THE POLITICAL ECONOMY OF STATE DEMOCRACY: *ROMER v. EVANS*

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I. INTRODUCTION

In a milestone opinion, *Romer v. Evans*,[1] the United States Supreme Court held unconstitutional an amendment to the Constitution of Colorado. "Amendment 2," as it is referred to, proscribed antidiscrimination legislation based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships. The *Evans* Court held the Colorado amendment violative of the Equal Protection Clause of the Fourteenth Amendment.[2]

The Supreme Court's opinion in *Evans* attests generally to the validity of contemporary constitutional interbranch authority and, more specifically, to the acceptance of federal policymaking without constitutional checks. Specifically, since *United States v. Curtiss-Wright Export Corp.*,[3] the Federal Executive Branch has implemented foreign policy that has been unchecked by any judicially-enforced demands of the Constitution. Similarly, since *NLRB v. Jones & Laughlin Steel Corp.*,[4] Congress has made national economic policy that has also been wholly unchecked. Likewise, since *United States v. Carolene Products Co.*,[5] federal judicial decisions have produced national social policy without constitutional check.

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[1]116 S. Ct. 1620 (1996).

[2]U.S. CONST. amend. XIV, § 1.

[3]299 U.S. 304 (1936). *But cf.* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY (David Gray Adler and Larry N. George, eds. 1996) (discussing the danger of unilateral presidential authority in foreign affairs).

[4]301 U.S. 1 (1937).

[5]304 U.S. 144 (1938). *But cf.* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 1996) (arguing "that in a diverse society, judges work best when they focus on practical solutions to particular cases, rather than taking sides in broader social conflicts" (quoting *New Scholarly Books*, THE CHRONICLE OF HIGHER EDUCATION, July 19, 1996, at A13)).

Furthermore, since *United States v. Darby*,[6] the states have been forced to abide by this wholly unchecked central power. The decision in *Evans* is yet another example of the Court's creation of national social policy, and forcing this policy upon the states, without constitutional check.

This article will first review the *Evans* litigation in the Colorado courts and, then, will analyze the United States Supreme Court's treatment of *Evans* in terms of constitutional political economy. According to this subdiscipline of economics, a court reviewing the constitutionality of state law should not give deference to the constitutional validity of local legislation, such as the local antidiscrimination authorities targeted by the Colorado amendment, but to statewide law, such as Colorado's amendment itself.

II. *EVANS I* IN COLORADO

A. THE *EVANS I* MAJORITY OPINION

On November 3, 1992, a proposed amendment to the Colorado Constitution, Amendment 2,[7] was presented to the Colorado electorate for

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[6]312 U.S. 100 (1941); *cf.* George Steven Swan, *The Political Economy of Taxation Without Representation*: Missouri v. Jenkins *and* Spallone v. United States, 3 J. RES. ON MINORITY AFFAIRS 65 (1992) (Choppin State College Research Inst. on Minority Affairs). In *Darby*, the Court quotes the Tenth Amendment:

> Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered.

312 U.S. at 123-24 (quoting U.S. CONST. amend. X). But compare the verbs of the States Rights Amendment of 1791 (as opposed to 1941) with those of the sentence following. The term familiar to lawyers ("not delegated") is misrepresented as its near-opposite ("not . . . surrendered"). *See infra* note 426 for the observation of the comparable falsification of Griswold v. Connecticut, 381 U.S. 479 (1965), *in* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[7]The Amendment provided,

> *No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.* 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,

a vote.[8] The initiative passed by a margin of 53.4 percent to 46.6 percent.[9] Amendment 2 was primarily aimed at reversing legislation that prohibited discrimination in employment, housing, and public accommodations on the ground of sexual orientation.[10] The amendment was also aimed at repealing an Executive Order[11] prohibiting employment discrimination for all employees of Colorado because of sexual orientation; a Colorado Insurance Code provision[12] forbidding health insurers from sexual orientation discrimination among their applicants, beneficiaries, or insureds; and provisions barring discrimination on the basis of sexual orientation at state colleges.[13]

On November 12, 1992, Richard G. Evans[14] and eight others, Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, and the City of Aspen filed suit in Denver District Court to

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> 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.

Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) [hereinafter *Evans I*].

[8]*Id.*

[9]*Id.*

[10]*Id.* at 1284. Such legislation existed in Aspen, Colo., Mun. Code § 13-98 (1977); Boulder, Colo., Mun. Code §§ 12-1-2 to -4 (1987); and Denver, Colo., Rev. Mun. Code art. IV, §§ 28-91 to 28-116 (1991).

[11]E.O. No. D0035 (December 10, 1990).

[12]Colo. Ins. Code, § 10-3-1104, 4A Colo. Rev. Stats. (1992 Supp.).

[13]Evans v. Romer, 854 P.2d 1270, 1285 n.26 (Colo. 1993). The enactment barred underwriters from charging enhanced premiums to, or from declining to insure, applicants at high risk of contracting AIDS, which served to transfer wealth to high-risk from low-risk insureds. THOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE 119-20, 204-05 (1993). Chief Judge Posner of the U.S. Court of Appeals for the Seventh Circuit, "is the person most singularly responsible for the spread of the school of law and economics, probably the most influential new method of legal analysis to arise in the past 20 years." *Musings of a 'Monkey with a Brain,'* NAT'L L. J., June 17, 1996 at A26.

[14]Mr. Evans was a Denver municipal employee active in gay causes. Joan Biskupic, *Court Strikes Down Colorado's Anti-Gay Amendment*, WASH. POST., May 21, 1996 at 1, A4.

enjoin enforcement of Amendment 2.[15] First, the plaintiffs brought a preliminary motion to enjoin Amendment 2 (prior to its effective date of January 15, 1993), arguing that the Amendment would deny them their First Amendment right to free expression.[16] The plaintiffs' contention was that the Amendment foreclosed all methods of redress for private discrimination (or retaliation) against lesbians, bisexuals, and gay men. Although the trial court did grant the injunction, the court did not address this claim.[17]

In addition, the plaintiffs advanced claims based on violations of their rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment. First, plaintiffs argued that Amendment 2 violated their right to equal protection under the laws to the extent it precluded lesbians, bisexuals, and gay men from equal participation in the political process.[18] Plaintiffs argued that Amendment 2 lacked a rational basis.[19]

Following a four-day hearing, the district court granted the preliminary injunction without making findings of fact.[20] The trial court reasoned that the Amendment "may burden fundamental rights of an identifiable group" — that is, "the right not to have the State endorse or give effect to private biases."[21] The Denver District Court added that under the strict scrutiny standard of review mandated in a constitutional rights case, the plaintiffs had demonstrated sufficiently the probability that Amendment 2 would be shown unconstitutional in a trial on the merits.[22]

The defendants appealed to the Supreme Court of Colorado, arguing that injunctive relief was unnecessary to protect existing fundamental rights.[23] According to the defendants, Amendment 2 would not infringe

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[15]*Evans*, 854 P.2d at 1272 (discussing procedural history).

