

COLORADO'S AMENDMENT 2 AND HOMOSEXUALS' RIGHT TO EQUAL PROTECTION OF THE LAW

On November 3, 1992, Colorado voters approved Amendment 2 ("Amendment 2" or "the amendment"), a referendum amending the state constitution.¹ This amendment rescinds state and local laws prohibiting discrimination on the basis of sexual orientation and prevents the enactment of any further legal protections on this basis.² It repeals Colorado laws and policies, as well as local laws in Denver, Boulder and Aspen, that prohibit discrimination against homosexuals.³ It also makes it impossible for Colorado citizens to seek legislation, executive policies or judicial determinations protecting homosexuals from discrimination in any state or local forum, regardless of the merits of, or need for, such legislation, policies or determinations.⁴

On January 15, 1993, Judge Bayless, of the Colorado District Court, issued a preliminary injunction preventing the addition of Amendment 2 to the Colorado Constitution.⁵ On July 19, 1993, the Supreme

¹ Louis Sahagyn & Ann Rovin, *Colorado's Gay Rights Ban Stayed*, L.A. TIMES, Jan. 15, 1993, at A4. Amendment 2 was passed by a fifty-three percent vote. *Id.*

² *Id.* Amendment 2 to Article II of the Colorado Constitution provides:

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

COLO. CONST. art. II (as amended by Amendment 2).

³ See *Evans v. Romer*, No. 92-CV-7223, 1993 WL 19678, at *5 (Colo. Dist. Ct. Jan. 15, 1993) (Amendment 2 repeals the Colorado Governor's Executive Order of Dec. 10, 1990, prohibiting discrimination based on sexual orientation, Colorado insurance law banning discrimination in issuing policies on the basis of sexual orientation (COLO. REV. STAT. ANN. § 10-3-1104(1)(f) (VIII) (1992)) and laws in three cities), *aff'd*, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 1993 U.S. LEXIS 6909 (U.S. Nov. 1, 1993) (No. 93-453); Laurie Goodstein, *New York Joins Boycott on Colorado Gay Law*, WASH. POST, Dec. 9, 1992, at A3. (Amendment 2 repeals laws in Denver, Boulder and Aspen). For simplicity's sake, this Note will use the terms homosexual, homosexuality and gay to refer to homosexual men, lesbians and bisexual men and women.

⁴ See *supra* note 2 for the text of Amendment 2.

⁵ *Evans*, 1993 WL 19678, at *12 (granting preliminary injunction). Judge Bayless issued the injunction finding that it was urgently needed, the challengers of Amendment 2 had a reasonable chance of winning, there was a danger of real, immediate and irreparable injury, there was no other plain, speedy and adequate remedy, the injunction would not disserve the public interest, the balance of equities favored the injunction and the injunction would preserve the status quo. *Id.* at *3, *12.

Court of Colorado affirmed this preliminary injunction and on November 1, 1993, the United States Supreme Court denied Colorado's petition for certiorari, requesting a review of this preliminary order.⁶ On December 14, 1993, the Colorado District Court found the amendment unconstitutional and imposed a permanent injunction.⁷ Colorado's Attorney General has announced that the state will appeal the ruling to the Colorado Supreme Court, but said that "the court has already indicated that it would almost certainly strike down" Amendment 2.⁸

The outcome of this challenge, which will likely be resolved by the United States Supreme Court, will have national implications.⁹ If the courts uphold Amendment 2, many similar measures will likely appear on state ballots across the country.¹⁰ Indeed, while Colorado voters were deciding the fate of Amendment 2, voters in Oregon considered a much broader state constitutional amendment limiting homosexual rights.¹¹ While the Oregon measure was defeated by a fifty-six percent

⁶ *Evans v. Romer*, 854 P.2d 1270, 1272, 1286 (Colo. 1993) (holding that Amendment 2, "to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the U.S. Constitution"), *cert. denied*, 1993 U.S. Lexis 6909 (U.S. Nov. 1, 1993) (No. 93-453).

⁷ *Evans*, 1993 WL 518586, at *12.

⁸ Dirk Johnson, *Violation Found on Rights to Equal Protection*, N.Y. TIMES, Dec. 15, 1993, at A22.

⁹ *Id.* (Gene Nichol, Dean of the University of Colorado Law School says that "[f]or all practical purposes, it's now going to be up to the United States Supreme Court" to decide the fate of Amendment 2); David Tuller, *New Ballot Measure Proposed For Gay Rights in Colorado*, S.F. CHRON., Feb. 26, 1993, at A4 (*Evans v. Romer* is expected to reach the Supreme Court); *Supreme Court Refuses To Intervene In Colorado Battle Over Gay Rights*, 1993 D.L.R. (BNA) 210, at D3 (Nov. 2, 1993) (Colorado's Deputy Attorney General says United States Supreme Court may decide not to hear the case until 1995). Amendment 2 may also be attacked at the ballot box. Tuller, *supra* at A4. A Colorado lawyer has proposed a ballot initiative which would overturn Amendment 2 and replace it with an amendment banning discrimination against homosexuals in employment, housing and public accommodations, but also banning "special rights" for gays, such as affirmative action programs. *Id.*

¹⁰ Justin Blum, *Anti-Gay Rights Vote Has Unleashed Harassment, Boycott*, Gannett News Serv., Nov. 21, 1992, available in LEXIS, Nexis Library, OMNI File.

¹¹ *Measure No. 9*, in VOTERS' PAMPHLET, STATE OF OREGON GENERAL ELECTION NOVEMBER 3, 1992, 93, 93 (1992). Measure No. 9, proposed by initiative at the Oregon general election, would amend the Oregon Constitution by creating a new section providing:

(1) This state shall not recognize any categorical provision such as "sexual orientation," "sexual preference," and similar phrases that includes homosexuality, pedophilia, sadism or masochism. Quotas, minority status, affirmative action, or any similar concepts, shall not apply to these forms of conduct, nor shall government promote these behaviors.

(2) State, regional and local governments and their properties and monies shall not be used to promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism.

(3) State, regional and local governments and their departments, agencies and other entities, including specifically the State Department of Higher Education and

vote, its sponsors, heartened by the success of Amendment 2, have announced plans to put a toned-down version on the ballot in 1994.¹² To date, groups in over a dozen states are planning ballot measures to pass amendments similar to Colorado's Amendment 2.¹³ Additionally, the outcome of this challenge will also influence other gay rights issues across the country.¹⁴

This Note argues that Amendment 2 violates the United States Constitution's Fourteenth Amendment guarantee of equal protection of the laws.¹⁵ Section I sets out modern equal protection law, discussing the different levels of judicial review, the requirement of state action and the treatment of acts that limit political power.¹⁶ Section II discusses equal protection treatment of homosexual classifications.¹⁷ Section III discusses the nature and causes of homosexuality and society's treatment of homosexuals.¹⁸ Section IV argues that laws that use homosexuality as a classification deserve heightened judicial scrutiny.¹⁹ Finally, section V argues that Amendment 2 is discriminatory state action that violates the Equal Protection Clause.²⁰

I. MODERN EQUAL PROTECTION LAW

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that "[n]o State shall . . . deny

the public schools, shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.

(4) It shall be considered that it is the intent of the people in enacting this section that if any part thereof is held unconstitutional, the remaining parts shall be held in force.

Id.

¹² Valerie Richardson, *Anti-Gay Forces in Oregon Undeterred After Defeat*, WASH. TIMES, Jan. 4, 1993, at A6.

¹³ Johnson, *supra* note 8, at A21 ("[a]dvocates for gay rights say efforts are under way in 14 states to put a measure similar to Colorado's on the ballot this year"); Brad Knickerbocker, *Gay Rights May Be Social Issue of 1990s*, CHRIS. SCI. MON., Feb. 11, 1993, at 1 (fund-raising and signature-gathering activities taking place in California, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Missouri, Montana, Ohio, Oregon and Washington); see also Lisa Keen, *Referendums and Rights: Across the Country, Battles Over Protection for Gays and Lesbians*, WASH. POST, Oct. 31, 1993, at C3 (referendums will be on ballots in eight states in 1994).

¹⁴ See Sue Anne Pressley, *Hearing Opens On Challenge To Colorado Gay Rights Ban; Trial May Become Forum On Status Of U.S. Homosexuals*, WASH. POST, Oct. 13, 1993, at A2.

¹⁵ U.S. CONST. amend. XIV, § 1. Amendment 2 may also violate other constitutional provisions that are beyond the scope of this Note.

¹⁶ See *infra* notes 21-165 and accompanying text.

¹⁷ See *infra* notes 166-208 and accompanying text.

¹⁸ See *infra* notes 209-98 and accompanying text.

¹⁹ See *infra* notes 299-344 and accompanying text.

²⁰ See *infra* notes 345-66 and accompanying text.

to any person within its jurisdiction the equal protection of the laws."²¹ This clause does not deny states the ability to classify a group of people and treat them differently from the rest of the population.²² Rather, it denies states the power to accord differential treatment on the basis of classifications that are unrelated to the promotion of a legitimate state interest.²³ To be valid, a classification must be reasonable and must have a fair and substantial relation to the state's objective, so that persons similarly situated are treated alike.²⁴ In determining whether an action violates the Equal Protection Clause, courts apply different levels of scrutiny depending upon the nature of the action involved and the classification it draws.²⁵ Equal protection analysis thus involves two steps.²⁶ First, the court must determine whether the action deserves heightened judicial scrutiny.²⁷ Second, the court must determine whether, under the applicable standard of review, the law deprives a class of persons of equal protection of the law.²⁸ This section discusses modern equal protection law. Part A reviews the basic levels of judicial scrutiny used in equal protection cases.²⁹ Part B discusses the types of discriminatory behavior that are considered state action and therefore fall within the scope of the Equal Protection Clause.³⁰ Finally, part C analyzes equal protection law where state action decreases a class' political power.³¹

A. *The Standards of Equal Protection Review*

The modern, multi-tiered approach to equal protection review, under which courts apply different levels of judicial scrutiny to different types of actions, was first suggested by the United States Supreme

²¹ U.S. CONST. amend. XIV, § 1. Equal protection claims brought under the Fifth Amendment are treated identically to those brought under the Fourteenth Amendment and will therefore not be distinguished in this Note. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (quoting *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975)). As this Note addresses a state measure, the Fourteenth Amendment Equal Protection Clause provides the appropriate remedy.

²² *Reed v. Reed*, 404 U.S. 71, 75 (1971).

²³ *Id.* at 75-76 (holding that a state could not give men preference over women in choosing an estate's administrator).

²⁴ *Id.* at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

²⁵ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

²⁶ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (attacking Texas system of financing public education).

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *infra* notes 32-89 and accompanying text.

³⁰ See *infra* notes 90-128 and accompanying text.

³¹ See *infra* notes 129-65 and accompanying text.

Court in a footnote in the 1938 case of *United States v. Carolene Products*.³² In this case, the Court held that a law that prohibited the interstate shipment of filled milk did not violate equal protection.³³ The Court reasoned that legislation affecting commercial transactions is assumed to be constitutional unless it has no rational basis.³⁴ In footnote four of its opinion, the Court suggested that some legislation may be subject to a greater degree of judicial review.³⁵ Although this footnote was only dictum mentioning the possibility of more rigorous judicial review, it has become the paradigm for heightened equal protection scrutiny of laws involving certain groups and fundamental rights.³⁶

Footnote four suggested two situations where heightened judicial scrutiny may be appropriate.³⁷ It implied that state action which amounts to "prejudice against discrete and insular minorities," such as racial, religious or national minorities, may demand more searching judicial inquiry.³⁸ It also implied that legislation which interferes with the political process may be subject to heightened scrutiny.³⁹ For example, the Court suggested that interferences with the right to vote, disseminate information or organize for political purposes might call for heightened judicial review.⁴⁰ In suggesting this, the Court reasoned that such interference must be closely scrutinized, because it can hinder the political process ordinarily utilized to effectuate the repeal of undesirable legislation.⁴¹ Footnote four led to the development of a two-tiered system of equal protection review, composed of a "rational basis" test for economic and social regulations and a "strict scrutiny" test for "suspect" classifications and limitations of certain fundamental rights.⁴² A third, intermediate standard of review was eventually added as another tier.⁴³

³² 304 U.S. 144, 152, n.4 (1938); see also *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 214 (Leonard W. Levy et al. eds., 1986).

