominent conservatives[190]—has opened the veil of morality that once covered such discrimination, exposing the empirical weakness of many claims about the harms caused by homosexuals. Finally, although some discrimination against gays surely does not threaten to dissolve the political community, for a Burkean conservative drastic measures to isolate them politically do.

So we have one tradition defending conventional sexual morality of which Amendment 2 might be an instance.[191] We have a competing tradition defending political equality that Amendment 2 defies. Which tradition—the tradition of conventional sexual morality or the tradition of political equality—should prevail for a conservative?

To answer this question as a general matter, we may return to Burke. When faced with competing traditions, conservatives should defend the higher tradition against the particular practices of the time. Conservatives should do so even if defending the higher tradition means defending an unpopular group, as Burke himself defended the

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188. Even the conservative critics of *Evans* agree with this point. Dailey & Farley, *supra* note 5, at 266.

189. *See supra* Part II.A.3.

190. *See infra* text accompanying notes 216-28.

191. Shortly, I explain in further detail why Amendment 2 "might be"—rather than clearly "is"—part of a tradition of defending conventional sexual morality: Amendment 2 is so extreme that it is outside the confines of the tradition of defending conventional sexual morality.

American colonists, the Hindus, religious minorities, black slaves, and even men convicted of sodomy.[192] At such times when it defends that which it disapproves, observed Russell Kirk, conservatism is most admirable.[193] Kirk noted that "[e]ven ancient prejudices . . . must sometimes shrink before the advance of positive knowledge."[194] Kirk specifically praised Burke for defending "a body of principles . . . that transcended the epiphenomena" of his time.[195] In the battle between Amendment 2 and the tradition of political equality, Amendment 2 seems more likely to count as an epiphenomenon of our time, and political equality is the better candidate for higher-principle status. This is so for several reasons.

First, even as a defense of conventional sexual morality, Amendment 2 goes farther than other such laws have gone by denying homosexuals legal protections in a sweeping manner. The premise that homosexual behavior is a vice—the assumption of conventional sexual morality—does not lead by itself to any particular policy conclusion. One could believe that anal sex is morally wrong, for example, but not want the state to criminalize it. The homosexuality-as-vice premise certainly does not lead necessarily to the historical oddity that was Amendment 2, which was the first—and only—such law to pass in any state in the union.[196] Its claims to a traditional pedigree are therefore questionable. Its very novelty should engender conservative skepticism. Even as an expression of traditional sentiment about conventional sexual morality, a tradition that is hardly monolithic or unchanging, Amendment 2 was an outlier. It was a kind of sodomites-in-the-pillory overkill that should alarm a Burkean conservative.[197]

Consider Justice Kennedy's concern that Amendment 2 was "unprecedented" (that is, unsupported by tradition) in American law. "I've never seen a case like this," he said at oral argument.[198] "Here, the classification is adopted to fence out . . . the class for all purposes, and I've never seen a statute like that."[199] Justice Ginsburg doubted that "in all of U.S. history there has been any legislation like this that earmarks a group and says, you will not be able to appeal to your State legislature to improve your status" or that "thou shalt not have access to the ordinary legislative process for anything that will improve the condition of this particular group."[200]

Justice Kennedy's opinion also contains statements rooted in the conservative disposition to distrust the untried and untested. The opinion noted that Amendment 2 was unprecedented. Justice Kennedy remarked that its very unusual character made

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192. *See supra* Part II.A.3.

193. KIRK, *supra* note 133, at 52.

194. *Id.* at 51.

195. *Id.* at 165.

196. Other laws preserving traditional morality have focused on specific areas of social policy (e.g., sodomy, marriage, and the military).

197. Consider here Burke's concern for the safety and rights of sodomites placed in the public pillory. *See* text accompanying notes 127-29.

198. Transcript of Oral Argument at 4, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039).

199. *Id.* at 5.

200. *Id.* at 8. These claims by Justices Kennedy and Ginsburg may have been a rhetorical exaggeration. Certainly there is precedent in American law for broadly fencing out an entire group of people from ordinary political processes. Slavery comes to mind. But that is not the kind of precedent a modern conservative would want to lean upon to defend Amendment 2.

it constitutionally suspect.[201] He concluded, in a distinctly conservative voice: "It is not within our constitutional *tradition* to enact laws of this sort."[202] This evident concern with American history and tradition reveals a healthy conservative instinct that distrusts innovation.