[16]*Id.* at 1273.

[17]*Id.*

[18]*Id.*

[19]*Id.*

[20]*Id.* at 1288 (Erickson, J., dissenting).

[21]Evans v. Romer, 854 P.2d 1270, 1273-74 (Colo. 1993) (citations omitted).

[22]*Evans I*, 854 P.2d at 1274.

[23]*Id.* "The sole issue before us on this appeal is the validity of the preliminary injunction issued by the district court." *Id.* at 1288 (Erickson, J., dissenting).

upon any right protected by the Equal Protection Clause.[24]

While the Supreme Court of Colorado acknowledged that lesbians, bisexuals, and gay men have not been classified as a constitutionally suspect class,[25] the Colorado Justices noted that the right of citizens to participate in the governmental process is a core democratic value that has commanded the utmost protection since the nation's inception.[26] In *Evans I* the court quoted Stanford Law School Prof. John Hart Ely when it explained that the Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes . . . and on the other,. . .with ensuring broad participation in the processes and distributions of government."[27]

The Justices recognized that the United States Supreme Court consistently has struck down legislation that requires preconditions on participation in the political process.[28] The Colorado Supreme Court also recognized that the Supreme Court has relied on an equal participation principle in reapportionment opinions.[29] This equality principle has been consistently relied upon by the Supreme Court in striking down political participation legislation in candidate eligibility opinions.[30] In *Evans I* the court recognized that the Equal Protection Clause protects the political process by ensuring that suspect legislation is subject to strict scrutiny, thus requiring that a compelling interest be forwarded in support of its constitutionality.[31]

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[24]*Id.* at 1274.

[25]*Id.* at 1275.

[26]*Id.* at 1276.

[27]*Id.* (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980)).

[28]*Id.* at 1277.

[29]*Id.*

[30]*Id.* at 1278.

[31]*Id.* at 1279. The Court stated:

> The Equal Protection Clause guarantees the fundamental right to participate equally in the political process and thus, any attempt to infringe on that right must be subject to strict scrutiny and can be held constitutionally valid only if supported by a compelling state interest. This principle is what unifies the

According to *Evans I*, this principle was articulated in opinions involving legislation barring political institutions from making particular laws supported by an identifiable bloc of electors.[32] The Colorado Supreme Court concluded that the Equal Protection Clause requires any enactment "fencing out" an independently identifiable class to be subject to strict scrutiny.[33] The justices denied that the right to equal political participation applies only to a traditional suspect class.[34]

Amendment 2 affected the right to participate equally in political competition because it prevented lesbians, bisexuals, and gay men from effectively participating in government affairs.[35] They were expressly precluded from participation by Amendment 2.[36] The court emphasized, "[s]trict scrutiny is . . . required because the normal political processes no longer operate to protect these persons."[37] In addition, "[w]hile the State is quite right that the plaintiff class, like any other member of society, has no right to successful participation in the political process, the fact remains that [the plaintiffs'] unsuccessful participation is mandated by the provisions of Amendment 2."[38]

The appellants did not persuade the Colorado Justices that any compelling state interest justified Amendment 2. Therefore, the Colorado Supreme Court found no error in the Denver District Court's grant of a preliminary injunction.[39]

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cases, in spite of the different factual and legal circumstances presented in each of them.

Id.

[32]*Id.*

[33]*Id.* at 1282.

[34]*Id.* at 1283-84.

[35]*Id.* at 1285.

[36]*Id.*

[37]*Id.*

[38]*Id.* at 1285 n.28.

[39]*Id.* at 1286.

B. JUSTICE ERICKSON'S *EVANS I* DISSENT

Justice Erickson would have reversed the Denver District Court, discharging the preliminary injunction and remanding for trial to determine whether to grant the permanent injunction.[40] The dissenting Justice found fault with both the Denver District Court and the *Evans I* majority.[41] Both courts concluded that Amendment 2 should be evaluated under a strict scrutiny standard of review.[42] The district court concluded that the strict scrutiny standard applied because the fundamental right to not have a state endorse and effectuate private biases regarding an identifiable class was implicated;[43] the *Evans I* majority, by contrast, determined that the strict scrutiny standard applied because of the implication of the fundamental right "to participate equally in the political process."[44] Before a trial court can issue a preliminary injunction, the moving party must establish a clear showing that such relief is necessary to protect fundamental constitutional rights.[45] Justice Erickson reviewed the order of the Denver District Court in light of the U.S. Supreme Court's reluctance to expand the list of fundamental constitutional rights.[46]

Relying on the U.S. Supreme Court's opinion in *Reitman v. Mulkey*,[47] the Denver District Court recognized the fundamental right of an identifiable group not to have a state endorse and give effect to private biases.[48] Justice Erickson criticized the district court's reliance on *Reitman*, noting that *Reitman's* equal protection analysis focused only on a racial classification and represented traditional suspect classification analysis.[49]

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[40]*Id.* at 1286 (Erickson, J., dissenting).

[41]*Id.*

[42]*Id.* at 1286-87 (Erickson, J., dissenting).

[43]*Id.* at 1287 (Erickson, J., dissenting).

[44]*Id.* at 1276 (Erickson, J., dissenting).

[45]*Id.* at 1289 (Erickson, J., dissenting).

[46]*Id.* at 1292 (Erickson, J., dissenting).

[47]387 U.S. 369, 377 (1967).

[48]Evans v. Romer, 854 P.2d 1270, 1292-93 (Colo. 1993) (Erickson, J., dissenting).

[49]*Id.* at 1293 (Erickson, J., dissenting).