³³ *Carolene Prod.*, 304 U.S. at 148.

³⁴ *Id.* at 152.

³⁵ See *id.* at 152 n.4.

³⁶ See *ENCYCLOPEDIA*, *supra* note 32, at 214-15.

³⁷ See *Carolene Prod.*, 304 U.S. at 152 n.4.

³⁸ *Id.* at 153 n.4.

³⁹ *Id.* at 152 n.4; see also *ENCYCLOPEDIA*, *supra* note 32, at 214.

⁴⁰ *Carolene Prod.*, 304 U.S. at 152 n.4; see also *ENCYCLOPEDIA*, *supra* note 32, at 214.

⁴¹ *Carolene Prod.*, 304 U.S. at 152 n.4; see also *ENCYCLOPEDIA*, *supra* note 32, at 214.

⁴² See *ENCYCLOPEDIA*, *supra* note 32, at 214-15.

⁴³ *Id.* at 215. In a dissenting opinion to the 1970 case of *Dandridge v. Williams*, Justice Thurgood Marshall suggested replacing this multi-tiered approach with a "sliding-scale" approach. 397 U.S. 471, 520-21 (1970). Under this approach, instead of pigeon-holing a classification into a level of scrutiny, courts would weigh the character of the classification, the relative

Most equal protection challenges fall within the rational basis test, wherein courts will presume an action to be valid and sustain it if the classification it draws is rationally related to a legitimate state interest.⁴⁴ This interest can be the stated purpose of the act, but need not be.⁴⁵ In fact, courts have even provided hypothetical interests to justify the disparate treatment when the state has not given any.⁴⁶ Almost every case that has used this standard has upheld the challenged action.⁴⁷ The United States Supreme Court, however, has struck down laws under this standard when they are based on illegitimate objectives, such as "a bare desire to harm a politically unpopular group."⁴⁸

For example, in 1985, in *City of Cleburne v. Cleburne Living Center*, the United States Supreme Court held it unconstitutional for a city to require a special permit for a group home for the mentally retarded but not for similar housing units for the non-retarded.⁴⁹ The Court applied the rational basis standard of review, noting that classifications that are based on mental retardation may be justifiable due to the reduced abilities and special needs of the members of this class.⁵⁰ The Court stated that the only basis for the classification was prejudice against retarded persons.⁵¹ The Court found this did not justify the state's law, as negative attitudes and fear are not permissible bases for treating one class of persons differently from others.⁵² Therefore, the Court held that because there was no legitimate state purpose, the law violated the Equal Protection Clause.⁵³

importance to individuals in the class of the governmental benefits they are denied and the asserted state interest in supporting the classification. *Id.* This approach has not been adopted.

⁴⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

⁴⁵ See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178-79 (1980) ("[w]here . . . there are plausible reasons for Congress' action, our inquiry is at an end"); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

⁴⁶ See, e.g., *Fritz*, 449 U.S. at 178-79 (upholding retirement system's different treatment of different classes on the basis of a hypothetical state purpose); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 490 (1955) (upholding statute making it unlawful for anyone other than a licensed optamologist or optometrist to fit eyeglass lenses on the basis of hypothetical state purposes).

⁴⁷ See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 636, 643 (1986) (upholding distinction between households of closely related persons and those composed of others for food stamp eligibility); *Bowen v. Owens*, 476 U.S. 340, 348 (1986) (upholding provision of Social Security Act awarding payment of survivor's benefits to a widow's spouse who remained single after age 60, but not a similarly situated divorced widowed spouse). This standard of review has been so deferential that scholars have criticized it as being a mere "rubber-stamp review." Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 808 (1984).

⁴⁸ *Cleburne*, 473 U.S. at 446-47 (quoting *Moreno*, 413 U.S. at 534).

⁴⁹ *Id.* at 450.

⁵⁰ *Id.* at 442.

⁵¹ *Id.* at 450.

⁵² *Id.* at 448.

⁵³ *Cleburne*, 473 U.S. at 450.

Similarly, in 1973, in *United States Department of Agriculture v. Moreno*, the United States Supreme Court held that a law that had the intent and effect of discriminating against hippies violated the Equal Protection Clause.⁵⁴ *Moreno* addressed a provision of the Food Stamp Act of 1964, which excluded from participation in the food stamp program any household containing unrelated persons.⁵⁵ The Court applied the rational basis equal protection analysis, stating that to be valid, the classification must rationally relate to a legitimate governmental purpose.⁵⁶ The Court reasoned that the classification was not related to the stated purpose of the act, minimizing fraud, or to any other legitimate governmental goal.⁵⁷ According to the Court, the purpose of the act was to keep hippies and "hippie communities" out of the food stamp program.⁵⁸ It reasoned that this objective could not support the law, because the desire to harm an unpopular group is not a legitimate governmental purpose.⁵⁹ Hence, the Court concluded that there was no rational basis for the classification, and it therefore violated the Equal Protection Clause.⁶⁰

Courts will apply the more rigorous strict scrutiny standard of review when the classification in question is considered "suspect."⁶¹ Under this standard, courts will only uphold a classification if it is necessary to achieve a compelling state interest.⁶² Courts apply this level of scrutiny to classifications based on race, national origin and sometimes alienage.⁶³ They use this higher standard of review because these classifications are rarely relevant to the achievement of a legitimate state interest.⁶⁴ Courts generally consider four elements in determining whether heightened scrutiny is appropriate for a given classification: (1) whether the class is defined by a trait that frequently bears no relationship to the ability to perform in or contribute to

⁵⁴ 413 U.S. at 538.

⁵⁵ *Id.* at 529.

⁵⁶ *Id.* at 533.

⁵⁷ *Id.* at 537-38.

⁵⁸ *Id.* at 534.

⁵⁹ *Moreno*, 413 U.S. at 534.

⁶⁰ *Id.* at 538.

⁶¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

⁶² See *Cleburne*, 473 U.S. at 440; see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (racial classifications must be struck down unless "necessary to the accomplishment of some permissible state objective").

⁶³ *Cleburne*, 473 U.S. at 440; see, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (aliens are usually a class deserving heightened judicial review); *Loving*, 388 U.S. at 11 (racial classifications are suspect and subject to the "most rigid scrutiny"); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (same). But see *Cabell v. Chavez-Salido*, 454 U.S. 432, 442 (1982) (applying intermediate scrutiny to aliens).

⁶⁴ See *Cleburne*, 473 U.S. at 440.

society; (2) whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes; (3) whether the trait defining the class is immutable; and (4) whether the class is a politically powerless minority.⁶⁵ No one factor is determinative.⁶⁶ For example, the Supreme Court has indicated that immutability is not a necessary element for suspect class status.⁶⁷ Taken together, however, these elements establish whether a classification is suspect and therefore subject to the application of strict judicial scrutiny.⁶⁸

With the exception of immutability, courts accord these elements their plain meanings.⁶⁹ The immutability element, however, does not mean literal immutability—the physical inability to change or mask the trait.⁷⁰ For example, aliens can become naturalized, African-Americans can sometimes hide their race and immigrants can often hide their national origin, yet these are all immutable suspect classifications.⁷¹ All that is needed to satisfy the immutability element is that changing the trait that defines the class would involve great difficulties, such as a major physical change or a traumatic change of identity.⁷² Along the same lines, traits are considered immutable if they are “so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them.”⁷³

⁶⁵ See *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (en banc) (Norris, J., concurring), cert. denied, 498 U.S. 957 (1990); see also *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (applying heightened scrutiny to a Texas statute withholding state funds to schools where children are not “legally admitted” into the United States); *Frontiero v. Richardson*, 411 U.S. 677, 684, 686 (1973) (applying heightened scrutiny for women); Miller, *supra* note 47, at 812.

⁶⁶ See Miller, *supra* note 47, at 812 (neither immutability, unique disabilities based on stereotypes, a history of discrimination nor political powerlessness alone indicates whether a particular classification should receive heightened scrutiny); see also *Cleburne*, 473 U.S. at 440–41 (listing the characteristics of a suspect class without mentioning immutability); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (same); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (same); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 376–77 (9th Cir. 1990) (Canby, J., dissenting) (immutability of trait not a requisite for suspect class).

⁶⁷ *Cleburne*, 473 U.S. at 442 n.10, 440–41; *Murgia*, 427 U.S. at 313; *Rodriguez*, 411 U.S. at 28.

⁶⁸ See Miller, *supra* note 47, at 812 (factors taken together help determine whether a classification needs special protection); Tracey Rich, Note, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773, 801–03 (1988) (discussing designation of homosexuals as a suspect class).

⁶⁹ See *Cleburne*, 473 U.S. at 440–41 (applying ability to perform in society to gender); Miller, *supra* note 47, at 814–16 (discussing stereotypes, discrimination and the politically powerless).

⁷⁰ See *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring), cert. denied, 498 U.S. 957 (1990); Miller, *supra* note 47, at 813.

⁷¹ See *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

⁷² See *id.* (Norris, J., concurring).

⁷³ *Id.* (Norris, J., concurring).

Strict judicial scrutiny is also applied, regardless of the classification drawn, when "fundamental" rights and liberties are threatened by the state action at issue.⁷⁴ Thus, when an act threatens the proper functioning of our representative government, this higher level of review is used.⁷⁵ For this reason, in the 1969 case of *Kramer v. Union Free School District*, the United States Supreme Court held that a limitation on the right to vote must be closely scrutinized.⁷⁶ The Court examined a New York law that restricted the electorate in school district elections to property owners and parents of schoolchildren in the district.⁷⁷ The Court reasoned that the rational basis test rests on the assumption that government institutions are structured to fairly represent the people and therefore deserve great deference.⁷⁸ The Court stated that when, as in this case, the challenge to the action is a challenge to this assumption, the assumption can no longer justify this deferential level of review.⁷⁹ The Court held that such actions must therefore meet the more rigorous test of being necessary to promote a compelling state interest.⁸⁰

Similarly, in the 1966 case of *Harper v. Virginia Board of Elections*, the Supreme Court held that a poll tax must be strictly scrutinized.⁸¹ *Harper* addressed a Virginia poll tax of \$1.50 imposed on all voters.⁸² The Court reasoned that the tax discriminated against the poor in the fundamental right of suffrage.⁸³ The Court closely scrutinized the law and found it violative of the Equal Protection Clause.⁸⁴ Similarly, the Court has applied strict scrutiny in striking down unreasonable voter residency requirements.⁸⁵

A third and final level of judicial scrutiny applies to laws that rely on "quasi-suspect" classifications.⁸⁶ This level of review falls in between

⁷⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

⁷⁵ See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 628 (1969).

⁷⁶ *Id.* at 626.

⁷⁷ *Id.* at 622.

⁷⁸ *Id.* at 628.

⁷⁹ *Id.*

⁸⁰ *Kramer*, 395 U.S. at 626-27.

⁸¹ 383 U.S. 663, 670 (1966).

⁸² *Id.* at 668.

⁸³ *Id.* at 666-67.

⁸⁴ *Id.* at 670.

⁸⁵ *Dunn v. Blumstein*, 405 U.S. 330, 342, 345 (1972) (one-year residency requirement invalid as not necessary to achieve a compelling state interest).