At first, Justice Kennedy's characterization of Amendment 2 as novel might seem unfair or, as one scholar put it, "a bit odd."[203] Amendment 2 was a reaction to a set of developments—the adoption and passage of gay civil rights protections—that are themselves new to the American scene. Thus, on this view, Amendment 2 might be thought of as "restoring the traditional status quo ante by undoing those [gay-civil-rights] laws."[204]

Yet Amendment 2 did considerably more than restore the status-quo-ante gay-civil-rights laws in Colorado. After Amendment 2, the political and legal landscape for gay Coloradans was more hazardous than before passage of local ordinances protecting them from discrimination. Amendment 2 did not simply repeal those ordinances, after all; it forbade their future passage. And a state constitutional amendment meant that, to obtain legislative relief, they could no longer go to their local governing bodies or even to their state legislature, as they could before the civil rights protections were passed. They had to appeal to the entire state. No law had previously classified citizens in that way. The far more modest—and conservative—idea of restoring the status quo ante would have meant simply repealing antidiscrimination protections in the locales in which they had been enacted, with every opportunity to reinstate them locally at a later date. Amendment 2 did not simply turn back the clock; it invented a new time zone and put gays in it.

Second, even if Amendment 2 could be thought to fit within the conventional-sexuality tradition in American law, the principle of political equality should trump it. Unlike the conventional-sexuality tradition, the tradition of equality is written into the nation's founding document itself. A commitment to equality in the face of traditions of discrimination and popular hostility against classes of citizens is a hallmark of the Fourteenth Amendment. For example, it has been used to overcome longstanding traditions of racism and sexism reflected in law.

Further, conservatives have recognized that society should be wary of creating castes out of the various disapproved groups that comprise it.[205] Eliot, for example, recognized that a Christian society must not create castes of people who fundamentally disagree with the governing moral tradition. Christians and non-Christians should not be "classified" according to belief or even according to a rigid code of behavior, he advised.[206] Instead, these dissenters must be allowed to

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201. *Evans*, 517 U.S. at 633 (citing Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928)).

202. *Id.* (emphasis added).

203. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 154 (1999).

204. *Id.*

205. Conservatives are not the only ones to recognize that the law should not create castes. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2433 n.74 (1994) (applying principle to protect groups with visible characteristics, like race or sex, but not to gays); Farber & Sherry, *supra* note 57, at 265-70.

206. ELIOT, *supra* note 136, at 34.

participate and to contribute their talents.[207] By singling out homosexuals as a class, Amendment 2 denominated them as a separate caste of moral dissenters unworthy of legal protection.

Finally, conservatives acknowledge that a traditional practice or body of thought can evolve over time, aided by the advance of positive knowledge.[208] Conservatism cannot be allowed to putrefy and neither can society. The process of reevaluation and testing of existing practices is essential to Burkean conservatism, which values those practices *because* they have been tested and have withstood the test of time. Recall that Burke believed in "a slow but well-sustained progress."[209] Kirk thought that accommodating slow change, even on matters backed by ancient practice and belief, was a matter of self-preservation.[210] To forestall the testing process is to cut the experiential legs out from under Burkean conservatism. "To use coercion to maintain the moral *status quo* at any point in a society's history," observed H.L.A. Hart in a discussion of Burke, "would be artificially to arrest the process which gives social institutions their value."[211]

A slow process of evolution in attitudes appears to be happening right now with respect to gays. A majority of Americans now supports equal rights for gays in housing, employment, and the military.[212] Overall disapproval of homosexuality dropped by nearly twenty percentage points in the space of ten years, from seventy-five percent to fifty-six percent.[213] Fewer than half the states now have laws prohibiting sodomy, and only a handful of those aim exclusively at gay sex.[214] The few prohibitory laws that remain are enforced only sporadically—and almost never against individuals having sex in the privacy of a home.[215]

Conservatives, too, have recognized that traditional attitudes toward homosexuality are retreating in the face of positive knowledge about it. As long ago as 1963, Ernest van den Haag, a prolific conservative writer on law and culture, argued against the

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207. *Id.* at 34-35.

208. *See supra* Part II.A.1.

209. BURKE, *supra* note 99, at 198.

210. KIRK, *supra* note 133, at 8.

211. H.L.A. HART, LAW, LIBERTY, AND MORALITY 75 (1963) (emphasis in original).

212. Carey Goldberg, *Tolerance for Gays Up, Study Says*, HOUS. CHRON., May 31, 1998, at A4, LEXIS, News Library, HCHRN File.