According to Justice Erickson, the *Evans I* majority was also in error. While the majority did find a fundamental right to participate equally in the political process,[50] there is no Supreme Court precedent expressly identifying such a right. The *Evans I* majority had extrapolated the recognition of such a right from Supreme Court decisions.[51] The Supreme Court held that there is a fundamental right to have one's vote counted equally.[52] Yet, the Justice noted, such opinions are distinguishable from *Evans I* because each was founded in the fundamental right to vote.[53]

While Justice Erickson recognized that the Supreme Court in a separate line of decisions had concluded that regulations respecting ballot access can implicate the Equal Protection Clause, the ballot-access cases cited in the *Evans I* majority opinion did not apply the strict scrutiny review standard.[54] According to the Justice, the *Evans I* majority premised their decision to recognize a fundamental right to equal participation in the political process on ballot-access and right to vote precedents, and cited a limited category of

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[50]*Id.*

[51]*Id.* at 1294 (Erickson, J., dissenting). The *Evans I* majority cited the following United States Supreme Court decisions in support of its contention that a fundamental right to participate in the political process has been recognized: Lucas v. Forty-Forth Gen. Assembly of Colo., 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Williams v. Rhodes, 393 U.S. 23 (1968); Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Gordon v. Lance, 403 U.S. 1 (1971); Hunter v. Erickson, 393 U.S. 385 (1969). *See Evans I*, 854 P.2d at 1276.

[52]*Id.* at 1293-94 (Erickson, J., dissenting); *see* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 633 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

[53]*Id.* at 1295 (Erickson, J., dissenting). The Justice concluded:

> [A]n extended analysis of these cases is not necessary to reach the conclusion that the Supreme Court decisions cited by the majority involving reappointionment or direct restrictions on the exercise of the franchise all fall within the jurisprudence addressing the fundamental right to vote and not within a broader-based fundamental right to participate equally in the political process.

Id.

[54]*Id.* at 1296 (Erickson, J., dissenting).

opinions that recognized a fundamental right to equal participation in the political process.[55] In the Justice's view:

> [A] careful reading of these . . . cases highlights the fact that they are not fundamental rights cases at all, but instead address potential violations of the Equal Protection Clause based on traditionally suspect classifications, albeit in situations where the ordinary political process has been restructured.[56]

Were the Supreme Court ever to explicitly adopt the *Evans I* majority's constitutional premise — "an expansive fundamental right to participate equally in the political process" — its decision, according to Justice Erickson, would amount to reliance on substantive due process.[57]

III. *EVANS II* IN COLORADO

A. THE *EVANS II* MAJORITY OPINION

After the *Evans I* decision, the case was remanded for a determination of whether Amendment 2 was supported by a compelling state interest, and whether it was narrowly tailored to serve that interest.[58] At trial, the defense offered six compelling state interests.[59]

Foremost, the defendants asserted that there was a governmental interest in protecting the sanctity of religious, familial, and personal privacy.[60] Assuming, *arguendo*, that ordinances, which did not provide an exemption for religiously-based objections, substantially burdened the religious liberty of those objecting to renting to or employing lesbians, bisexuals, and gay men, the *Evans II* majority decided ultimately that an equally effective and substantially less onerous method of ensuring religious

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[55]*Id.*

[56]*Id.* at 1297 (Erickson, J., dissenting).

[57]*Id.* at 1301 (Erickson, J., dissenting).

[58]Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994) [hereinafter *Evans II*].

[59]*Id.*

[60]*Id.* at 1342-43.

liberty would be to require such an exemption.[61] Amendment 2 was not the least restrictive means to ensure religious liberty; nor was it narrowly tailored to serve the compelling interest of the state by ensuring the free exercise of religion.[62]

Addressing the plaintiffs' first claim, the Justices found nothing in Amendment 2 aimed at interfering with the parental privacy right to instruct their children on the immorality of homosexuality.[63] The right to privacy can be respected via exempting intimate associations from the scope of antidiscrimination laws.[64] The Colorado Supreme Court found that such exemptions are already present in Denver's antidiscrimination ordinance, exempting from its housing and public accommodation provisions two-unit dwellings where one is owner-occupied.[65] Similarly, the Colorado Civil Rights Statute exempts from its housing and public accommodation provisions rooms for rent or lease in an owner-occupied single-family dwelling.[66] As Amendment 2 did not provide such exemptions, the court concluded that it was not narrowly tailored to protect associational privacy.[67]

Second, defendants claimed that laws benefiting lesbians and homosexuals detracted from the ability of state and local governments to combat discrimination against suspect classes.[68] The court concluded that the preservation of the public treasury and reduction of the governmental workload were not compelling state interests;[69] Amendment 2 was neither

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[61]*Id.* at 1343. Denver's antidiscrimination laws are an example of those that require such an exemption. *Id.* (citing Denver Colo. Rev. Mun. Code art. IV I 28-92, 28-93, 28-95 to 28-97 (1992) (providing an exemption for religiously-based objections)).

[62]*Evans II*, 882 P.2d at 1343.

[63]*Id.* at 1344.

[64]*Id.* at 1345.

[65]*Id.* (citing Denver, Colo., Rev. Mun. Code art. IV, §§ 28-95 (b)(2) and 28-96 (b)(2) (1991)).

[66]*Id.* at 1345 (citing 10A Colo. Rev. Stats. § 24-34-501(2)).

[67]*Id.* at 1345.

[68]*Id.*

[69]*Id.*

necessary to, nor narrowly tailored to, serve those interests.[70]

Third, defendants proposed that Amendment 2 promoted the compelling governmental interest in allowing the people themselves to define social and moral norms.[71] The defendants cited no authority to support their contention that promoting public morality is a compelling governmental interest.[72] Moreover, preventing discrimination against lesbians, bisexuals, and gay men does not imply an endorsement of any particular sexual preference.[73] Therefore, the *Evans II* court repudiated the defendant's third asserted interest.[74]

Fourth, the defendants argued that Amendment 2 precluded the government from supporting the political goals of a special interest group.[75] The court, rejecting the defense presented, concluded that even if antidiscrimination laws implicitly endorse homosexuality, which they do not,[76] this contention proved too much. The court reasoned that "[t]he state exists for the very purpose of implementing the political objectives of the governed, so long as that can be done consistently with the Constitution."[77]

Fifth, defendants cited *Storer v. Brown*,[78] arguing that Amendment 2 deterred factionalism by ensuring that decisions regarding protections for bisexuals and homosexuals be made at the highest governmental level.[79] In *Storer* the United States Supreme Court did allow a state to regulate party

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[70]*Id.* at 1346.

[71]*Id.*

[72]*Id.* at 1347.

[73]*Id.*

[74]*Id.*

[75]*Id.* at 1348.

[76]*Id.*

[77]*Id.*

[78]415 U.S. 724 (1974).