⁸⁶ See *Miller*, *supra* note 47, at 811; see also, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (heightened scrutiny for classifications based on gender); *Mills v. Habluetzel*, 456 U.S. 91, 98-99 (1982) (heightened scrutiny for classifications based on illegitimacy).

strict scrutiny and rational basis.⁸⁷ It requires that the classification be "substantially related to a sufficiently important governmental interest."⁸⁸ Courts generally reserve this level of scrutiny for classifications based on gender, illegitimacy and sometimes alienage.⁸⁹

B. State Action

The Fourteenth Amendment only applies to acts that can be fairly attributed to the state.⁹⁰ Hence, the Equal Protection Clause provides no remedy for private discriminatory conduct, regardless of its severity.⁹¹ When it is not clear whether the state should be considered an actor, courts follow a few principles set forth by the United States Supreme Court in the following cases.⁹²

As the Supreme Court held in the 1989 case of *DeShaney v. Winnebago County Department of Social Services*, a state's failure to protect against private conduct is not state action.⁹³ In *DeShaney*, a child was beaten and permanently injured by his father.⁹⁴ The child's guardian ad litem sued city social workers because they received complaints and had reason to believe that the father was beating the child, but did not act to remove him from his father's custody.⁹⁵ The Court reasoned that the Fourteenth Amendment does not confer a right to governmental aid, even when such aid is necessary to secure interests of which the government itself may not deprive an individual.⁹⁶ The Court stated that the state had no duty to protect the child because, although it may have been aware of the dangers, it played no part in their creation and

⁸⁷ See Miller, *supra* note 47, at 811.

⁸⁸ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985); see also *Craig v. Boren*, 429 U.S. 190, 192, 204 (1976) (no valid purpose in prohibiting sale of beer to males under the age of twenty-one but allowing its purchase by females over the age of eighteen).

⁸⁹ See *Hogan*, 458 U.S. at 724 (gender); *Mills*, 456 U.S. at 99 (illegitimacy); *Cabell v. Chavez-Salido*, 454 U.S. 432, 442 (1982) (alienage); *Boren*, 429 U.S. at 204 (gender); see also Miller, *supra* note 47, at 811.

⁹⁰ *E.g.*, *Lugar v. Edmondson Oil*, 457 U.S. 922, 924-25, 937 (1982) (state officers acting jointly with private party in securing privately disputed property was state action); *Jackson v. Metropolitan Edison*, 419 U.S. 345, 347, 351 (1974) (termination of service by a heavily regulated utility with a partial monopoly was not state action).

⁹¹ See *Jackson*, 419 U.S. at 349; *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

⁹² See *infra* notes 93-122 and accompanying text for a discussion of factors used to determine whether an action can be attributed to the state.

⁹³ 489 U.S. 189, 195 (1989). Although this was a due process case, its state action analysis is analogous to that of equal protection, as they both rely on the applicability of the first clause of the Fourteenth Amendment. See *id.*

⁹⁴ *Id.* at 191.

⁹⁵ *Id.*

⁹⁶ *Id.* at 196.

did nothing that rendered the child more vulnerable to them.⁹⁷ The Court also noted that the fact that the state once took temporary custody of the child did not mean that it had a duty to protect him.⁹⁸ According to the Court, a state need not protect an individual's safety simply because it has done so in the past.⁹⁹ The Court therefore concluded that a state's failure to protect a person against private conduct did not constitute state action.¹⁰⁰

Similarly, in 1977, in *Maher v. Roe*, the United States Supreme Court held that the government does not have to fund an activity simply because it has a constitutional duty not to interfere with it.¹⁰¹ Despite the fact that states cannot interfere with a woman's right to have an abortion, the Court permitted a state to disallow Medicaid funding for abortions, even though the state funded other forms of pregnancy care.¹⁰² The Court reasoned that failure to fund or support does not create a barrier to a right, but merely leaves individuals in the position they would be in if the government did not address the issue at all.¹⁰³ Hence, the Court held that the government has no duty to support or finance an activity simply because it has a constitutional duty not to interfere with it.¹⁰⁴

On the other hand, as the United States Supreme Court held in the 1961 case of *Burton v. Wilmington Parking Authority*, private conduct can be imputed to the state if the state is sufficiently entangled in the activity.¹⁰⁵ In *Burton*, the Court addressed racial discrimination in a private restaurant which occupied leased space in a public garage building.¹⁰⁶ The Court stated that the lease relationship placed the state in a position of interdependence with the restaurant and therefore made it a participant in the discrimination.¹⁰⁷ The Court held that the private conduct of the restaurant was attributable to the state, and was therefore within the scope of the Equal Protection Clause.¹⁰⁸

⁹⁷ *Id.* at 201.

⁹⁸ *DeShaney*, 489 U.S. at 201.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 197.

¹⁰¹ 432 U.S. 464, 470 (1977).

¹⁰² *Id.* at 464, 470; *see also* *Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991) (federal government not obligated to fund abortions at family-planning clinics).

¹⁰³ *Maher*, 432 U.S. at 474.

¹⁰⁴ *Id.* at 470; *see also* *Rust*, 111 S. Ct. at 1776.

¹⁰⁵ 365 U.S. 715, 725 (1961).

¹⁰⁶ *Id.* at 716, 719-20 (restaurant refused to serve blacks).

¹⁰⁷ *Id.* at 725.

¹⁰⁸ *Id.*

Additionally, state encouragement of private action can bring that action within the scope of the Fourteenth Amendment.¹⁰⁹ For example, in the 1964 case of *Robinson v. Florida*, the United States Supreme Court held that, when encouraged by an otherwise valid state regulation, private discrimination can be attributed to the state.¹¹⁰ In *Robinson*, the Court said that the private discrimination of a restaurant in not serving Negroes could be attributed to the state due to a state health regulation requiring separate lavatories for each race.¹¹¹ Although the Court did not find the regulation invalid in itself, it reasoned that the regulation encouraged private discrimination to a degree sufficient to support a finding of state action.¹¹² Therefore, the Court held the private policy of the restaurant to be state action.¹¹³

Similarly, in the 1953 case of *Barrows v. Jackson*, the United States Supreme Court held that a state court's awarding of damages for breaches of discriminatory covenants makes such covenants state action.¹¹⁴ The lawsuit in *Barrows* was brought between the parties to a covenant forbidding the use of real estate by non-whites.¹¹⁵ The Court reasoned that awarding damages for breaching such covenants encourages their making.¹¹⁶ The Court therefore concluded that the covenants constituted state action that violated the Equal Protection Clause.¹¹⁷

In fact, words alone can be sufficient encouragement to implicate the state in the resulting action.¹¹⁸ For example, in the 1963 case of *Lombard v. Louisiana*, the United States Supreme Court held that due to their coercive effect, non-binding proclamations by government officials constituted state action.¹¹⁹ In *Lombard*, the Court addressed announcements by a city's mayor and superintendent of police that "sit-in" demonstrations of restaurants that segregated or refused to

¹⁰⁹ See, e.g., *Robinson v. Florida*, 378 U.S. 153, 156 (1964) (state law encouraged discrimination by private restaurants); *Lombard v. Louisiana*, 373 U.S. 267, 270-71, 273 (1963) (proclamations by government officials coerced discrimination); *Barrows v. Jackson*, 346 U.S. 249, 254 (1953) (awarding damages for breach of private discriminatory covenants encouraged such covenants).

¹¹⁰ 378 U.S. at 156-57.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 346 U.S. 249, 254 (1953).

¹¹⁵ *Id.* at 251-52.

¹¹⁶ *Id.* at 254.

¹¹⁷ *Id.*

¹¹⁸ *Lombard*, 373 U.S. at 270-71, 273.

¹¹⁹ *Id.* at 273.

serve blacks would not be permitted.¹²⁰ The Court reasoned that, despite the fact that they were not supported by law, the announcements had great coercive effect in promoting continued segregation.¹²¹ The Court recognized the effect of the "voice of the state" on private actions and imputed the segregation encouraged by the announcements to the state.¹²²

Finally, it is worth noting that, although private biases are not within the realm of the Equal Protection Clause, the clause does prevent the state from acting upon them.¹²³ Accordingly, in the 1984 case *Palmore v. Sidoti*, the United States Supreme Court held that the Constitution prohibits states from giving private biases effect.¹²⁴ The *Palmore* Court addressed a ruling affirmed by the Florida Supreme Court that removed a child from the custody of a white divorcee because she was marrying a black man.¹²⁵ The state of Florida took the child out of the mother's custody due to the social "pressures" the child would face as a result of living in an interracial household.¹²⁶ The United States Supreme Court reversed, holding that private biases and the possible injury resulting therefrom were not permissible considerations on which the state should act.¹²⁷ The Court reasoned that, although the Constitution cannot prevent such private prejudices, it cannot tolerate them either.¹²⁸

C. *Equal Protection of Political Power*

The Equal Protection Clause prohibits state actions that reduce the power of a class, either by making the classification a factor in politics or by making it harder for the class to seek government action.¹²⁹ For this reason, the Supreme Court has held it violative of the Equal Protection Clause to disadvantage a minority group at the

¹²⁰ *Id.* at 270-71.

¹²¹ *Id.* at 273.

¹²² *Id.* at 274.

¹²³ See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

¹²⁴ *Id.*

¹²⁵ *Id.* at 430-31.

¹²⁶ *Id.* at 431.

¹²⁷ *Id.* at 433.

¹²⁸ *Palmore*, 466 U.S. at 433.

¹²⁹ See *Hunter v. Erickson*, 393 U.S. 385, 387, 393 (1969) (city charter making it harder to pass ordinances dealing with racial discrimination in housing); *Reitman v. Mulkey*, 387 U.S. 369, 371, 381 (1967) (state constitutional amendment prohibiting laws against housing discrimination); *Anderson v. Martin*, 375 U.S. 399, 401, 404 (1964) (requiring candidates' race to be printed on ballots).

polls.¹³⁰ In the 1964 case of *Anderson v. Martin*, the United States Supreme Court held it unconstitutional to require a candidate's race to be printed on election ballots.¹³¹ In *Anderson*, African-Americans who sought election to a school board challenged a statute that required the race of all candidates to be printed on the ballots.¹³² The Court examined the law in light of attitudes toward and pressures on blacks at the time and found that it would have a repressive effect.¹³³ The Court reasoned that the law was a vehicle for prejudice that could influence elections along racial lines and therefore held it to be invalid.¹³⁴

The Court has also invalidated laws that make it harder for a minority group to redress grievances than it is for people outside of the group.¹³⁵ In the 1967 case of *Reitman v. Mulkey*, the United States Supreme Court held it violative of the Equal Protection Clause for a state constitution to allow full discretion in real estate transactions.¹³⁶ In *Reitman*, the Court addressed an amendment to the California Constitution providing that any person could decline to sell, lease or rent private real property with complete discretion.¹³⁷ This amendment was passed by popular referendum.¹³⁸ A couple brought suit on the basis of a landlord's refusal to rent an apartment to them because of their race.¹³⁹ The California Supreme Court stated that the intent of the amendment was to overturn state laws that prevented discrimination in real estate transactions and to prevent any future laws or other state action to the same end.¹⁴⁰ Because the amendment established a right to discriminate in the state constitution, the United States Supreme Court agreed with the California court that the law had the effect of encouraging and authorizing discrimination.¹⁴¹ The Court

¹³⁰ *Anderson*, 375 U.S. at 403, 404.

¹³¹ *Id.* at 404.

¹³² *Id.* at 401.

¹³³ *Id.* at 403.

¹³⁴ *Id.* at 402.

¹³⁵ See *Hunter*, 393 U.S. at 393; *Reitman*, 387 U.S. at 376.

¹³⁶ 387 U.S. at 371, 376.

¹³⁷ *Id.* at 371. The provision, submitted as proposition 14 in the 1964 election, provided: Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id. at 370-71 (quoting CAL. CONST. art. I, § 26).

¹³⁸ *Id.* at 371.

¹³⁹ *Id.* at 372.

¹⁴⁰ *Id.* at 374.