213. *Id.*

214. ESKRIDGE, *supra* note 73, at app. A1 (listing state statutes).

215. An exception to this is the arrest in 1998 of two men having sex in a private residence in Houston. Because Texas is one of the few states with a sodomy law aimed exclusively at gay sex, TEX. PENAL CODE ANN. § 21.06 (Vernon 1994), the men are now appealing their convictions, in part, on the grounds that the law violates the Equal Protection Clause. Lawrence v. Texas, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417, at *1 (Tex. Crim. App. June 8, 2000). Two of three Republican judges on an intermediate appeals court in Houston recently held the state sodomy law unconstitutional under the state's equal rights amendment forbidding sex discrimination. *Id.* The state is appealing the decision to the Texas Court of Criminal Appeals, the highest court in the state handling criminal matters. If it should eventually reach the U.S. Supreme Court, the case appears to present the most compelling circumstances for a reexamination of *Hardwick* in years; therefore, it may eventually test the theory that *Evans* overruled *Hardwick* sub silentio. Whatever the outcome, the rarity of the Houston case proves the rule of nonenforcement.

notion that homosexuality is a sickness, denied that its suppression could be justified by religious objections or natural law, and favored the legalization of homosexual acts.[216]

Van den Haag saw that the advance of positive knowledge about homosexuality was undermining traditional arguments against it. This positive knowledge includes, among other things, the realization that homosexuality is not a disease or a "sickness,"[217] is not addictive,[218] is not infectious,[219] is not created by imitation or habituation,[220] is not associated with a particular personality type,[221] and cannot be suppressed by legal restriction.[222] Moreover, homosexuals are no more likely to force themselves on unwilling partners through "theft, swindle, or rape" than are heterosexuals.[223] In the face of this growing knowledge, van den Haag did not see any useful purpose served by laws that suppress homosexuality.[224]

Van den Haag argued that "[t]he American ethos no more demands restrictions on homosexuality than does the French or Italian ethos," where gay sex is not prohibited by law.[225] In a passage striking for its similarity to Burke's recognition that even long-standing practices and beliefs might require revision and even discarding, van den Haag concluded: "A hundred years ago one may have considered this restriction of [homo]sexual conduct of practical value. It is not today: such prohibition is not effective, and the values to be protected are no longer essential to the ethos as they once were."[226] At the time van den Haag wrote those words, only one state, Illinois, had decriminalized sodomy.[227] Since then, decriminalization has become the majority rule.

Like van den Haag, Judge Richard Posner has underscored the invalidity of numerous empirical claims made about homosexuality, including claims that it is a sickness, that it is chosen or changeable, and that its incidence varies with the degree of tolerance or repression in a legal regime.[228]

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216. Ernest van den Haag, *Notes on Homosexuality and Its Cultural Setting*, *in* THE PROBLEM OF HOMOSEXUALITY IN MODERN SOCIETY 291 (Hendrik M. Ruitenback ed., 1963).

217. *Id.* at 297. Van den Haag was joined in this view by the American Psychological Association in 1973 when it removed homosexual orientation from the list of disorders in the Diagnostic and Statistical Manual. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 185-86 (1997). Van den Haag, who was a practicing psychoanalyst in 1963, recalled an exchange with a colleague who insisted that "all my homosexual patients are quite sick." Van den Haag, *supra* note 216, at 297. Van den Haag memorably replied, "[S]o are all my heterosexual patients." *Id.*

218. Van den Haag, *supra* note 216, at 296.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 300.

223. *Id.* at 295.

224. *Id.* at 291.

225. *Id.* at 300.

226. *Id.*

227. Van den Haag himself noted: "One may observe whether this leads to undesirable effects there. I do not believe so." *Id.* at 302 n.6.

228. POSNER, *supra* note 72, at 297-307. Posner, who has criticized Burkeanism in law as "a mood rather than a method of analysis," would deny that he is a Burkean conservative.

A conservative devoted to Constitutional originalism should not be oblivious to changes in society's understanding of, and knowledge about, social phenomena. Robert Bork recognizes the role played by the advance of positive knowledge in adjusting constitutional principle to changed circumstances.[229] Recall that Bork has defended the result in *Brown v. Board of Education*,[230] even though he believed it was inconsistent with the specific views of the framers of the Fourteenth Amendment, on the grounds that *experience* had shown segregation was inconsistent with the equality principle they had written into the Constitution.[231]

Applying that method to the clash between a tradition defending conventional sexual morality and a tradition of political equality yields two important lessons. First, experience has shown that many justifications once offered for treating homosexuals as a class differently are baseless. As in *Brown*, choosing either route (defending conventional sexual morality or upholding political equality) "would violate one aspect of the original understanding, but there [is] no possibility of avoiding that."[232] Second, it is the equality principle, not conventional sexual morality, that is written into the Constitution. Therefore, in a clash between the two principles the one with textual roots—equality—should prevail. Recall that both these methods—revising longstanding beliefs in light of experience and resorting to a higher principle to trump a lower one—are Burkean.[233]

Thus, even to the extent that Amendment 2 can be said to represent a tradition defending conventional sexual morality against the claims of gay-equality advocates, that tradition is in flux, has lost its empirical support, and is rapidly losing cultural ground—even among conservatives. Though some conservatives may feel a lingering queasiness about homosexuality, the time approaches when they would be well-advised to follow Kirk's advice to accept the changing mores "with good grace, for the sake of a general conciliation."[234]

Evans itself follows the conservative model for slow change.[235] Nothing in *Evans* works a radical, sudden, and therefore unconservative change in the law.[236] The

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RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 443 (1990). However, in his pragmatism and demand for attention to the lessons of actual experience rather than theoretical abstraction, Posner certainly shares the Burkean "mood." *See id.*

229. *See* BORK, *supra* note 13, at 82.

230. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

231. BORK, supra note 13, at 82.

232. *Id.* I do not suggest Bork himself would agree with the result in *Evans* or with the more general point I am making about the constitutional consequences of the advance of positive knowledge about gays.

233. *See supra* Part II.A.3.

234. KIRK, *supra* note 133, at 52.

235. *See, e.g.*, SUNSTEIN, *supra* note 203, at 137-71 (defending the result in *Evans* as a minimalist one allowing for future judicial expansion).

236. This process of slow legal change—in addition to satisfying the conservative penchant for incrementalism—may also serve the long-term interests of gay civil rights causes. Kevin H. Lewis, *Equal Protection After* Romer v. Evans: *Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 222 (arguing that "incremental reform . . . is more palatable to the public and is probably more likely to achieve the advocates' ultimate goal of invalidating bans on same-sex marriage").

opinion did not explicitly decide the level of scrutiny applicable to laws classifying gays.[237] It did not ban all governmental discrimination against gays.[238] It did not overrule *Hardwick*.[239] It did not declare unconstitutional laws against same-sex marriage.[240] It did not overturn the ban on gay military service or the host of other legal disabilities applied to homosexuals.[241] The Court did not take the opportunity to announce a new regime of full legal equality for gays.[242] It struck down only the most extreme and sweeping of laws targeting gays. In short, it left intact much of the anti-gay landscape that preceded it. Of course, the end of some anti-gay epiphenomena may come in future applications of *Evans* but the Court made no attempt to sweep them aside immediately.

Evans, then, can be supported on conservative grounds as the limited defense of a higher principle—political equality—against a questionable expression of a dying tradition that conceives homosexuality as a threat to sexual morality. As such, the opinion preserves tradition even as it overrules the epiphenomenon that was Amendment 2.

B. Evans *and the Conservative Constitution of Political Equality*

The Equal Protection Clause embodies a constitutional principle that operates as a critique of existing and past practices and traditions.[243] It was designed, at a minimum, to overturn a regime of racism that had been expressed most vividly in the institution of slavery. It has since been read to challenge traditions of inequality for women, aliens, and others. Therefore, it establishes a constitutional norm that, across a broad spectrum of social issues, undermines the status quo and even longstanding practices. In that sense, at first blush, it could be viewed as the ultimate rebuke to conservatism.

Is the Equal Protection Clause unconservative? Rather than seeing the equality principle as standing outside American tradition looking in, we could see it as inside that tradition commenting on what it finds there. Conservatism in America, after all, is a philosophy that accounts for and respects America's own particular heritage.

The political equality principle is an undeniable, venerable, and deeply rooted

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237. Romer v. Evans, 517 U.S. 620, 631-35 (1986).

238. *Id.*

239. *Id.* The dissent criticized the majority for not even mentioning *Hardwick*. *Id.* at 640 (Scalia, J., dissenting).

240. *Id.* It would be an understatement to say that such a sweeping ruling would provoke a fierce reaction from the public, the courts, and the state and federal legislatures, likely provoking a constitutional amendment to ban same-sex marriages. Sunstein, *supra* note 98, at 25-27 (1994) (arguing that a sudden constitutional affirmation of same-sex marriage would lead to a constitutional crisis). Richard Posner has made a similar objection, on pragmatic grounds, to such a decision, "Were the Court to recognize the right to same-sex marriage today, it would be taking on almost the whole nation." RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 251 (1999).

241. *Evans*, 517 U.S. at 631-35.

242. *Id.*

243. Sunstein, *supra* note 98, at 3.

aspect of that heritage. The Equal Protection Clause itself and the other post-Civil War Amendments date back more than 130 years. Before that, the nation's most important statesmen, thinkers, and founders eloquently defended the principle of political equality even if they were not always willing to follow it in practice.

What we have, by constitutional design, is tradition at war with tradition. This is not as paradoxical as it might seem at first blush. To begin, there is no necessary conflict between a Due Process Clause that protects historic rights from innovation, on the one hand, and an Equal Protection Clause that ensures that those rights are spread around equally, on the other. There will, of course, be tension between the equality principle (as even conservatives understand it) and some particular practices. However, to the extent conservatives see the equality principle as sustaining the entire constitutional enterprise through periods of change—by, for example, shoring up the liberty of all and making the political community possible—this tension is healthy. It ultimately preserves the whole design in times of instability.