[79]Evans v. Romer, 882 P.2d 1335, 1348-49 (Colo. 1994).

primary election law so as to assure the stability of its party system.[80] However, "[n]either *Storer*, nor any other case . . . [they were] aware of supports the proposition that there is a compelling governmental interest in preventing divisive issues from being debated at all levels of government by prohibiting one side of the debate from seeking desirable legislation in those fora."[81]

Sixth, defendants asserted that while each governmental interest, *in vacuo*, might not be compelling, they were so in the aggregate. The court emphatically disagreed, stating, "[i]n this context, the whole *is* equal, and is equally deficient as the sum of its parts."[82]

Because the plaintiffs did not assert that the Amendment 2 restrictions regarding conduct, practices or relationships were constitutionally suspect, the defendants also argued that only those provisions of Amendment 2 regarding sexual orientation ought to be stricken as unconstitutional.[83] Again, however, the defendants' argument was rejected. The court explained that "[t]he government's ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right."[84] The Justices also rejected the defendants' argument that Amendment 2 represented a valid exercise of Colorado's Tenth Amendment[85] power.[86]

B. THE *EVANS II* SCOTT CONCURRENCE

Justice Scott concurred with the *Evans II* majority's conclusion that Amendment 2 offended the Equal Protection Clause.[87] Justice Scott wrote separately to proffer that Amendment 2 impermissibly burdened the Fourteenth Amendment Privileges and Immunities Clause guarantee that

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[80]*Storer*, 415 U.S. at 736; *cf.* George Steven Swan, *The Political Economy of Congressional Term Limits:* U.S. Term Limits, Inc. v. Thornton, 47 ALA. L. REV. 775, 786-88 (1996).

[81]*Evans II*, 882 P.2d at 1349.

[82]*Id.* (emphasis in original).

[83]*Id.* The provisions of Amendment 2 were not severable. *Id.*

[84]*Id.* at 1350.

[85]U.S. CONST. amend. X.

[86]Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994).

[87]*Id.* at 1351 (Scott, J., concurring).

every citizen has the right to peaceably assemble and petition the government for redress of grievances.[88] Justice Scott quoted from James Madison's *Federalist Paper*, No. 10 when he explained that republican liberties are properly protected from majority rule by preserving, inviolate, certain rights accruing to all citizens.[89] Further, the concurrence quoted from a former member of the U.S. Court of Appeals for the District of Columbia Circuit, Judge Robert H. Bork, for the proposition that there are some areas of life wherein the individual must be free of majority rule.[90] Should not one such area be sexual orientation?

Justice Scott repeatedly cited Prof. Ely, who explained that the framers regarded the Fourteenth Amendment's Privileges and Immunities Clause as crucial to that Amendment.[91] In *Corfield v. Coryell*,[92] Justice Washington held that the Article IV Privileges and Immunities Clause[93] protected fundamental privileges belonging to the citizens of all free governments.[94] As Ely observed, "[t]he drafters of the Fourteenth Amendment 'repeatedly adverted to the *Corfield* discussion as the key to what they were writing.'"[95]

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[88]U.S. CONST. amend. I, cl. 5-6.

[89]*Evans II*, 882 P.2d at 1351 (Scott, J., concurring) (quoting THE FEDERALIST NO. 10, at 42 (James Madison) (Wills 1982)).

[90]*Id.* at 1352 (Scott, J., concurring) (quoting ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139 (1990)).

[91]*Id.* at 1353, 1353 n.5 (Scott, J., concurring) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22 (1980)).

[92]6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825).

[93]U.S. CONST. art. IV, § 2, cl. 1.

[94]*Corfield*, 6 F.Cas. at 551.

[95]Evans v. Romer, 882 P.2d 1335, 1353 n.7 (Colo. 1994) (Scott, J., concurring) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 24 (1980)). Justice Scott noted that,

> The syntax of the Fourteenth Amendment Clause seems inescapably that of substantive entitlement . . . . "[T]he slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements."

Id. at 1356 (Scott, J., concurring) (quoting ELY, *supra*, at 24).

Justice Scott found that Amendment 2 compromised a fundamental right inherent in national citizenship, the right to participate equally in the political process, protected by the comparable Fourteenth Amendment Privileges and Immunities Clause.[96]

C. THE *EVANS II* ERICKSON DISSENT

In *Evans II* Justice Erickson again dissented.[97] Justice Erickson would have reversed the decision of the Denver District Court and vacated the injunction.[98] In Justice Erickson's view there was no fundamental right nor suspect class at issue in this Amendment 2 litigation, and thus Erickson would have applied a rational relation standard of review.[99]

The dissent observed that never in American jurisprudence has the development of fundamental rights been a matter of *ad hoc* determination.[100] Fundamental rights must be explicitly or implicitly guaranteed by the Constitution.[101] Citing *Shapiro v. Thompson*,[102] Justice Erickson observed that among the fundamental rights recognized by the Supreme Court is the right to interstate travel.[103] As Ely explained, citing *Crandall v. Nevada*,[104] the right to travel through the several states is

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[96]*Id.* at 1357 (Scott, J., concurring).

[97]*Id.* (Erickson, J., dissenting).

[98]*Id.* at 1366 (Erickson, J., dissenting).

[99]*Id.* at 1357 (Erickson, J., dissenting).

[100]*Id.* at 1359 (Erickson, J., dissenting).

[101]*Id.*

[102]394 U.S. 618, 634 (1969).

[103]Evans v. Romer, 882 P.2d 1355, 1359 (Colo. 1994) (Erickson, J., dissenting). "The Burger Court, like the Warren Court before it, has been especially solicitous of the right to travel from state to state, demanding a compelling state interest if it is to be inhibited." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 927 (1973) [hereinafter Ely, *Crying Wolf*].

[104]73 U.S. 35, 44 (1868).

critical to the exercise of the rights more obviously political.[105] Justice Erickson's dissent states: "Never before has any court recognized the right to participate equally in the political process as a fundamental right, the curtailing of which warrants strict judicial scrutiny."[106]

The Justice explained that because Amendment 2 was a product of a popular initiative,[107] no rationale was expressly denominated. Nevertheless, Justice Erickson noted three of the interests articulated by the state to meet the rationality test.[108] In Aspen, the sexual orientation ordinance demanded that if church facilities were open to any community organization, they would also have to open facilities to homosexual organizations.[109] In Boulder, the Municipal Code precluded a church with deeply held religious views on homosexuality from declining to hire anyone on the basis of sexual orientation.[110] Justice Erickson found the religious privacy defense of Amendment 2 valid.[111]

The dissent also acknowledged that Colorado has a legitimate interest in statewide uniformity and deemed Amendment 2 rationally related to that interest.[112] Additionally, Justice Erickson recognized Colorado's legitimate state interest in allocating its fiscal resources to ends other than remedying sexual and racial discrimination.[113]

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[105]JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 179 (1980) [hereinafter ELY, DEMOCRACY AND DISTRUST].