¹⁴¹ *Reitman*, 387 U.S. at 374-76.

reasoned that the amendment did much more than repeal existing anti-discrimination laws; it embodied the right to discriminate "in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government."¹⁴² According to the Court, the amendment had the effect of allowing those who wanted to discriminate to do so free from any official interference.¹⁴³ The Court held that the measure significantly involved the state in private discrimination and therefore violated the Equal Protection Clause.¹⁴⁴

Two years after *Reitman*, the Court came to a similar result in addressing another measure that made it more difficult for a minority group to seek political redress.¹⁴⁵ In 1969, in *Hunter v. Erickson*, the United States Supreme Court held that an amendment to a city charter that made it harder to pass anti-discrimination laws violated the Equal Protection Clause.¹⁴⁶ *Hunter* involved an amendment to the Akron, Ohio, charter which prevented the city council from implementing any ordinance dealing with racial, religious or ancestral discrimination in housing without the approval of a majority of the city's voters.¹⁴⁷ An African-American who was not shown houses by a real estate agent because the owners did not wish their houses shown to Negroes brought suit.¹⁴⁸ This amendment, like that in *Reitman*, was passed by a majority referendum vote.¹⁴⁹ Also like the amendment in *Reitman*, the *Hunter* amendment had the effect of both repealing current anti-discrimination laws and requiring a majority plebiscite vote to pass new ones.¹⁵⁰ The Court reasoned that the amendment drew a distinction between groups seeking protection against discrimination in property dealings and those who sought to regulate such dealings for other reasons.¹⁵¹ It

¹⁴² *Id.* at 377.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 381.

¹⁴⁵ *Hunter v. Erickson*, 393 U.S. 385, 393 (1969).

¹⁴⁶ *Id.* at 386.

¹⁴⁷ *Id.* at 386-87. Akron City Charter § 137 provided:

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Id. at 387.

¹⁴⁸ *Id.*

¹⁴⁹ *Hunter*, 393 U.S. at 387; *Reitman*, 387 U.S. at 370-71.

¹⁵⁰ *Hunter*, 393 U.S. at 387; *Reitman*, 387 U.S. at 371.

¹⁵¹ *Hunter*, 393 U.S. at 390.

stated that the amendment affected racial minorities and placed special burdens on them within the governmental process.¹⁵² The Court reasoned that this was no more permissible than denying minorities the right to vote.¹⁵³

The *Hunter* Court used the strict scrutiny standard, because the case involved racial discrimination, and found that the amendment was not valid.¹⁵⁴ It reasoned that, although a state may distribute legislative power as it desires and the people may retain power over certain subjects, a legislative structure that disregards the limits of the Fourteenth Amendment is invalid.¹⁵⁵ The fact that the measure was implemented through a popular referendum did not immunize it from the requirements of the Equal Protection Clause.¹⁵⁶ Hence, the Court held that a state cannot disadvantage a group by making it more difficult to enact legislation on its behalf than for other groups, and the Court therefore invalidated the measure as a violation of the Equal Protection Clause.¹⁵⁷

In sum, the Equal Protection Clause forbids states from treating a class of people differently from others, unless the classification is reasonably related to a legitimate state objective.¹⁵⁸ In making this determination, courts apply different levels of scrutiny.¹⁵⁹ Most challenges will only face rational basis review, whereby the court will uphold the action if it is rationally related to a legitimate state interest.¹⁶⁰ When the classification is considered "suspect" or involves a fundamental right, however, courts will apply a strict scrutiny standard of review, and the action will only be upheld if the classification is necessary to achieve a compelling state interest.¹⁶¹ Courts will also occasionally apply an intermediate level of scrutiny when the classification is "quasi-suspect."¹⁶² The Equal Protection Clause only applies to actions that can be fairly attributed to the state.¹⁶³ State encouragement of private

¹⁵² *Id.* at 391.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 392.

¹⁵⁵ *Id.*; see also *Lucas v. Forty-fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964) ("[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people chose that it be").

¹⁵⁶ *Hunter*, 393 U.S. at 392.

¹⁵⁷ *Id.* at 393.

¹⁵⁸ See *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

¹⁵⁹ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

¹⁶⁰ See *id.* at 440.

¹⁶¹ See *id.*

¹⁶² See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

¹⁶³ See, e.g., *Lugar v. Edmonson Oil*, 457 U.S. 922, 937 (1982).

actions can bring them within the scope of this clause.¹⁶⁴ Furthermore, state actions that reduce the political power of a class deny the class equal protection of the laws and are therefore unconstitutional.¹⁶⁵

II. EQUAL PROTECTION TREATMENT OF HOMOSEXUALS

The United States Supreme Court has not yet addressed the issue of whether homosexuals are a suspect class deserving strict scrutiny under the Equal Protection Clause.¹⁶⁶ Although some commentators suggest that they are, several lower courts have held that they are not.¹⁶⁷ These courts apply the rational basis test and usually find such a basis to justify the act in question.¹⁶⁸ Many of these cases, however, deal with a unique governmental need to justify the classification in the particular situation.¹⁶⁹ For example, courts have upheld the military's ban on homosexuals due to the unique governmental interest in maintaining the discipline and morale of the armed forces.¹⁷⁰

In reaching the conclusion that homosexual classifications do not deserve strict equal protection scrutiny, many courts rely on the United States Supreme Court's 1986 landmark decision of *Bowers v. Hardwick*.¹⁷¹ In *Hardwick*, the Supreme Court held that the due process right

¹⁶⁴ See, e.g., *Robinson v. Florida*, 378 U.S. 153, 156 (1964); *Lombard v. Louisiana*, 373 U.S. 267, 273 (1963); *Barrows v. Jackson*, 346 U.S. 249, 254 (1953).

¹⁶⁵ See *Hunter*, 393 U.S. at 393; *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967); *Anderson v. Martin*, 375 U.S. 399, 404 (1964).

¹⁶⁶ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (Supreme Court never subjected homosexual classifications to heightened review).

¹⁶⁷ See, e.g., LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1616 (2d ed. 1988) (homosexuals should be deemed a suspect class); *High Tech Gays*, 895 F.2d at 571 (rational basis review is proper for examination of denial of security clearances due to homosexuality); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (rational basis review proper for examination of discharge from Army due to homosexuality), *cert. denied sub nom.*, *Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same for discharge from Navy), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (same level of review for refusal to employ homosexual as FBI agent); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (upholding Texas statute prohibiting sexual intercourse with another individual of the same sex), *cert. denied*, 478 U.S. 1022 (1986).

¹⁶⁸ E.g., *Ben-Shalom*, 881 F.2d at 465 (rational basis exists for dismissing soldier from army due to homosexuality); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (same).

¹⁶⁹ See, e.g., *Ben-Shalom*, 881 F.2d at 465 (Army); *Rich*, 735 F.2d at 1229 (same).

¹⁷⁰ *Ben-Shalom*, 881 F.2d at 465; *Rich*, 735 F.2d at 1229. In *Rich*, the court said that the special government interest was so compelling that the dismissal of a soldier from the army due to homosexuality would even withstand strict scrutiny review. 735 F.2d at 1229. The constitutionality of banning homosexuals from military service is once again being reviewed due to the recent public debate over and change in the military's policy on homosexuals. See *supra* notes 291-98.

¹⁷¹ 478 U.S. 186 (1986); see, e.g., *High Tech Gays*, 895 F.2d at 571 (referring to *Hardwick*); *Ben-Shalom*, 881 F.2d at 464 (same); *Woodward*, 871 F.2d at 1075 (same); *Padula*, 822 F.2d at 103 (same).

to privacy does not include a fundamental right to engage in homosexual sodomy.¹⁷² The defendant in *Hardwick* was charged with violating a Georgia statute by committing sodomy with another male in the privacy of his bedroom.¹⁷³ The Court refused to expand the reach of the Due Process Clause by adding a new fundamental right and found that even if the law was based purely on morality, that was an adequate rationale to support it.¹⁷⁴ Hence, the Court held that the criminalization of homosexual sodomy did not violate due process.¹⁷⁵

The *Hardwick* decision only dealt with the issue of whether there is a fundamental right to engage in homosexual sodomy.¹⁷⁶ It only addressed sodomy, an act; it did not address any issues relating to homosexuality itself, a status.¹⁷⁷ It also did not address the issue of whether it is constitutional to criminalize heterosexual sodomy or the issue of equal protection.¹⁷⁸ Nonetheless, courts have held that *Hardwick* dictates that homosexuals, as a class, are not entitled to heightened equal protection scrutiny.¹⁷⁹ Although these courts recognize that *Hardwick* did not address equal protection, they state that its reasoning leads to the conclusion that homosexuals cannot constitute a suspect class.¹⁸⁰

¹⁷² 478 U.S. at 190-91. Interestingly, *Hardwick* was almost decided the other way. See Linda Greenhouse, *When Second Thoughts Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A14. The case was decided 5-4, with Justice Powell casting the deciding vote. *Id.* In a 1990 interview, Justice Powell said that he "probably made a mistake" in voting with the majority. *Id.* This does not, however, mean that the decision will probably be overturned, as it appears that justices who joined the court after the decision, such as Justices Scalia and Kennedy, would probably have voted with the majority. See *id.*

¹⁷³ 478 U.S. at 187-88; GA. CODE ANN. § 16-6-2 (1992). The law made it a crime to commit sodomy by performing or submitting to "any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1992).

¹⁷⁴ *Hardwick*, 478 U.S. at 195, 196. The Court said that "the law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.* at 196. Chief Justice Burger, in a concurring opinion, further emphasized the moral basis of such laws, saying that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197 (Burger, C.J., concurring).

¹⁷⁵ *Id.* at 196.

¹⁷⁶ *Id.* at 190.

¹⁷⁷ See *id.*

¹⁷⁸ *Id.* at 188 n.2 (although the statute at issue applied to heterosexual as well as homosexual sodomy, the court expressly stated that it expressed "no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy"); *id.* at 196 n.8 (case does not address equal protection).

¹⁷⁹ See *supra*, note 171 and accompanying text; see also Rhonda R. Rivera, *Sexual Orientation and The Law*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 81, 84 (John C. Gonsiorek & James D. Weinrich eds., 1991).

¹⁸⁰ See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied sub nom.*,

For example, in 1987, in *Padula v. Webster*, the United States Court of Appeals for the District of Columbia Circuit held that homosexuals do not constitute a suspect class for equal protection purposes.¹⁸¹ *Padula* addressed equal protection under the Fifth Amendment.¹⁸² In *Padula*, an applicant for a position as a special agent with the Federal Bureau of Investigation brought suit claiming that she was denied employment because of her homosexuality.¹⁸³ The *Padula* court reasoned that, although *Hardwick* did not address the issue of equal protection, its reasoning foreclosed homosexuals from gaining suspect class status.¹⁸⁴ The court said that it would be anomalous to give strict scrutiny under the Equal Protection Clause to a group defined by conduct that states may constitutionally criminalize.¹⁸⁵ The court explained that it is unjustifiable to discriminate invidiously against a suspect class.¹⁸⁶ After *Hardwick*, however, states can validly discriminate against homosexuals by making the conduct that defines them criminal.¹⁸⁷ The court therefore concluded that, in order to be logically consistent with *Hardwick*, homosexuals cannot be afforded suspect or quasi-suspect class status for equal protection purposes.¹⁸⁸

The opposite position was set forth by Judge William A. Norris, of the United States Court of Appeals for the Ninth Circuit, in a concurring opinion to the 1989 case of *Watkins v. United States Army*.¹⁸⁹ This position is that the Supreme Court's holding in *Hardwick* is not relevant to the appropriate degree of equal protection scrutiny for classifications based on homosexuality.¹⁹⁰ The lawsuit in *Watkins* was brought by a soldier who was denied reenlistment in the army due to his homosexuality.¹⁹¹ Although the case was decided on other grounds, Judge Norris set out his position on the equal protection issue in a

Ben-Shalom v. Stone, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1075 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

¹⁸¹ 822 F.2d at 103.

¹⁸² *Id.* at 101. This is not an important distinction, however, as courts afford the same treatment to Fifth Amendment equal protection claims as they do to equal protection claims brought under the Fourteenth Amendment. *Id.* at 101 n.5.

¹⁸³ *Id.* at 98.

¹⁸⁴ *Id.* at 103.

¹⁸⁵ *Padula*, 822 F.2d at 103.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 103-04.

¹⁸⁹ 875 F.2d 699, 718 (9th Cir. 1989) (en banc) (Norris, J., concurring), *cert. denied*, 498 U.S. 957 (1990).