Thus, America's constitutional tradition incorporates a principle—equality under the law—that itself operates as a critique of some traditional practices. It embodies a constitutional dialogue that protects democratic processes and at the same time reins in those processes, especially as they work to erode the fundamental principle of equality itself. No conservative in America deserving of the title could fail to appreciate the whole of American tradition, including this perhaps unusual but fundamental part of it. A conservative approach to eqnal protection, then, is to see it as a part of the national framework, appreciate its critique of some existing practices, and apply that critique in an incremental fashion and pace that causes minimal disruption to the whole.[244]

Although Burke would have been unfamiliar with the specifics of the American equality principle as it has developed over the past two centuries, and especially since the Fourteenth Amendment, he could surely have appreciated the application of it as the defense of a higher principle against existing practices. In America, political equality is an "ancient opinion" or "old prejudice" that a Burkean conservative does not lightly toss to the side.[245]

Certainly full legal equality for gays—which exists nowhere in America thanks to a patchwork of sodomy laws, the military ban, the gay-marriage prohibitions, and a host of other legal rules—would work a dramatic change on the face of American law at the local, state, and national levels. But in some sense, it would do nothing more than give life and meaning to a venerated American tradition: the idea of political equality. That idea must apply even to "the obnoxious and the suspected"[246] people, like gays, who are nevertheless part of the whole.

Some conservative legal scholars, like Bork, have made room for the adaptation of constitutional principle to intervening experience and understanding. *Evans* falls squarely in this mold. Since it does not require instant legal equality for gays—a mandate that would be very controversial and unpopular to say the least—*Evans* does not take the path some conservatives thought the Court took in the Warren Court era

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244. *Cf.* ELIOT, *supra* note 136, at 92 (stating that reform must "avoid, in putting one thing right, putting something else wrong").

245. *See supra* Part II.C.

246. Letter to the Sheriffs, *supra* note 108, at 206.

by forcing dramatic social change on an unwilling populace.[247]

Rather, by preserving the power of local governments in Colorado and other states to adopt gay civil-rights laws as they see fit, *Evans* protects the process of consensus building that is so important to deliberative democracy.[248] One criticism of *Roe v. Wade*,[249] the most detested Supreme Court opinion for many judicial conservatives, is that it foreclosed the development of a deliberated consensus on abortion.[250] It was a top-down command foreclosing further political deliberation.[251] Similarly, Amendment 2 attempted to end the development of a political consensus at the local level in Colorado.[252] Like the result in *Roe v. Wade*, Amendment 2 was an order to shut down more localized democratic deliberation.[253]

Homosexual equality is, to be sure, an area of consensus building not specifically envisioned by any framer of the 1787 Constitution or the Fourteenth Amendment. But that fact alone should not trouble a conservative who believes we have a legitimate Burkean interest in applying constitutional principle to changed times.

Evans permits the evolution of consensus in the direction of political equality for gays, a process that Amendment 2 attempted to foreclose in Colorado. By making gays unequal to other citizens, by permitting the law to "see particular men with a malignant eye,"[254] Amendment 2 eroded this principle.

Recall that Burke believed the absence of equality would dissolve the community itself.[255] For a conservative, no person is by nature the ruler of another. By singling gays out as a class, and then declaring that that class should have inferior access to the usual processes for obtaining legal relief, Amendment 2 made every heterosexual citizen of Colorado the ruler of every homosexual citizen. Like a decision of Parliament to withdraw habeas corpus protection from only those citizens who happened to be out of the country at a particular time, Amendment 2 denied the possibility of true political community. This, for a conservative embracing the concept of equal political participation, the state should not be allowed to do.

C. Evans *and the Madisonian Dilemma*

Evans can also be defended on conservative grounds as answering the central concerns of the Framers regarding the abuse of powers by a majority faction against

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247. *Cf.* BORK, *supra* note 13, at 129-30; NASH, *supra* note 145, at 214-15.

248. NASH, *supra* note 145, at 213-15.

249. 410 U.S. 113 (1973).

250. *Cf.* NASH, *supra* note 145, at 215 ("[W]hile nine judges can draw up a fixed constitutional provision *without* the authority of a hard constitutional consensus, their decision cannot be reversed *except* on the authority of a hard constitutional consensus." (emphasis in original)).

251. Some such top-down commands are surely justified by the Constitution, which protects some rights against even deliberative democracy.

252. States are generally free, of course, to require that certain decisions be made at the state instead of at the local level. But under *Evans* they may not do so in a way that violates the principle of equal protection.