[106]*Evans II*, 882 P.2d at 1389-60 (Erickson, J., dissenting). *See generally,* Section IX B.

[107]*Id.* at 1362 (Erickson, J., dissenting).

[108]*Id.*

[109]*Id.* at 1363 (Erickson, J., dissenting).

[110]*Id.*

[111]*Id.*

[112]*Id.* at 1363-65 (Erickson, J., dissenting).

[113]*Id.* at 1365 (Erickson, J., dissenting). Justice Erickson explained:

> The State of Colorado, through entities such as the Colorado Civil Rights Division, has attempted to further the interest in remedying specific instances of sexual and racial discrimination through existing civil rights laws and enforcement programs. However, owing to the fiscal constraints which are inevitably a part of public administration, unlimited funds are not available

IV. THE *ROMER v. EVANS* BRIEFS

In her brief filed with the United States Supreme Court, Colorado Attorney General Gale A. Norton[114] echoed Ely when she asserted that the Supreme Court of Colorado had created from "whole cloth a new fundamental 'group right' not to be 'fenced out' from unfettered political participation at all levels of government."[115] According to the Pulitzer Prize winning Dr. George F. Will, the Attorney General urged the Supreme Court to "remove the uncertainty of the future of popular government"[116] in Colorado. It was asserted that if the *Evans II* precedent was not reversed, important public policy concerns could not decisively be dealt with through the political process. Government continually would be obliged to reassess every policy choice.[117] Elimination of local provisions compelling religious institutions and landowners to open their facilities to bisexuals and to gays is a rational means to protect the permissible preferences of a majority of the State's population.[118] The brief further argued that Colorado citizens had not been disenfranchised or frustrated in casting an equally-weighted ballot, nor were they impeded in electing the representative of their choice.[119]

A brief challenging Amendment 2, filed by plaintiffs, including the cities of Denver and Boulder, declared that the state could not identify another constitutional provision excluding a group from the normal legislative, administrative, and judicial fora to which everyone else freely may appeal.[120] Plaintiffs claimed that the legislative history of Amendment

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> for this purpose. Therefore, it is incumbent upon the state to set priorities for its enforcement efforts. In this case, the setting of priorities is a legitimate state interest and Amendment 2 is rationally related to that interest.

Id. at 1366 (Erickson, J., dissenting).

[114]Romer v. Evans, 116 S. Ct. 1620 (1996).

[115]64 U.S.L.W. 3177 (U.S. September 26, 1995) (quoting ELY, DEMOCRACY AND DISTRUST, *supra* note 105, at 37).

[116]George F. Will, *Order by the Court*, WASH. POST, October 12, 1995, at A25 (quoting the Colorado attorney General's brief).

[117]*Id.*

[118]64 U.S.L.W. 3177 (U.S. September 29, 1995).

[119]Jeffrey Rosen, *Disoriented*, THE NEW REPUBLIC, October 23, 1995, at 24, 26.

[120]64 U.S.L.W. 3177 (U.S. Sept. 26, 1995).

2 confirmed that the Amendment only serves the aim of expressing hostility against gay people.[121]

An *amicus curiae* brief filed by seven states[122] urged reversal of the Colorado Supreme Court's opinion. The states argued that the *Evans II* precedent "'casts a long shadow over numerous provisions of state constitutions and statutes that remove issues favored by other 'identifiable groups' from the local political process.'"[123]

An *amicus* brief filed on behalf of Equal Rights, Not Special Rights Inc., was signed by, *inter alia*, former Judge Bork.[124] This brief distinguished restraints on officials from those on the people. It proposed that to take from elected officials their authority to impose certain laws would not constitute a denial of the lobbying rights of the people and a denial of the people's right to participate in the political process.[125]

Another *amicus* brief was filed by a startlingly prominent group of law school professors[126] including Laurence H. Tribe of Harvard Law School, John Hart Ely, Gerald Gunther, Kathleen M. Sullivan of Stanford Law School, and the late Phillip B. Kurland of the University of Chicago School of Law.[127] According to these professors, Amendment 2 presented:

> a rare example of a per se violation of the Equal Protection Clause. . . . To decree that some identifying feature or

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[121]*Id.*

[122]*Id.*

[123]*Id.* (quoting the *amicus* brief).

[124]*Id.*

[125]64 U.S.L.W. 3177 (U.S. September 26, 1995).

[126]*Id.*

[127]Stuart Taylor, Jr., *Justices Fall Short on Gay Rights Opinions*, MIAMI DAILY BUS. REV., May 28, 1996, at A2; Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. OF BOOKS, August 8, 1996, at 44, 49. Ronald Dworkin is a well-known Professor of Jurisprudence at Oxford University and Professor of Law at New York University. For further reading of works by Ronald Dworkin, see FREEDOM'S LAW (1996); LIFE'S DOMINION (1993); A MATTER OF PRINCIPLE (1985); TAKING RIGHTS SERIOUSLY (1977).

The significance of Kathleen M. Sullivan's participation in the *amicus* brief is that she, along with Professor Tribe, assisted with the brief in *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986). In *Bowers*, the Supreme Court rejected a constitutional assault against a criminal sodomy statute.

> characteristic of a person or group may not be invoked as the basis of any claim of discrimination under any law or regulation enacted, previously or in the future, by the state, its agencies, or its localities — is, *by definition*, to deny the 'equal protection of the laws' to persons having that characteristic . . . . No extrapolation from precedents dealing with racial or other minorities, or from precedents dealing with rights of [sic] political or legal participation, is needed to conclude that this selective preclusion of claims of discrimination violates the Equal Protection Clause.[128]

This brief was deemed persuasive[129] and "powerful,"[130] encompassing an "elegant argument."[131] It propounded that Amendment 2 conjured up, relative to homosexuals, "a unique hole in the state's fabric of existing and potential legal protections" against "discrimination." Colorado had created "a paradigm case of what it means for a state to structure its legal system so as to 'deny . . . the equal protection of the laws.'"[132]

Compare Tribe's longstanding[133] defense of the problematic[134] 1948 Supreme Court opinion, *Shelley v. Kraemer*:[135]

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[128]64 U.S.L.W. 3177 (emphasis in original). "Such a declaration, the brief said, in effect outlaws the group, and it was the central point of the [E]qual [P]rotection [C]lause to prevent that kind of caste distinction." DWORKIN, *supra* note 127, at 49. Nowhere in Dworkin's seven-page tabloid essay critiquing, *inter alia*, *Bowers v. Hardwick*, 478 U.S. 186 (1986) and *Romer v. Evans*, 116 S. Ct. 1620 (1996), appears the acronym "AIDS."