¹⁹⁰ *Id.* (Norris, J., concurring).

¹⁹¹ *Id.* at 701.

concurring opinion.¹⁹² Judge Norris stated that, as it only held that the Due Process Clause provided no substantive privacy protections for acts of homosexual sodomy, *Hardwick* did not suggest that states may penalize homosexuals for their sexual orientation.¹⁹³ He pointed out that *Hardwick* dealt with homosexual conduct, not orientation, and was decided on due process, not equal protection grounds.¹⁹⁴ He also pointed out that the motivation behind the Court's decision in *Hardwick* was its concern with the expansion of fundamental due process rights, not an antipathy toward homosexuals.¹⁹⁵

Judge Norris refuted the "anomaly" argument set forth in *Padula*, explaining that the equal protection inquiry is fundamentally different from the due process inquiry.¹⁹⁶ He explained that the latter protects policies that are "deeply rooted in th[e] Nation's history and tradition," while the former "protects minorities from discriminatory treatment at the hands of the majority."¹⁹⁷ Hence, Norris explained, *Hardwick* merely decided that homosexual sodomy is not so "deeply rooted in this Nation's history and tradition" that it should fall within the zone of personal privacy protected by the Due Process Clause.¹⁹⁸ He explained that there was no anomaly in applying strict scrutiny to classifications based on homosexuality because the reason that homosexuality is not considered a deeply-rooted part of our tradition, and therefore not a fundamental right, is that homosexuals have been subjected to a long history of invidious discrimination.¹⁹⁹ Thus, he stated that the very reason why there is no due process right to engage in homosexual conduct supports the conclusion that homosexuals deserve suspect class status.²⁰⁰ This view is supported by the fact that these constitutional guarantees operate in entirely different dimensions: due process deals with basic individual rights and equal protection addresses broadly defined classifications.²⁰¹ Judge Norris concluded that, because the question of whether homosexual conduct is

¹⁹² *Id.* at 711, 716-31 (Norris, J., concurring). The court relied on common law estoppel grounds to hold that the army could not deny reenlistment; it did not address the issue of equal protection. *See id.* at 711.

¹⁹³ *Id.* at 716 (Norris, J., concurring).

¹⁹⁴ *Watkins*, 875 F.2d at 716-17 (Norris, J., concurring).

¹⁹⁵ *Id.* at 720 (Norris, J., concurring).

¹⁹⁶ *Id.* at 718 (Norris, J., concurring).

¹⁹⁷ *Id.* (Norris, J., concurring).

¹⁹⁸ *Id.* at 718-19 (Norris, J., concurring).

¹⁹⁹ *Watkins*, 875 F.2d at 719 (Norris, J., concurring).

²⁰⁰ *Id.*

²⁰¹ *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1166, 1168 (1988).

protected by the Due Process Clause is a different question from what level of scrutiny should apply to homosexuals under the Equal Protection Clause, *Hardwick* did not preclude the application of strict scrutiny to homosexuals as a class.²⁰²

Norris' view is supported by the United States Supreme Court's distinction between laws addressing acts and laws addressing status.²⁰³ In the 1962 case of *Robinson v. California*, the Supreme Court held that while a state can criminalize drug use (an act), it cannot criminalize drug addiction (a status).²⁰⁴ The Court examined a California statute that made it a criminal offense for a person to "be addicted to the use of narcotics."²⁰⁵ The statute made the status of narcotics addiction an offense for which people could be convicted at any time before they reformed, even if they never used or possessed narcotics in the state.²⁰⁶ The Court distinguished acts from status and held that while the former can be criminalized, the latter cannot.²⁰⁷ The Court invalidated the statute as an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.²⁰⁸

III. HOMOSEXUALITY

A. *The Nature Of Homosexuality*

Although there are many definitions of homosexuality, the most common is an erotic or affectional disposition toward members of the same sex.²⁰⁹ This definition is misleading because most people experience some degree of homosexual feelings at some point in their lives.²¹⁰ In fact, such feelings are so common among children that some authorities regard a homosexual phase as a normal part of development.²¹¹ In addition, many heterosexual adults also have some homosexual inclinations.²¹² Sexual orientation, however, goes beyond simple dispo-

²⁰² *Watkins*, 875 F.2d at 719 (Norris, J., concurring).

²⁰³ See *Robinson v. California*, 370 U.S. 660, 666 (1962).

²⁰⁴ *Id.* at 667.

²⁰⁵ *Id.* at 660.

²⁰⁶ *Id.* at 666.

²⁰⁷ *Id.* at 667.

²⁰⁸ *Robinson*, 370 U.S. at 667.

²⁰⁹ See John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 1, 1 (John C. Gonsiorek & James D. Weinrich eds., 1991).

²¹⁰ D.J. WEST, *HOMOSEXUALITY RE-EXAMINED* 1 (1977).

²¹¹ *Id.*

²¹² *Id.*

sitions and inclinations.²¹³ It is a fundamental part of personal identity, which has "a pervasive and profound impact on" one's "self-perception, group affiliation, and identification by others."²¹⁴ Homosexuality is thus a major part of one's personhood.²¹⁵ A precise definition of homosexuality is not necessary for the purposes of this Note, however, as Colorado's Amendment 2, by its very nature, can only apply to openly homosexual persons and those publicly believed to be homosexual.²¹⁶

There is much disagreement over the causes of homosexuality.²¹⁷ Some experts say that it is acquired psychologically, through experiences.²¹⁸ Some of these experts believe that it is acquired through family socialization.²¹⁹ Supporters of this view point to the fact that male homosexuals tend to have dominating mothers and weak father figures.²²⁰ Others believe that homosexuality is acquired by early erotic experiences with the same gender.²²¹

Other experts assert that homosexuality is caused, at least partially, by biological factors.²²² Recent research supports this theory.²²³ Researchers have found that hormonal responses in homosexual males are different from those in heterosexual males.²²⁴ A recent study measured luteinizing hormone, a substance produced in the human brain that responds to injections of estrogen.²²⁵ In women, the level drops slightly and then rises sharply upon injection.²²⁶ The response in men is not as dramatic.²²⁷ Researchers have found that when homosexual

²¹³ See Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1304-05 (1985).

²¹⁴ *Id.* at 1303-04.

²¹⁵ *Id.* at 1305.

²¹⁶ See *supra* note 2 for the text of Amendment 2.

²¹⁷ Randolph Blake, *Neurohormones and Sexual Preference*, PSYCHOL. TODAY, Jan. 1985, at 12.

²¹⁸ *Id.*

²¹⁹ WEST, *supra* note 210, at 86, 94.

²²⁰ *Id.* at 86.

²²¹ See LON G. NUNGESSER, *HOMOSEXUAL ACTS, ACTORS, AND IDENTITIES* 24 (1983).

²²² See, e.g., Richard Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, J. PSYCHIATRY & L. 537, 568-69 (1988); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034, 1034-35 (1991); J. Silberner, *Hormone Markers for Homosexuality?*, SCI. NEWS, Sep. 29, 1984, at 198.

²²³ See, e.g., Green, *supra* note 222, at 568-69 (data points to some contribution of genetics or hormones to homosexuality); LeVay, *supra* note 222, at 1034-35 (difference in structure of part of brain found in homosexual men); Silberner, *supra* note 222, at 198 (homosexuals demonstrate a difference in biological response to sex hormone).

²²⁴ Silberner, *supra* note 219, at 198.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

men are injected, their response is in between that of women and that of heterosexual men.²²⁸

More dramatic is a recent study that found a difference in the brain structure of homosexual, compared to heterosexual men.²²⁹ This study found that a cell group in an area of the brain that participates in the regulation of male-typical sexual behavior was especially small in homosexual men.²³⁰ The study found that in homosexual men this area was about half the size of that in heterosexual men and about the same size as that in women.²³¹ The researcher, however, warned that the study does not conclusively show if this difference in size is a cause or result of sexual orientation, or if they are both the result of a third factor.²³² This study is supported by another recent study that found another difference in this area of the brain in homosexual men.²³³

Other evidence also supports a biological element of homosexual causality.²³⁴ For example, homosexual behavior has been observed in many animals.²³⁵ Implicit in such observations is the conclusion that homosexuality cannot be solely the result of human social factors.²³⁶ Additionally, studies of twins lend support to the existence of a biological correlation.²³⁷ Most experts who support the existence of a biological factor, however, do not rule out psychological ones as well.²³⁸

Although some experts believe that people can change their sexual orientation, most believe that sexual orientation is essentially unchangeable.²³⁹ They believe that sexual orientation is set at birth, or at least at an early age, and cannot be changed except in rare circumstances.²⁴⁰ A biological root of homosexuality, if proven, would clearly

²²⁸ *Id.*

²²⁹ See LeVay, *supra* note 222, at 1034.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 1036.

²³³ Denise Grady, *The Brains of Gay Men*, DISCOVER, Jan. 1992, at 29.

²³⁴ See John A. W. Kirsch & James D. Weinrich, *Homosexuality, Nature, and Biology: Is Homosexuality Natural? Does It Matter?*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 13, 14-15 (John C. Gonsiorek & James D. Weinrich eds., 1991); Green, *supra* note 222, at 542.

²³⁵ Kirsch & Weinrich, *supra* note 234, at 14-15 (homosexual behavior observed in bulls, cows, stallions, donkeys, cats, rams, goats, pigs, antelope, elephants, hyenas, monkeys, apes, rabbits, lions, porcupines, hamsters, mice and porpoises).

²³⁶ See *id.*

²³⁷ See Green, *supra* note 222, at 542.

²³⁸ See West, *supra* note 210, at 65.

²³⁹ See Rivera, *supra* note 179, at 84; see also Chandler Burr, *Homosexuality & Biology*, ATLANTIC MONTHLY, Mar. 1993, at 65 ("[f]ive decades of psychiatric evidence demonstrates that homosexuality is immutable").

²⁴⁰ See *id.* But see NUNGESSER, *supra* note 221, at 22 ("[p]reference in sexual behaviors and partners may change over a person's lifetime").

support such immutability. This position is also supported by those believing that homosexuality is acquired.²⁴¹ There is no anomaly in this theory, as learned phenomena, especially those learned at an early age, can be extremely resistant to change.²⁴² The permanence of homosexuality is also supported by the poor results of attempted "treatments."²⁴³ Even where it is possible for a homosexual to adopt apparently heterosexual behavior, the trait is still essentially unchangeable due to the arduousness and painfulness of this process.²⁴⁴

B. *Homosexuals and Society*

As subjects of prejudice, discrimination and public disapproval, homosexuals are a discrete and insular minority.²⁴⁵ As Judge Norris of the United States Court of Appeals for the Ninth Circuit said, "the discrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin."²⁴⁶ Throughout history, homosexuals have suffered both public and private discrimination.²⁴⁷ Various religions have condemned homosexuality as a sin and psychiatry has labeled it a mental illness.²⁴⁸ Homosexuals suffer from stigmatization in all spheres of life and receive a high degree of contempt from society at large.²⁴⁹ The public censure of homosexuals is seen in varying degrees and forms, ranging from the common use of words denouncing homosexuality to express general contempt, to the disparate treatment of homosexuals in many spheres of life, to unprovoked violence against them.²⁵⁰ The government supports such discrimination by failing to protect homosexuals from the bigoted actions of others and by denying them a fair chance

²⁴¹ See Green, *supra* note 222, at 568-69.

²⁴² *Id.* at 565.

²⁴³ See Charles Silverstein, *Psychological and Medical Treatments of Homosexuality*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 101, 110-11 (John C. Gonsiorek & James D. Weinrich eds., 1991).

²⁴⁴ See Green, *supra* note 222, at 569.

²⁴⁵ *TRIBE*, *supra* note 167, at 1616.

²⁴⁶ *Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989) (en banc) (Norris, J., concurring), *cert. denied*, 498 U.S. 957 (1990).

²⁴⁷ See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Watkins*, 875 F.2d at 724 (Norris, J., concurring).

²⁴⁸ Green, *supra* note 222, at 538.

²⁴⁹ Note, *supra* note 213, at 1285, 1302.