253. I am indebted to David McGowan for drawing my attention to this similarity.

254. Letter to the Sheriffs, *supra* note 108, at 191.

255. *See supra* text accompanying notes 155-57.

a minority. To Madison, it did not matter whether the faction animated by hostility to another group constituted "a majority or [a] minority."[256] The dilemma for the new republic created by the 1787 Constitution was how to deal effectively with these factions while at the same time retaining the practice of self-government.[257] One conservative scholar, commenting on Amendment 2, concluded: "Such class legislation was of paramount concern to the Constitution's framers, who worried about the power of 'factions' to manipulate the coercive power of government for their own ends."[258]

Madison defined a faction as a group "of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens."[259] On one level, this definition might be thought to encompass virtually all democratic decisionmaking, since every decision is necessarily the product of a legislative (or voting) majority motivated sufficiently to act in some fashion. Often, the democratic result will be detrimental to the interests of an identifiable group within the polity.

But ordinary democratic decisionmaking cannot have been Madison's principal concern since the Framers wanted to make self-government possible and lasting.[260] Rather, Madison focused on the idea that the faction is driven by a "passion," or an "impulse," to such an extent that it becomes "overbearing" and seeks to enforce "schemes of oppression."[261] Madison was concerned about nondeliberative decisionmaking. That is, he was concerned with decisions that result from a pure desire to oppress, an unreasoned backlash against a group, produced not by any studied weighing of alternatives but by demagoguery and invective.

Evans confronts nothing more or less than the enactment of an aroused Madisonian faction of the majority. Justice Kennedy's opinion paints Amendment 2 as being "inexplicable by anything but animus toward the class it affects."[262] Justice Kennedy explained that Amendment 2 "[was] born of animosity toward [homosexuals]."[263] It was enacted with the purpose of making gays "unequal to everyone else."[264] Whether or not Justice Kennedy is correct about the purpose of Amendment 2—though evidence from the campaign that preceded its passage supports his conclusion[265]—his concern is a traditional Madisonian one about a faction of the majority run amok.[266] Amendment 2, Justice Kennedy seems to say, has no purpose other than to serve as

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256. THE FEDERALIST NO. 10, *supra* note 167, at 17.

257. *Id.* at 16 ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.").

258. Clint Bolick, Editorial, *Beyond Gay Rights: 'Romer' Court Struck a Blow for Individuals Against Government*, L.A. DAILY J., June 4, 1996, at I6.

259. THE FEDERALIST NO. 10, *supra* note 167, at 17.

260. *Id.* at 16.

261. *Id.* at 17, 20.

262. Romer v. Evans, 517 U.S. 620, 632 (1996).

263. *Id.* at 634.

264. *Id.* at 635.

265. *See* Jackson, *supra* note 24, at 459-60.

266. THE FEDERALIST NO. 10, *supra* note 167, at 19-20.

a constitutionally impermissible "scheme[] of oppression."[267]

For Madison, the danger that such a scheme could be enacted was compounded where it occurred through direct, rather than representative, democracy.[268] Amendment 2 was, of course, an example of direct democracy at work. This is not to argue that democracy by referendum is unconstitutional—it certainly is not. Rather, it suggests that popular plebiscite is especially likely to reflect aroused factional passions.[269]

Since direct democracy of the sort represented by Amendment 2 was not available in Burke's England, it is not possible to say with certainty how he would have reacted to such a process. But Burke's view of governance as deliberative and driven by reason applied by leaders exercising independent judgment, rather than by "different and hostile interests,"[270] suggests that he would not have viewed it as a proper substitute for representative government.

Justice Kennedy's opinion also echoes Burke's concern that a democratic majority is "capable of exercising the most cruel oppressions upon the minority."[271] Burke described the minority so besieged—in stark and evocative terms—as being "deprived of all external consolation" and "deserted by mankind, overpowered by a conspiracy of their whole species."[272] In other words, Burke saw that a democracy might attempt to isolate an unpopular minority.

A similar concern about the isolating effect of Amendment 2 on gays rings throughout Justice Kennedy's opinion. "Homosexuals, by state decree," he wrote, "are put in a solitary class with respect to transactions and relations in both the private and governmental spheres."[273] He concluded that, by passing Amendment 2, Colorado made the gay community "a stranger to its laws."[274] Justice Kennedy's opinion thus reflects the Burkean conservative's concern that democratic action not be allowed to isolate and target a group of citizens.

The Framers' understanding sheds light on our constitutional design, particularly as it relates to the principle of equal access to the political process. This does not, however, call into question every state action or other legal barrier to change requiring a supermajority to be revoked. It does call into question those state actions that specifically identify groups of people for the purpose of burdening their participation in the political process.

Thus, an amendment outlawing gambling does not violate equal protection for gamblers because the focus of the hypothetical amendment is the activity prohibited—not the members defined by the activity or those with a "gambler's orientation."