[129]Clarence Page, *Anti-Gay Initiative Has Implications for All*, LIBERAL OPINION WEEK, October 23, 1995, at 5.

[130]Jeffrey Rosen, *supra* note 119, at 26.

[131]*Id.*

[132]Clarence Page, *supra* note 129, at 5 (quoting the amicus brief).

[133]LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1169-70 (1978) [hereinafter TRIBE, 1st ed.].

[134]LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1698, 1714 (2d ed. 1988) [hereinafter TRIBE, 2nd ed.].

[135]334 U.S. 1 (1948); *cf.* George Steven Swan, *The Political Economy of American "Apartheid"*: Shaw v. Reno, 11 THOMAS M. COOLEY L. REV. 1, 22-23 (1994).

> [T]he state's contract and property rules, including elaborate doctrines designed to limit the enforceability of restraints on the alienation of land, were not in fact neutral in their enforcement of *racial* restraints on alienation while treating many other restraints as unenforceable.[136]

The focus of both *Shelley* and *Evans* is specific state manipulations to preclude certain individuals from access to the law. In *Shelley*, many prospective plaintiffs were frustrated from bidding to enforce a restraint on alienation because of elaborate doctrines limiting when might a court legally enforce a restraint on alienation of land. In *Evans*, a pressure group aiming to pass a law was barred from so doing unless a state-constitutional amendment was enacted.

V. THE ORAL ARGUMENT OF OCTOBER 10, 1995

The more than thirty *amicus curiae* briefs filed with the U.S. Supreme Court in *Evans* marked the significance of the appeal.[137] The oral argument of October 10, 1995, was the first before the Supreme Court regarding gay rights in a decade.[138] The brisk[139] hourlong exchange[140] frequently pitted one Justice against another.[141] The question most often put from the bench was: "What does this mean?"[142] The Justices appeared frustrated by the vague replies offered by the attorneys for both sides.[143]

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[136]TRIBE, 2nd ed., *supra* note 134, at 1715 (emphasis in original).

[137]Arguments before the Court, 64 U.S.L.W. 3279 (U.S. October 17, 1995).

[138]Linda Greenhouse, *U.S. Justices Hear, and Also Debate, A Gay Rights Cause*, N.Y. TIMES, October 11, 1995, at A5 [hereinafter Greenhouse, *U.S. Justices Hear*].

[139]Aaron Epstein, *Key Justices Question Colorado's Anti-Gay Law*, ATLANTA J., October 11, 1995, at A5 [hereinafter Epstein, *Key Justices*].

[140]Tony Mauro, *Colorado Gay Bias Measure Draws Skeptical Review*, USA TODAY, October 11, 1995, at 4A [hereinafter Mauro, *Colorado Gay Bias*].

[141]Jan Crawford Greenburg, *Justices Get Testy Over Gay Rights Case*, CHI. TRIBUNE, October 11, 1995, at 5 [hereinafter Greenburg, *Justices Get Testy*].

[142]Arguments before the Court, *supra* note 137, at 3279.

[143]Mauro, *Colorado Gay Bias*, *supra* note 140, at 4A.

The *Evans* issue, which had divided cities and states with increasing frequency,[144] seemed to polarize the Justices also.[145]

A. SOLICITOR GENERAL TYMKOVICH FOR THE APPELLANTS

Just minutes following the opening of oral argument, Justices Anthony Kennedy and Sandra Day O'Connor questioned the breadth of Amendment 2.[146] Colorado Solicitor General Timothy M. Tymkovich[147] argued that because homosexuals are not a suspect class, Amendment 2, rather than denying a fundamental right, simply forestalled homosexuals from netting "special protections,"[148] which are unavailable to the greater public.[149] Tymkovich took a states' rights stance positing that Amendment 2 represented Coloradans' reservation of statewide authority.[150] Amendment 2, being a political response to legislative overreaching, was a political question not justiciable by the Justices.[151]

When Justice David Souter asked Tymkovich upon what basis affirmative protections can be denied to homosexuals, Tymkovich responded that Amendment 2 represented the political judgment of the voters.[152] "Why is discrimination against one particular group handled differently than for others?" Souter queried.[153] The Justice saw no valid rationale beyond

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[144]James Brooke, *Colorado Is the Engine in Anti-Gay Rights Furor*, N.Y. TIMES, October 11, 1995, at C18; *cf.* LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF THE LAW (Didi Herman & Carl Stychin, eds. 1996)

[145]Greenburg, *Justices Get Testy, supra* note 141, at 5.

[146]Epstein, *Key Justices, supra* note 139, at A5; Robert Marquand, *High Court Swings on Two Justices*, CHRISTIAN SCI. MONITOR, October 12, 1995, at 1.

[147]Greenhouse, *U.S. Justices Hear, supra* note 138, at 1.

[148]Arguments before the Court, *supra* note 137, at 3279.

[149]Greenburg, *Justices Get Testy, supra* note 141, at 4A.

[150]Mauro, *Colorado Gay Bias, supra* note 140, at C18.

[151]Greenhouse, *U.S. Justices Hear, supra* note 138, at C18.

[152]Arguments before the Court, *supra* note 137, at 3280; Greehouse, *U.S. Justices Hear, supra* note 138, at C18.

[153]Arguments before the Court, *supra* note 137, at 3280.

"that's what the people want."[154] "It's a judgment that's made politically. But that doesn't address the rational basis. Your rational basis has got to go to the justification for the classification." [155] Tymkovich responded that also relevant were the competing interests in associative liberty and religious freedom.[156] These fundamentally entail sensitive cultural and moral concerns of Coloradans.

Souter protested, "That doesn't get you any further."[157] Several times when Tymkovich faltered, Justice Antonin Scalia rescued him:[158] Amendment 2 merely eliminated "special protections;"[159] the "one step at a time"[160] approach to protecting groups would be a sufficiently rational basis, Justice Scalia offered. "Exactly," said Tymkovich.[161] Justice Scalia repeatedly replied to aggressive questions from Justices Ruth Bader Ginsburg and Stephen G. Breyer.[162]

Chief Justice William H. Rehnquist responded to Justice John Paul Stevens' inquiry as to what rationale justifies an Amendment whereby "the people outside of Aspen [are] telling the people in Aspen they cannot have this nondiscrimination provision." Those outside Aspen are the remainder of Colorado initiative voters. Apparently, Rehnquist surmised that voters would prefer statewide rules to local rules.[163] Rehnquist's state-local dichotomy proved of special relevance because Justice Ginsburg challenged Tymkovich over the constitutionality of an amendment decreeing "no local ordinance can give women the vote."[164] When Tymkovich denied that

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[154]*Id.*

[155]Greenhouse, *U.S. Justices Hear, supra* note 138, at C18.