²⁵⁰ *Id.* at 1285 n.3.

at a job, service in the armed forces, and the status of formally recognized committed relationships.²⁵¹

Systematic discrimination against homosexuals has been particularly evident in housing and employment.²⁵² Even more striking is the common violence against homosexuals for no other reason than their sexual orientation.²⁵³ Such violence is becoming more and more common in the 1990s.²⁵⁴ In a poll of lesbians and gay men, five percent of the men and ten percent of the women reported being physically abused or assaulted due to their sexual orientation in the prior year.²⁵⁵ In the same survey, forty-seven percent of the respondents reported experiencing some form of discrimination during their lives on this basis.²⁵⁶ Indeed, the wave of anti-gay hate crimes that swept Colorado after the passage of Amendment 2 demonstrates the existence of widespread discriminatory violence against homosexuals.²⁵⁷

This public sentiment against homosexuals is reflected in widely-held, but inaccurate, stereotypes.²⁵⁸ One such stereotype is that homo-

²⁵¹ See Rivera, *supra* note 179, at 232. For a discussion of the current debate over the ban on gays in the military, see *supra* notes 291-98 and accompanying text.

²⁵² See *Hearing on Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 97th Cong., 2d Sess. 23 (1982) (prepared statement by Rep. Paul Tsongas of Massachusetts) (study by the National Institute of Mental Health showed that sixteen percent of all gay people in the United States have employment problems because of their sexual orientation); see also, e.g., *Ben-Shalom*, 881 F.2d at 466 (homosexual tendencies upheld as grounds for discharge from U.S. Army).

²⁵³ See *Watkins*, 875 F.2d at 724 (Norris, J., concurring); see also William Paul, *Minority Status for Gay People: Majority Reaction and Social Context*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL AND BIOLOGICAL ISSUES* 351, 359-61 (William Paul et al., eds., 1982).

²⁵⁴ Bob Dart, *Gay Rights Movement Is Marching Ahead*, ATLANTA J. & CONST., Feb. 26, 1993, at A4.

²⁵⁵ Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 60, 61 (John C. Gonsiorek & James D. Weinrich eds., 1991).

²⁵⁶ *Id.*

²⁵⁷ See Knickerbocker, *supra* note 13, at 1 (Klanwatch reports that recent gay-rights ballot initiatives and the controversy over homosexuals in the military corresponds to an increase in the number of attacks on homosexuals); *Honor the Boycott of Colorado*, STAR TRIB., Feb. 1, 1993, at 8A (upturn of violence against homosexuals one result of the passage of Amendment 2); Paul McEnroe, *Violence Is Apparent Fallout of Colorado Law on Gays*, STAR TRIB., Jan. 25, 1993, at 1A ("[h]atred appears to have been unleashed by" Amendment 2); Tony Freemantle, *The Hate State Label Dividing Colorado*, HOUS. CHRON., Jan. 17, 1993, at A1 (gay-rights groups report a sharp rise in hate crimes against homosexuals as well as those who opposed Amendment 2); Mark Shaffer, *Colorado Grapples With Fallout From Anti-Gay Ordinance*, HOUS. CHRON., Jan. 3, 1993, at A16 (Sue Anderson, executive director of Denver's Gay and Lesbian Community Center, said that hate crimes against gays reached 45 in the month Amendment 2 was passed, three times as many as the 1991 monthly average).

²⁵⁸ See John Balzar, *Why Does America Fear Gays?*, L.A. TIMES, Feb. 4, 1993, at A1 (cruel phobias against homosexuals such as regarding gay men as "obsessive predators with their eyes on America's children" and lesbians as "anti-social battle-axes"); Miller, *supra* note 47, at 822-23

sexuals try to convert children to homosexuality.²⁵⁹ This stereotype is unfounded, both in the belief that homosexuals do this and in the belief that such behavior can be successful.²⁶⁰ Other unfounded stereotypes are that homosexuals are more likely to be child molesters than heterosexuals and that homosexuality is a mental disease.²⁶¹ Such stereotypes are merely the result of widespread prejudice against and misunderstanding of homosexuals.²⁶²

Public opinion polls about homosexuals and homosexual rights evidence this prejudice.²⁶³ A recent poll reported that fifty-three percent of the population does not consider homosexuality to be "acceptable" behavior.²⁶⁴ In fact, this poll found that forty-five percent of the population believe that gay rights are a threat to the American family and its values.²⁶⁵ The same poll reported that only about a third of the respondents said they believe that homosexuals should be allowed to marry or adopt.²⁶⁶ At the end of the 1980s, although nearly sixty percent of Americans believed that homosexual acts should be legal, eighty percent believed that homosexuality is wrong.²⁶⁷

Surveys of employment opportunities for homosexuals also demonstrate the public sentiment about homosexuals and their place in society.²⁶⁸ One poll found that seventy-eight percent of the population believe that gay men and women should have the same access to job opportunities as heterosexuals, leaving more than one in five people believing that homosexuals do not deserve the same job opportunities as others.²⁶⁹ Another poll shows that people are even less accepting of homosexuals in the workplace when asked about personally working with them.²⁷⁰ This poll found that twenty-five percent of respondents

(homosexuals often viewed as child molesters or mentally ill); see also *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 847-49 (D. Md. 1973) (school board concern over gay teacher's influence on students), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

²⁵⁹ See, e.g., Balzar, *supra* note 258, at A1; *Acanfora*, 359 F. Supp. at 847-49.

²⁶⁰ Colman McCarthy, *Gay Rights and Gay Acceptance*, WASH. POST, Oct. 9, 1982, § 1, at A19 (no evidence that homosexuals are "compulsive recruiters to their orientation").

²⁶¹ See Miller, *supra* note 47, at 822-23; see also *Boutilier v. INS*, 387 U.S. 118, 120, 125 (1967) (holding that homosexual aliens could be excluded from the United States as having psychopathic personalities).

²⁶² See Miller, *supra* note 47, at 823-24.

²⁶³ See Bill Turque, *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 35, 36-37; Deborah Scroggins, *The Gay Community: Impact in Atlanta*, ATLANTA J. & CONST., June 23, 1991, at A8.

²⁶⁴ See Turque, *supra* note 263, at 36.

²⁶⁵ See *id.*

²⁶⁶ See *id.*

²⁶⁷ See Balzar, *supra* note 258, at A14.

²⁶⁸ See Turque, *supra* note 263, at 36; Herek, *supra* note 255, at 61; Scroggins, *supra* note 263, at A8.

²⁶⁹ See Turque, *supra* note 263, at 36.

²⁷⁰ See Herek, *supra* note 255, at 61.

to a national survey would strongly object to working around homosexuals and another twenty-seven percent would prefer not to do so.²⁷¹ Furthermore, two other polls show that a very large portion of the population does not think that homosexuals should be hired in occupations that involve children or delicate personal matters.²⁷²

Despite the prejudice and discrimination against them, homosexuals are a productive segment of our society.²⁷³ The American Psychiatric Association asserts this fact in a resolution stating that homosexuality "implies no impairment in judgment, stability, reliability or general social or vocational capabilities."²⁷⁴ In fact, according to a broadly-based market survey, homosexuals appear to contribute more to society than do others, as reflected by their income, education, employment and political participation.²⁷⁵ The survey reveals that homosexuals' average household income is markedly higher than that of all U.S. households,²⁷⁶ homosexuals are more than twice as likely as the average American to hold a college degree,²⁷⁷ homosexuals are more likely to hold professional and managerial jobs than the average American,²⁷⁸ and per capita, more homosexuals participated in the 1988 presidential election than did Americans at large.²⁷⁹

Despite this high level of political participation, the power of homosexuals in our government is not entirely clear.²⁸⁰ Some courts

²⁷¹ *Id.*

²⁷² See Turqe, *supra* note 263, at 346; Scroggins, *supra* note 263, at A8. The surveys asked whether homosexuals should be hired in each of the following categories (numbers are percent saying yes). The results of one survey were: salesperson - 83%; member of the President's cabinet - 64%; member of armed forces - 59%; doctor - 59%; high school teacher - 54%; elementary school teachers - 51%; clergy - 48%. Turqe, *supra* note 263, at 36. The results of the other survey, which was only conducted in Atlanta, were: salesperson - 87%; military - 64%; doctor - 56%; high school teacher - 52%; clergy - 50%; elementary school teacher - 45%. Scroggins, *supra* note 263, at A8.

²⁷³ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 578 (9th Cir. 1990) (citing RESOLUTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION, January 1975); Ramon G. McLeod, *Gay Market a Potential Gold Mine*, S.F. CHRON., Aug. 27, 1991, at A1.

²⁷⁴ *High Tech Gays*, 895 F.2d at 578 (citing RESOLUTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION, January 1975).

²⁷⁵ See McLeod, *supra* note 273, at A1.

²⁷⁶ See *id.* The survey reported an average gay male household income of \$51,325 and an average gay female household income of \$45,927, as compared with an overall U.S. household income of \$36,520. *Id.*

²⁷⁷ *Id.* The survey found that 62% of gay males and 59% of gay females have college degrees, while only 24% of all males and only 17% of all females have one. *Id.*

²⁷⁸ *Id.* The survey reported that 47% of gay males and 40% of gay females had professional or managerial jobs, as compared with 31% for all males and 25% for all females. *Id.*

²⁷⁹ *Id.* The survey reported that 87% of gay men and 82% of gay women voted, while only 56% of all men and 58% of all women did. *Id.*

²⁸⁰ Compare *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting) (homosexuals do not have significant political power) with *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) (homo-

and commentators assert that politics, prejudice and ignorance ensure that gays will not receive legislative or executive aid sufficient to overcome discrimination against them.²⁸¹ Amendment 2 and the more than a dozen similar measures being proposed across the nation are themselves strong evidence of the political forces against homosexuals.²⁸² Others argue that gays are not without political power.²⁸³ The one hundred and forty congressional sponsors to a proposed amendment to the Civil Rights Act that would include homosexuals evidence homosexuals' political influence.²⁸⁴ This amendment, however, is not likely to be passed anytime soon.²⁸⁵ Also reflecting homosexuals' political influence is the growing number of homosexuals in government.²⁸⁶ To date, American voters have elected at least seventy-five open homosexuals into local, state and federal offices.²⁸⁷ Indeed, the political participation and economic power of the homosexual community, and the scores of gay-rights ordinances in place across the country, support the argument that homosexuals have substantial political power.²⁸⁸ Supporters of this view point to the growing strength of homosexuals in the Democratic Party, noting President Clinton's support of gay rights in such issues as the ban on homosexuals in the military and the ban on travelers with AIDS, as well as his appointment of a lesbian and gay-rights activist—Roberta Achtenberg—as the assistant secretary for fair housing and equal opportunity in the Department of Housing and Urban Development.²⁸⁹ On the other hand, despite his strong support, President Clinton has not been able to lift the military's ban on homosexuals or the ban on travelers with AIDS.²⁹⁰

sexuals have significant political power), *cert. denied*, 494 U.S. 1004 (1990); see also Green, *supra* note 222, at 538–39 (homosexuals do not have significant political power); Miller, *supra* note 47, at 825–26 (same).

²⁸¹ See, e.g., *High Tech Gays*, 909 F.2d at 378; Green, *supra* note 222, at 538–39; Miller, *supra* note 47, at 825–26.

²⁸² See *supra* notes 1–13 and accompanying text for a discussion of Amendment 2 and the proposal of similar measures.

²⁸³ See, e.g., *High Tech Gays*, 895 F.2d at 574; *Ben-Shalom*, 881 F.2d at 466.

²⁸⁴ See Knickerbocker, *supra* note 13, at 4.

²⁸⁵ See Keen, *supra* note 13, at C3 (“amendment doesn’t stand a chance in Congress, at least not this year”).

²⁸⁶ See Dart, *supra* note 254, at A4.