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267. *Id.* at 20.

268. *Id.* ("[A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction . . . . Hence it is that such democracies have ever been spectacles of turbulence and contention . . . ." (footnote omitted)).

269. *Id.* at 18.

270. Letter to the Sheriffs, *supra* note 108, at 187.

271. BURKE, *supra* note 99, at 144.

272. *Id.*

273. Romer v. Evans, 517 U.S. 620, 627 (1996).

274. *Id.* at 635.

On the other hand, an amendment that prohibited gamblers qua gamblers from seeking protection from discrimination might be suspect under the *Evans* analysis. It does not matter that Amendment 2 did not use the words "homosexuals may not seek protection as homosexuals"; the effect of Amendment 2 was to do exactly that. As the Court suggested in *Evans*, Amendment 2 was a status-based, not a conduct-based, enactment.[275]

Evans leaves open the possibility that a legislative action to strip all groups of legal protections across the board would be constitutional, while a measure to strip a single group of all legal protection from discrimination is not. Some conservative commentators have called this potential result "anomalous" and "counterintuitive."[276] It is nothing of the kind. The equal protection clause means that what the polity is ready to apply to one group of citizens it must apply to all citizens. The requirement that a legislative enactment must have general application—including application to the majority itself—is a structural protection for political minorities built into the Fourteenth Amendment.

Burke would certainly have understood this aspect of the American equal protection tradition. Recall that Burke objected most vehemently to Parliament's partial suspension of the Habeas Corpus Act because it operated only against some citizens, those who had been out of the realm for a prescribed time, rather than against all.[277] Presaging the rationale for the structural protections of minorities built into the Fourteenth Amendment, Burke wrote:

> [I]t is never the faction of the predominant power that is in danger: for no tyranny chastises its own instruments. It is the obnoxious and suspected who want the protection of the law; and there is nothing to bridle the partial violence of state factions but this—"that, whenever an act is made for a cessation of law and justice, the whole people should be universally subjected to the same suspension of their franchises."[278]

The problem, as Burke saw it, was that under the selective provisions of the act "the lawful magistrate may see particular men with a malignant eye."[279]

A proposal to strip everyone of statutory legal protection from discrimination—a proposal whose passage would survive my reading of *Evans*—would probably be unpopular politically precisely because it would mean that members of the majority would themselves be stripped of protection. This they are unlikely to do. However, stripping *someone else* of legal protection may appeal to them just as "schemes of oppression"[280] appealed to Madison's hypothetical faction of the majority and "partial violence" appealed to Burke's "faction of the predominant power."[281]

In short, America's political and legal tradition, as conservative authors have pointed out, includes the protection of individual liberty and equal application of the

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275. *Id.* at 627, 633.
276. Dailey & Farley, *supra* note 5, at 258-59.
277. *See supra* text accompanying notes 155-57.
278. Letter to the Sheriffs, *supra* note 108, at 191 (emphasis in original).
279. *Id.*
280. THE FEDERALIST NO. 10, *supra* note 167, at 20.
281. Letter to the Sheriffs, *supra* note 108, at 191.

laws. This country, at its best, has welcomed those who do not conform to others' judgments about what they should be.

Burke understood this. Explaining Americans' fierce love of liberty to Parliament, Burke noted that many colonists were dissenters from the established religions in their homelands who sought refuge in the New World. The colonists from England were largely Protestant, which, according to Burke, "even the most cold and passive, is a sort of dissent."[282] Further, those who arrived in America from outside England were largely "dissenters from the [religious] establishments of their several countries."[283]

Even to an Eighteenth Century observer across the Atlantic, then, it was obvious what sort of legacy America was building: one in which people with widely different views about the most fundamental parts of life were to live in one country. The legal expression of that legacy of heterodoxy and tolerance of heterodoxy has been, among other things, our commitment to the equal protection of the laws.

The most shameful moments in our constitutional history have been those times when we abandoned that fundamental commitment to satisfy the felt needs of momentary passion, as when we permitted states to segregate the races,[284] or forced Jehovah's Witnesses to salute the flag,[285] or rounded up Japanese Americans and put them in internment camps,[286] or prohibited interracial marriage,[287] or excluded women from the practice of law,[288] or prevented the children of illegal aliens from attending public schools,[289] or put gay men and women into a solitary class and made that class a "stranger to our laws."[290] These epiphenomena should not survive a principled conservative critique.

CONCLUSION

"One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among its citizens.'"[291]

I remember very clearly the first time I read those words, the opening sentence of *Romer v. Evans*. It was late May 1996, and I was sitting in my office, with the door

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282. Speech on Conciliation, *supra* note 119, at 160.