[156]Arguments before the Court, *supra* note 137, at 3280.

[157]Greenhouse, *U.S. Justices Hear, supra* note 138, at C18.

[158]Epstein, *Key Justices, supra* note 139, at A5.

[159]*Id.*

[160]Arguments before the Court, *supra* note 137, at 3280.

[161]Greenhouse, *U.S. Justices Hear, supra* note 138, at C18.

[162]Greenburg, *Justices Get Testy, supra* note 141, at 5.

[163]*Id.*

[164]Arguments before the Court, *supra* note 137, at 3280.

such a case would be the same, she countered: "Cast your eyes back to the days before the 19th Amendment."[165] (The truth is, numerous desirable reforms, including, in several states, women's suffrage, arose via Amendment 2-style initiatives.[166] Perhaps this is unknown to Ginsburg.)

B. JUSTICE DUBOFSKY FOR THE APPELLEES

Former Colorado Supreme Court Justice Jean E. Dubofsky[167] of Boulder[168] argued for striking down Amendment 2.[169] Representing six gay residents of Colorado,[170] and the cities of Aspen, Boulder, and Denver,[171] the former justice[172] proposed, "This case is about targeting a particular group of people because of a personal characteristic."[173] "I don't think there is such a thing as special rights and special protection . . . there is a right of every person to be free of arbitrary discrimination."[174]

When Justice Scalia asked Dubofsky whether she sought to overturn *Bowers v. Hardwick*,[175] the Supreme Court precedent rejecting a due process constitutional assault against a criminal sodomy statute, her rejoinder

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[165]*Id.*

[166]*See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 245 (1995) (citing Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 707-77 (1991)).

[167]Greenhouse, *U.S. Justices Hear, supra* note 138, at C18.

[168]Arguments before the Court, *supra* note 137, at 3279.

[169]David G. Savage, *High Court's Debate Cheers Gay Advocates*, L.A. TIMES, October 11, 1995 at A16. Mr. Savage is author of, *inter alia*, DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992).

[170]Greenhouse, *U.S. Justices Hear, supra* note 138, at C18.

[171]Epstein, *Key Justices, supra* note 139, at A5.

[172]Former Justice Dobofsky had represented the plaintiffs-appellees in both of the *Evans* (*Evans I* and *Evans II*) appeals before the Supreme Court of Colorado. Evans v. Romer, 854 P.2d 1270, 1271 (Colo. 1993); Evans v Romer, 882 P.2d 1335, 1338 (Colo. 1994).

[173]Epstein, *Key Justices, supra* note 139, at A5.

[174]Greenhouse, *U.S. Justices Hear, supra* note 138, at C18.

[175]478 U.S. 186 (1986).

was negative.[176] But Justice Stevens, replying to Scalia, explained that in *Evans* a target individual falls under Amendment 2 even if she refrains from homosexual behavior offensive to state law.[177]

Each Justice speaking questioned the precedent-breaking Amendment 2.[178] In Justice Ginsburg's words: "I would like to know whether in all of U.S. history there has ever been anything like this."[179] "It's everything — thou shalt not have access," Justice Ginsburg added.[180] Justice Kennedy flatly announced: "I've never seen a statute like this."[181]

Commenting on the oral argument, New York University School of Law Dean James Simon[182] propounded that Justices Kennedy and O'Connor are the pivotal members of the Supreme Court. It is left to them to decide cases like Colorado's.[183] Director of the American Civil Liberties Union National Lesbian and Gay Right Project, Matthew Coles announced, "We think the argument went very well, and we feel most encouraged. We think the court got it."[184] Former Justice Dubofsky pronounced herself highly hopeful.[185] The Supreme Court surprisingly devoted little attention to the

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[176] Arguments before the Court, *supra* note 137, at 3280; Mauro, *Colorado Gay Bias, supra* note 140, at 4A. Apparently, there is no scholarly research clarifying the impact upon the Supreme Court of the requests of parties to overturn precedent. SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS*: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1949-1992, 19, 72-73 n.2, 108, 111 (1995).

[177] Arguments before the Court, *supra* note 137, at 3280.

[178] *Id.* Justice Clarence Thomas was the only Justice who remained silent. *Id.*; Greenhouse, *U.S. Justices Hear, supra* note 138, at C18.

[179] Joan Biskupic, *Justices Appear Skeptical About Colorado Measure Barring Gay Rights Laws*, WASH. POST, October 11, 1995, at A3.

[180] Mauro, *Colorado Gay Bias, supra* note 140, at 4A.

[181] Robert Marquand, *Presidential Politics Presage a Change in the Supreme Court*, CHRISTIAN SCI. MONITOR, May 28, 1996, at 8 [hereinafter Marquand, *Presidential Politics*]; Mauro, *Colorado Gay Bias, supra* note 140 at 4A.

[182] *See, e.g.*, James Simon, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995).

[183] Marquand, *Presidential Politics, supra* note 181, at 1.

[184] Savage, *supra* note 169, at A16.

[185] *Id.*

Colorado Justices' *Evans II* decision.[186]

VI. THE KENNEDY OPINION FOR THE *EVANS* MAJORITY

The *amicus* brief of Professor Tribe, who had argued and lost for the respondent in *Bowers*,[187] provided the constitutional basis for *Evans*;[188] Justice Kennedy's opinion relied heavily upon that brief.[189] The majority took a different approach from that of the Supreme Court of Colorado.[190] It is proper to style his "the" Kennedy opinion for the *Evans* majority, because the absence of other Justices' joining with separate opinions displays an effort by Kennedy's majority to present a united front on a contentious issue.[191]

The majority began its opinion with a quotation[192] from Justice Harlan's dissent in *Plessy v. Ferguson*.[193] In *Plessy*, dissenting Justice Harlan admonished that the Constitution "neither knows nor tolerates classes

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[186]Linda Greenhouse, *Gay Rights Laws Can't Be Banned, High Court Rules*, N.Y. TIMES, May 21, 1996 at C18 [hereinafter Greenhouse, *Gay Rights*].

[187]Bowers v. Hardwick, 478 U.S. 186, 187 (1986). "Like many libertarians, Tribe believed that one's rights to privacy in sexual matters was [sic] a logical outgrowth of previous court rulings upholding the rights to privacy in decisions concerning abortion and birth control." RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY VIETNAM TO THE PERSIAN GULF 522 (1993).