²⁸⁷ *Id.*

²⁸⁸ See *id.* (over 130 states, counties and cities have enacted laws protecting homosexuals against discrimination); *In Colorado, A Correct Decision*, L.A. TIMES, Jan. 19, 1993, at B6 (7 states and over 100 local governments now have gay rights laws). See *supra* notes 274–79 and accompanying text for a discussion of homosexuals’ economic power and political participation.

²⁸⁹ See Kevin Phillips, *Gay Clout, Political Dynamite*, WASH. POST, Jan. 31, 1993, at C1, C3; Knickerbocker, *supra* note 13, at 1.

²⁹⁰ Major Garrett, *Party’s Centrists to Hold Applause*, WASH. TIMES, Feb. 21, 1993, at A1 (Senate

The weak political position of homosexuals in our society is reflected by the current debate over allowing them into the military. Originally, President Clinton had said that he would lift the military's prohibition of homosexuals.²⁹¹ However, after opposition from the military and Congress, he compromised with a "don't ask, don't tell" policy.²⁹² Under this policy, the military will no longer inquire into recruits' or service members' sexual orientation, but will be able to discharge homosexuals on that basis.²⁹³ The language of this final compromise denigrates homosexuality by calling it an "unacceptable risk."²⁹⁴ This policy appears to have the full weight of both the executive and legislative branches of the federal government behind it. It was passed by an overwhelming majority in both the House and the Senate.²⁹⁵ When the policy was temporarily enjoined from going into effect by a federal court,²⁹⁶ the Clinton Administration appealed the injunction all the way to the Supreme Court.²⁹⁷ Due to the Supreme Court's emergency reversal of the preliminary injunction, the policy will be in effect, at least until the Ninth Circuit Court of Appeals rules on the matter after a full hearing.²⁹⁸

IV. HOMOSEXUALS SHOULD BE DEEMED A SUSPECT CLASS DESERVING STRICT JUDICIAL SCRUTINY

The United States Supreme Court has not addressed the issue of whether homosexuals are a suspect class deserving strict scrutiny under the Equal Protection Clause.²⁹⁹ Lower courts and commentators are

votes 76-23 to ban travelers with AIDS); Paul Quinn-Judge, *Rep. Frank Speaks On Gay Service Ban: The Clinton Agenda*, BOSTON GLOBE, Feb. 19, 1993, at 7 (congressional opposition to lifting military's ban on gays).

²⁹¹ Joan Biskupic, *Administration Divided On Gays - Military Strategy; Pentagon Wants To Seek Emergency Stay Of Ruling*, WASH. POST, Oct. 22, 1993, at A2.

²⁹² *Id.*

²⁹³ *Id.*; Clifford Krauss, *With Caveat, House Approves Gay-Troops Policy*, N.Y. TIMES, Sept. 29, 1993, at A15.

²⁹⁴ *Id.*

²⁹⁵ *Id.* (passed by House by a vote of 301 to 134); Helen Dewar, *Senate Codifies Policy On Gays In The Military*, WASH. POST, Sept. 10, 1993, at A18 (passed by Senate by a vote of 63 to 33).

²⁹⁶ *Meinhold v. U.S. Dep't of Defense*, 808 F. Supp. 1453, 1455 (C.D. Cal. 1992), *stay denied*, 61 Empl. Prac. Dec. (CCH) ¶ 42197 (9th Cir. 1993), *motion for stay granted in part*, 1993 U.S. LEXIS 6922 (Oct. 29, 1993) (declaring preliminary injunction because, *inter alia*, the ban of homosexuality violates the equal protection guarantee of the Fifth Amendment).

²⁹⁷ 1993 U.S. LEXIS 6922 (Oct. 29, 1993); *see also* Linda Greenhouse, *High Court Lets Pentagon Put Gay Policy Into Effect*, N.Y. TIMES, Oct. 30, 1993, at 6 (Court unanimously granted stay of injunction on procedural grounds).

²⁹⁸ *Id.*

²⁹⁹ *See* *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (Supreme Court never held homosexual classifications to heightened review); Ben-Shalom

split on the issue.³⁰⁰ This section argues that homosexuals should be deemed a suspect class deserving strict judicial scrutiny under the Equal Protection Clause. Part A argues that the United States Supreme Court's decision in *Bowers v. Hardwick* does not affect this determination.³⁰¹ Part B completes the argument by asserting that classifications based on homosexuality should receive strict judicial scrutiny because homosexuality meets all of the criteria for suspect class status.³⁰²

A. *Hardwick Is Irrelevant to Equal Protection Analysis*

The Supreme Court's decision in *Hardwick* is not relevant to the determination of the level of judicial scrutiny courts should apply in equal protection cases.³⁰³ *Hardwick* merely held that the due process right to privacy does not include a fundamental right to engage in homosexual sodomy.³⁰⁴ It did not address the issue of equal protection.³⁰⁵ Nonetheless, some courts have held that *Hardwick* precludes suspect class status for homosexual classifications.³⁰⁶ These decisions are faulty because they tie the constitutional guarantees of due process and equal protection too closely together.³⁰⁷ They rely on the argument that there is an anomaly in being able to criminalize the conduct that defines a suspect class.³⁰⁸ Judge Norris, however, in his concurring opinion to *Watkins v. United States Army*, demonstrated that there is no such anomaly.³⁰⁹ Judge Norris showed that *Hardwick* is irrelevant to equal protection cases due to the different dimensions of the constitutional guarantees of due process and equal protection.³¹⁰ Thus, it

v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (discussing *Hardwick*), cert. denied, 494 U.S. 1004 (1990).

³⁰⁰ See *supra* notes 166-202 and accompanying text for a discussion of the level of equal protection review granted to homosexuals.

³⁰¹ See *infra* notes 303-16 and accompanying text.

³⁰² See *infra* notes 317-44 and accompanying text.

³⁰³ See *supra* notes 166-208 and accompanying text for a discussion of *Hardwick's* relevance to equal protection scrutiny of homosexual classifications.

³⁰⁴ 478 U.S. 186, 190-91 (1986); see also, *Watkins v. United States Army*, 875 F.2d 699, 718 (9th Cir. 1989) (en banc) (Norris, J., concurring), cert. denied, 498 U.S. 957 (1990).

³⁰⁵ 478 U.S. at 196 n.8; see also *Watkins*, 875 F.2d at 716, 717 (Norris, J., concurring).

³⁰⁶ See *supra* notes 171-88 and accompanying text for a discussion of decisions holding that *Hardwick* precludes the application of strict scrutiny equal protection review to laws using classifications based on homosexuality.

³⁰⁷ See *supra* notes 196-202 and accompanying text for a discussion of the difference between due process and equal protection.

³⁰⁸ See *supra* notes 184-88 and accompanying text for a discussion of this anomalous argument.

³⁰⁹ See *supra* notes 189-202 and accompanying text for a discussion of this opinion.

³¹⁰ See *id.*

is not anomalous to grant homosexuals suspect class status simply because homosexual sodomy is not protected by the Due Process Clause.³¹¹

That *Hardwick* dealt with criminalizing homosexual sodomy, an act, whereas equal protection addresses homosexuality, a status, also shows that *Hardwick* is not relevant to the level of equal protection scrutiny to be given to homosexual classifications.³¹² As the Court held in *Robinson v. California*, there is a distinction between laws addressing acts and laws addressing personal status.³¹³ While the former can be criminalized, the latter cannot.³¹⁴ It follows that, because *Hardwick* addressed a criminal statute, it cannot apply to status. In turn, because equal protection analysis only deals with status, *Hardwick* is inapplicable. *Padula's* assertion that homosexuals, as a group, are defined by certain sexual acts is simply wrong.³¹⁵ As demonstrated above, the status of homosexuality involves much more than engaging in "homosexual conduct."³¹⁶ Thus, *Hardwick* is not relevant to the determination of the appropriate level of equal protection review for classifications based on homosexuality.

B. *Homosexuals Deserve Suspect Class Status*

Classifications based on homosexuality should receive strict scrutiny from the courts, because homosexuality is central to personal identity and because homosexuals meet all of the criteria of suspectness. These criteria are: (1) the class is defined by a trait that frequently bears no relationship to the ability to perform in or contribute to society; (2) the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes; (3) the trait defining the class is immutable; and (4) the class is a politically powerless minority.³¹⁷ As the following examination reveals, homosexuality meets each of these criteria.

First, homosexuality bears no relationship to a person's ability to contribute to society.³¹⁸ The American Psychiatric Association set this

³¹¹ See *id.*

³¹² See *supra* notes 203-08 and accompanying text for a discussion of the distinction between status and acts.

³¹³ 370 U.S. 660, 667 (1962).

³¹⁴ See *id.*

³¹⁵ See *supra* note 185 and accompanying text.

³¹⁶ See *supra* notes 209-44 and accompanying text.

³¹⁷ See *supra* notes 61-73 and accompanying text for a discussion of the elements of suspectness.

³¹⁸ See *supra* notes 273-79 and accompanying text for a discussion of homosexuals' ability to contribute to society.

forth, saying that homosexuality implies no impairment in judgment, stability, reliability or general social or vocational abilities.³¹⁹ Furthermore, the fact that homosexuals contribute as much, if not more, to society than heterosexuals, as reflected by their income, education, employment and level of political participation, demonstrates their ability to contribute equally to society.³²⁰

Second, homosexuals are saddled with unique disabilities because of both prejudice and inaccurate stereotypes.³²¹ They have been subjected to a long history of public and private denigration, condemnation, violence and discrimination.³²² Such discrimination is not rare and isolated, but is widespread throughout society.³²³ As Judge Norris of the United States Court of Appeals for the Ninth Circuit said, "the discrimination faced by homosexuals is no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens and people of a particular national origin."³²⁴

Third, homosexuality is an immutable trait.³²⁵ While there is disagreement over the causes of homosexuality, most experts agree that it is set at an early age and generally cannot be changed.³²⁶ Additionally, even if it could be changed, homosexuality is still essentially immutable due to the arduousness and painfulness of changing.³²⁷

Furthermore, even if sexual orientation were alterable without much difficulty, it would still be immutable for equal protection purposes because it is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change"³²⁸ Sexual orientation, like race and sex, is immutable for equal protection purposes because of its pervasive and profound impact on personal, as well as group, identity.³²⁹ Thus, even if not completely

³¹⁹ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 578 (9th Cir. 1990) (citing RESOLUTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION, January 1975).

³²⁰ See *supra* notes 275-79 and accompanying text for a discussion of the achievements of homosexuals in these areas.

³²¹ See *supra* notes 245-71 for a discussion of prejudice against and stereotypes concerning homosexuals.

³²² *Id.*

³²³ *Id.*

³²⁴ *Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989) (en banc) (Norris, J., concurring), *cert. denied*, 498 U.S. 957 (1990).

³²⁵ See *supra* notes 217-44 and accompanying text for a discussion of the causes and immutability of homosexuality.

³²⁶ See *id.*

³²⁷ See *supra* note 244 and accompanying text.

³²⁸ See *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

³²⁹ See *supra* notes 213-15 and accompanying text.

unchangeable, homosexuality is immutable for equal protection purposes.

Finally, homosexuals comprise a suspect class because they are politically powerless.³³⁰ Politics, prejudice and ignorance ensure that homosexuals will not receive sufficient governmental aid to overcome discrimination against them.³³¹ Some courts and commentators assert, however, that homosexuals have significant political power.³³² They point to the growing strength of homosexuals in the Democratic Party and to President Clinton's support for gay rights.³³³ This, however, is a limited amount of power when compared with the opposition gays face at all levels of government. They also point to the large number of sponsors in Congress for a proposed amendment to the Civil Rights Act that would include homosexuals.³³⁴ Congress, however, has yet to pass that amendment.³³⁵ Although homosexuals are also gaining advocates in government, the several score of homosexuals in government office across the country hardly amount to significant representation.³³⁶ Homosexuals' lack of political power is most clearly demonstrated by the successful opposition to allowing them to serve openly in the military.³³⁷ Despite focused national attention and the support of President Clinton, the military's ban on homosexuals could not be removed.³³⁸ In fact, the opposition to lifting the ban was so strong that many of its supporters, including the President of the United States, had to retreat to a compromise position supporting the ban.³³⁹ Even if the courts ultimately lift the ban, the failed political struggle to do so clearly demonstrates homosexuals' lack of political power. Finally, some argue that the scores of gay-rights ordinances in effect across the country demonstrate the political power of homosexuals.³⁴⁰ These laws are not dispositive, however, as blacks have many more laws protecting them, including several constitutional amendments, and they are a suspect class.³⁴¹

³³⁰ See *supra* notes 280-98 and accompanying text for a discussion of the political power of homosexuals.