283. *Id.*

284. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding state-imposed public racial segregation), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

285. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (upholding flag-salute requirement), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

286. Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of Japanese Americans).

287. Pace v. Alabama, 106 U.S. 583 (1883) (upholding antimiscegenation statute), *overruled in part by* McLaughlin v. Florida, 379 U.S. 184 (1964).

288. Bradwell v. Illinois, 83 U.S. 130 (1 Wall.) (1873) (upholding state law excluding women from practice of law).

289. Plyler v. Doe, 457 U.S. 202, 205 (1982) (striking down a state law that denied "state funds for the education of children who were not 'legally admitted' to the United States").

290. Romer v. Evans, 517 U.S. 620, 635 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

291. *Id.* at 620.

closed, alone. I had just been informed that the gay civil rights group of which I was then president, the Log Cabin Republicans of Texas, would not be allowed to have a six-foot wide information booth at the state GOP convention to be held the next month. It was the type of booth that every group from pro-choice activists to salsa vendors was routinely allowed to purchase in a large exhibit area right outside the convention hall. The reason for the denial, according to the executive director of the state party, was that "sodomy is illegal in Texas." I knew what she meant. To her, we were disqualified because we were gay and only dared to think we should have an equal place in the country. Before *Evans*, it seemed to me that the weight of the law was on her side. I was, by virtue of being gay, outside the law. I was not a citizen. The United States was not my country.

When I saw, in this single sentence, the Court link gays to a national tradition of bringing outcast people in from the cold, I knew something profound had changed, if not entirely in the law, then at least in our hearts. Two months later, when I was scheduled to speak in defense of the decision before the Houston chapter of the Federalist Society, some members threatened to resign in protest. Yet the local leaders of the group and the national executive director refused to cancel my appearance. Two federal judges, both conservative Republican appointees, had a hand in introducing me at the meeting. Change comes in small ways and in slim moments.

The Supreme Court's decision in *Evans* is consistent with conservatives' preference for slow, incremental change in society. It is consistent with the nation's foundational tradition of political equality for all citizens. And it answers the concerns expressed by the Framers that the polity not be ruled by aroused factions bent on employing schemes of oppression. All three of these justifications for the decision are consistent with traditionalist conservatism.

Nevertheless, *Evans* is, and for some time to come likely will continue to be, an unpopular decision among political and judicial conservatives. I suspect that much of conservatives' dismay with *Evans* has less to do with principled constitutional jurisprudence than it does with conservatives' general discomfort with gays. *Evans* is seen by many conservatives as the first step down a long road of changing cherished and long-standing beliefs about the legal and social standing of gays in American society. But, in a sense, *Evans* is no different than the similar first, tentative steps taken by courts and by political institutions on behalf of women,[292] racial minorities,[293] and other disfavored groups.[294]

Over time, conservatives will make their peace with the idea of equality for gays, just as conservatives have slowly made peace with the idea of equality for African-Americans and women. No less a conservative icon than Barry Goldwater, to many the father of the modern conservative political movement in the United States, accepted gay equality before his death.[295] "'It's time America realized that there was

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292. Reed v. Reed, 404 U.S. 71 (1971) (first case in which the Supreme Court invalidated a law because it discriminated based on sex).

293. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

294. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

295. Cragg Hines, *Barry Goldwater (1909-1998), Longtime Senator, 'An American Original' Dies at Age 89*, HOUS. CHRON., May 30, 1998, LEXIS, News Library, HCHRN File.

no gay exemption in the right to 'life, liberty and the pursuit of happiness' in the Declaration of Independence,'" he said in defense of a job-discrimination bill similar to the ones struck down by Amendment 2.[296] "'Job discrimination against gays,'" he added, "'is contrary to these founding principles.'"[297] On allowing gays to serve openly in the military, he was just as unequivocal: "'You don't need to be straight to fight and die for your country . . . . You just need to shoot straight.'"[298]

Evans has aided the process of accommodating conservatives to the idea of gay equality by linking that idea to the nation's most cherished traditions. The Court viewed Amendment 2 as just another case where, aroused by a momentary passion, we temporarily abandoned our constitutional commitment to political equality. Read again Justice Kennedy's words: "It is not within our constitutional tradition to enact laws of this sort."[299] Whatever else may be said about it, that is a profoundly conservative sentiment. The real radicals, the Court seems to be saying, were the ones who would discard our commitment to political equality where gay citizens are concerned. In this sense, *Romer v. Evans* was a revolution prevented, not achieved. It was a conservative triumph.

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296. *Id.*

297. *Id.*

298. E.J. Montini, *Outlook: Spare Us the Eulogies by Phony Friends*, HOUS. CHRON., May 31, 1998, LEXIS, News Library, HCHRN File.

299. Romer v. Evans, 517 U.S. 620, 633 (1996).