³³¹ See *supra* note 281.

³³² See *supra* notes 283-89 for a discussion of this position.

³³³ See *supra* note 289.

³³⁴ See *supra* note 284 and accompanying text.

³³⁵ See *supra* note 285 and accompanying text.

³³⁶ See *supra* notes 286-87 and accompanying text.

³³⁷ See *supra* notes 291-98 and accompanying text for a discussion of the current battle over allowing homosexuals to serve in the military.

³³⁸ *Id.*

³³⁹ See *supra* note 292 and accompanying text.

³⁴⁰ See *supra* note 288.

³⁴¹ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 378 (9th Cir.

The political powerlessness of homosexuals is underscored by the enactment of Amendment 2. The amendment, by its very nature, limits the political strength of homosexuals and their supporters.³⁴² The fact that Amendment 2 was enacted and can only be repealed by a constitutional amendment attests to the fact that homosexuals are politically powerless in Colorado. As a result of the amendment, for homosexuals in Colorado, the only avenue for relief from discrimination short of a constitutional amendment resides in the courts. In short, the political power of homosexuals is insufficient to protect them in a state where a majority of the population has voted to change the constitution to limit their rights.

Because homosexuality meets the characteristics of a "suspect class," it should be included in the list of classifications which receive strict judicial scrutiny.³⁴³ As Judge Canby of the United States Court of Appeals for the Ninth Circuit wrote:

To leave on the books the rule that the government can discriminate against homosexuals whenever it has a rational basis to do so, is an invitation to tragedy. Homosexuals are hated, quite irrationally, for what they are, what they did not choose to be, and what they cannot easily change. Mainstream society has mistreated them for centuries. If the equal protection clause means anything, it should mean that government cannot, on the slightest justifications, join in the discrimination.³⁴⁴

Homosexuals clearly need and deserve more protection than the rational basis test provides. Thus, laws that classify homosexuals should receive strict scrutiny equal protection review.

V. AMENDMENT 2 IS STATE ACTION THAT DENIES HOMOSEXUALS EQUAL PROTECTION OF THE LAW

Amendment 2 is state action that discriminates against homosexuals and denies them equal protection of the law. Although the Equal Protection Clause is not implicated by the government's failure to

1990) (Canby, J., dissenting) (three constitutional amendments, major federal civil rights acts and anti-discriminatory laws in 48 states protect blacks).

³⁴² See *supra* notes 1-4 and accompanying text for a discussion of Amendment 2 and its effects.

³⁴³ See *supra* notes 61-64 and accompanying text for a discussion of the application of strict scrutiny to suspect classifications.

³⁴⁴ *High Tech Gays*, 909 F.2d at 382 (Canby, J., dissenting).

protect against private discrimination, or even by the removal of government protection, Amendment 2 does more than just repeal anti-discrimination laws.³⁴⁵ At the very least, it encourages private discrimination, which is itself sufficient state action.³⁴⁶ The amendment has the effect of a state declaration that discrimination against homosexuals is permissible. The increase in violence against homosexuals that has accompanied Amendment 2's enactment evidences its encouragement of private discrimination.³⁴⁷ Such encouragement is enough to implicate the state in the discrimination.³⁴⁸

Amendment 2, however, goes much further; it embodies the right to discriminate "in the state's basic charter" and makes discrimination against homosexuals immune from legislative, executive or judicial regulations at any level of state government.³⁴⁹ In this way, Amendment 2 is like the laws in *Reitman* and *Hunter*, which were found to violate the Equal Protection Clause, as it makes it harder for a minority group to redress grievances.³⁵⁰ Like the laws in those cases, Amendment 2 repeals laws protecting a group and requires a majority plebiscite vote to pass new ones.³⁵¹ Thus, it encourages and authorizes discrimination and makes it harder for homosexuals to redress grievances or fight unfair treatment than it is for the rest of society. As a result of Amendment 2, homosexuals, unlike every other group of people in Colorado, cannot petition the government in any of its branches to protect their interests.³⁵² For example, a person can sue an employer for discrimination against him or her on other grounds, such as race, age or sex, but cannot bring suit if the discrimination is based on homosexuality. If Amendment 2 becomes effective, homosexuals' only avenue for official relief will be a constitutional amendment or the courts. Thus, Amendment 2 is identical in effect to the laws in *Hunter* and *Reitman* and should therefore be invalidated. Furthermore, as in *Hunter* and *Reitman*, Amendment 2 is no more valid because it was passed by public referendum.

³⁴⁵ See *supra* notes 93-104 and accompanying text for a discussion of equal protection and the failure of a state to protect individuals.

³⁴⁶ See *supra* notes 109-22 and accompanying text for a discussion of state encouragement of discrimination as state action for equal protection purposes.

³⁴⁷ See *supra* note 257 and accompanying text.

³⁴⁸ See *supra* notes 109-22.

³⁴⁹ *Reitman v. Mulkey*, 387 U.S. 369, 377 (1967); see *supra* notes 1-4 and accompanying text for a discussion of Amendment 2 and its effects.

³⁵⁰ See *Hunter v. Erickson*, 393 U.S. 385, 387 (1969); *Reitman*, 387 U.S. at 370-71; see *supra* notes 135-57 and accompanying text for a discussion of *Hunter* and *Reitman*.

³⁵¹ See *supra* notes 1-4 and accompanying text for a discussion of Amendment 2 and its effects.

³⁵² See *id.*

Like the laws in *Hunter* and *Reitman*, Amendment 2 violates a group's right to equal protection of the law by discriminating against them without justification. The analysis in section IV demonstrates that homosexuals should be deemed a suspect class, and therefore, Amendment 2 should be accorded strict judicial review under the Equal Protection Clause.³⁵³ Even if homosexuals are not a suspect class, strict scrutiny should still be applied as Amendment 2 interferes with the fundamental right of equal political representation.³⁵⁴ The amendment effectively reduces homosexuals' ability to seek redress in government and is therefore analogous to interference with the right to vote.³⁵⁵ Amendment 2 eliminates the assumption on which the rational basis test rests, that government institutions are structured to fairly represent the people.³⁵⁶ By making it harder to seek government assistance or protection, Amendment 2 reduces homosexuals' voice in these institutions and therefore eliminates the grounds for using the deferential rational basis standard of review.³⁵⁷ Thus, Amendment 2, like voting regulations, should receive strict judicial scrutiny. Under such scrutiny, to survive an equal protection attack, the amendment must be necessary to achieve a compelling state interest.³⁵⁸ As the Supreme Court held in *Hunter* and *Reitman*, limits on a group's political power are not justifiable by any legitimate state purpose.³⁵⁹ Thus, Amendment 2 violates the Equal Protection Clause.

In fact, even if homosexuals are not considered a suspect class and no fundamental right is found, Amendment 2 should still be struck down, as it cannot withstand an equal protection attack, even under the deferential rational basis standard of review. Amendment 2 fails to satisfy this test because it does not serve any legitimate governmental purpose.³⁶⁰ The only objective of Amendment 2 is "a bare . . . desire to harm a politically unpopular group," which is not a legitimate governmental purpose.³⁶¹ As the United States Supreme Court said in

³⁵³ See *supra* notes 299-344 and accompanying text for a discussion of the reasons why classifications based on homosexuality deserve strict scrutiny.

³⁵⁴ See *supra* notes 74-85 and accompanying text for a discussion of strict scrutiny of acts affecting fundamental rights.

³⁵⁵ See *supra* notes 1-4 and accompanying text for a discussion of Amendment 2 and its effects.

³⁵⁶ See *supra* notes 78-80 and accompanying text for a discussion of the foundation of the rational basis test and acts which undermine it.

³⁵⁷ See *id.*

³⁵⁸ See *supra* note 80 and accompanying text.

³⁵⁹ See *Hunter*, 393 U.S. at 393; *Reitman*, 387 U.S. at 376.

³⁶⁰ See *supra* notes 44-48 and accompanying text for a discussion of the rational basis test.

³⁶¹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985); see also *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Cleburne, "mere negative attitudes, or fear" are not a sufficient justification for the government to discriminate against a class of people.³⁶² Thus, Amendment 2 cannot be justified, even under the rational basis test.³⁶³

That many of the cases finding a rational basis for disparate treatment of homosexuals assert a unique situation that requires doing so, such as the demands of military discipline and morale, evidences the fact that there is no rational basis for simple discrimination against homosexuals.³⁶⁴ Such a unique situation does not exist to justify Amendment 2, as it is a broad provision covering all aspects of state government and all homosexuals.³⁶⁵ Because Amendment 2 is not justifiable, even under the rational basis test, the logic of *Hunter* and *Reitman* should apply. Thus, Amendment 2 should be struck down, even if it is not granted heightened equal protection scrutiny.³⁶⁶

VI. CONCLUSION

Amendment 2 should be invalidated because it violates the Equal Protection Clause of the United States Constitution by discriminating against a class of society for no valid reason. This class, homosexuals, should be deemed a suspect class deserving strict judicial scrutiny. Despite the holding of several courts, *Bowers v. Hardwick* does not apply to equal protection analysis because it was decided on due process grounds and addressed an act, not a status. Homosexuals deserve suspect class status because they satisfy all of its requirements: they are defined by a trait that frequently bears no relationship to the ability to perform in or contribute to society, they have been saddled with unique disabilities because of prejudice and inaccurate stereotypes, they are defined by a trait which is immutable, and finally, they are a politically powerless minority. Furthermore, even if homosexuals do

³⁶² 473 U.S. at 448.

³⁶³ While the Supreme Court, in *Hardwick*, has held that morality can be a rational basis for a law, that decision was based on substantive due process, not equal protection, and is therefore inapposite to the challenge to Amendment 2. 478 U.S. at 196. See *supra* notes 193-98 and accompanying text for a discussion of the different dimensions of due process and equal protection. Furthermore, Amendment 2 does not promote morality, but rather, simply discriminates against a class of citizens due to public dislike for them.

³⁶⁴ See *supra* notes 168-70 and accompanying text for a discussion of application of the rational basis test to disparate treatment of homosexuals and special considerations that justify such treatment.

³⁶⁵ See *supra* note 2 for text of Amendment 2.

³⁶⁶ The California Court of Appeals reached this conclusion in a recent case involving a city ordinance similar to Amendment 2. *Citizens for Responsible Behavior v. Superior Ct.*, 2 Cal. Rptr. 2d 648, 650-51, 655 (Ct. App. 1991).

not constitute a suspect class, strict scrutiny should still apply because Amendment 2 infringes upon the fundamental right to equal political representation.

Amendment 2 is state action that violates the Equal Protection Clause by discriminating against homosexuals. It does more than just remove their governmental protections; it encourages discrimination and embodies the right to discriminate in the state's basic charter. The amendment makes it harder for homosexuals to receive government aid or protection than it is for anyone else. Thus, like the laws in *Hunter* and *Reitman*, Amendment 2 should be invalidated. Finally, even if homosexuals are not found to constitute a suspect class and no fundamental right is recognized, Amendment 2 should still be invalidated because it fails to satisfy the rational basis test. The amendment does not promote any legitimate governmental purpose, but only promotes a desire to discriminate against an unpopular group.

The outcome of the challenge to Amendment 2 is of national importance. Groups in many other states are preparing and promoting similar measures, and more will surely join in if the courts uphold Amendment 2. This challenge is all the more important, because gay rights is becoming a prominent issue of our time. The outcome of this challenge may well affect gay rights in other realms, such as the military's ban on homosexuals. Thus, Amendment 2's final disposition is of utmost importance not just to Coloradans, but to people in every state of the union.

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