[188]Peter S. Canellos, *High Court Gives Boost to Gay Rights*, BOSTON GLOBE, May 21, 1996, at 1.

[189]Lyle Denniston, *Anti-Gay Amendment Struck Down*, THE SUN (Baltimore), May 21, 1996 at 6A.

[190]Greenhouse, *Gay Rights, supra* note 186 at 1, C19.

[191] Robert Marquand, *Court Boosts Gay Rights in 'Culture War' Ruling*, CHRISTIAN SCI. MONITOR, May 21, 1996 at 1, 3 [hereinafter Marquand, *Court Boosts Gay Rights*]. "'You hear a lot about a fractured court these days,' says Mark Tushnet, a dean at the Georgetown University Law School. 'The Justices worked to avoid that in this decision. That sends a message.'" *Id.*

[192]Romer v. Evans, 116 S. Ct. 1620 (1996).

[193]163 U.S. 637 (1896), *overruled sub silentio*, Gayle v. Browder, 352 U.S. 903 (1956).

among citizens."[194] The initial section of *Evans* reviews the history of the case.[195]

Colorado's principal argument in defending Amendment 2, according to the majority, was that Amendment 2 merely placed lesbians and gays in a position identical to every other person.[196] But Kennedy found, "The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[197]

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[194]163 U.S. at 559 (Harlan, J., dissenting). Justice Harlan fumed that black Americans were statutorily criminalized for sharing a coach with white citizens, when even "a Chinaman" was not.

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled by law to participate in the political control of the state and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.

Id. at 561 (Harlan, J., dissenting). Assuming, *arguendo*, that under 1997 standards the dissent in *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting), is homophobic, *quaere*: Is Harlan's dissent in *Plessy*, under 1997 standards, nativist?

[195]*Romer*, 116 U.S. at 1623-24. *See* discussion *supra* Sections II and III.

[196]*Id.* at 1624.

[197]*Id.* at 1625. Considering the proposition that Amendment 2 simply precluded special rights, the majority concluded:

> [W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for

Having determined that Amendment 2 entailed a disadvantageous group-classification, the majority tested whether it bore a rational relation to a legitimate end.[198] This is the most deferential of review standards, adequate to the ordinary equal protection case.[199] Thereunder, a law is upheld if it can be said to promote a legitimate governmental interest, even if the law appears unwise or disfavors a certain group.[200] Amendment 2 failed a rational relation test on two grounds.[201]

First, Amendment 2 was condemned as peculiarly imposing an undifferentiated and broad disability on a specific named classified group.[202] Regarding this point, the majority concluded, "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[203]

> granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

Id. at 1626-27. But why "civic"?

[198]*Id.* at 1627.

[199]*Id.*

[200]*Id.*; Williamson v. Lee Optical, 348 U.S. 483 (1955) (upholding a "famously stupid law."), *quoted in* FISCHEL, *supra* note 166, at 300.

> The Oklahoma legislature passed a law that required (among other contortions) that before an optician can repair eyeglass lenses, the customer must obtain a prescription from a licensed optometrist or opthamologist. There is no credible reason for this law other than that optometrists had a more effective lobby than the opticians in the Oklahoma legislature at the time.

Id.

[201]Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

[202]*Id.*

[203]*Id.* at 1628. Here Kennedy echoes the language of Tribe's brief as quoted in Section IV, *supra*. Greenhouse, *Gay Rights, supra* note 186, at C19.

> Kennedy did accept, in general terms, the argument of the academic brief. He emphasized, as that brief did, that Amendment 2 was wholly novel in the sheer

Second, Amendment 2 was condemned as inevitably raising the inference that its disadvantage is born of animosity toward the affected class:

> The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.[204]

There is good reason to reproduce this lengthy passage. Colorado had asserted that a non-animosity rationale supportive of Amendment 2 was the liberty of employers and landlords objecting to homosexuality. Homosexuality, under *Bowers*, does not merit constitutional protection.[205] The *Evans* court perfunctorily dismisses the State's argument.[206] The

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> breadth of the potential damage it worked on homosexuals, by depriving them of any possible opportunity to secure protection, except by constitutional amendment, against any form of discrimination no matter how harmful or wrongful.

Dworkin, *supra* note 127, at 49.

[204]*Romer,* 116 S. Ct. at 1629.

[205]David A. Kaplan & Daniel Klaidman, *A Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24, 30.

[206]*Id.*

> Kennedy peremptorily brushes aside the state's claims that it was justified both by the need to protect the free-association rights of landlords and employers who have moral or religious objections to homosexuality, and by the goal of focusing scarce resources on fighting discrimination against other groups, deemed by the voters to be more deserving of protection.

Taylor, *supra* note 127, at A2.

majority offers no explication in terms of constitutional theory or history.[207] The Supreme Court of Colorado dedicated more than a page to discussing the right of associational privacy,[208] and almost a page to discussing resource conservation.[209] But this conclusory Kennedy opinion was widely reported to be less juridical science than a political manifesto.[210] As such, this opinion, necessarily, drew a dissent.

VII. JUSTICE SCALIA'S *EVANS* DISSENT

Following Justice Kennedy's dispassionate reading from the bench of the majority ruling,[211] Justice Antonin Scalia took the unusual step of reading his dissent aloud.[212] Justice Kennedy stared coldly at Scalia as Scalia read his dissent.[213] The dissent was joined by Chief Justice Rehnquist and Justice Clarence Thomas.[214] This dissent was variously belittled and reviled as colorful,[215] blistering,[216] angry,[217] harshly

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[207]Kaplan, *supra* note 205, at 30.

[208]Evans v. Romer, 882 P.2d 1335, 1344-45 (Colo. 1994).

[209]*Id.* at 1345-46; *see supra* text in Section III. A.

[210]Kaplan, *supra* note 205, at 30.

[211]Denniston, *supra* note 189, at 6A.

[212]Tony Mauro, *Supreme Court Upholds Gay Rights; Punitive Damage Awards Restricted*, USA TODAY, May 21, 1996, at 1, 2A [hereinafter Mauro, *Supreme Court Upholds Gay Rights*].

[213]*Id.*

[214]Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting).

[215]Marquand, *Court Boosts Gay Rights, supra* note 191, at 3.

[216]*Id.*; Jan Crawford Greenburg, *Court Strikes Down Ban on Gay Rights*, CHI. TRIB., May 21, 1996, at 14 [hereinafter Greenburg, *Court Strikes Down Ban*]; Aaron Epstein, *High Court Kills Colo. Gay Rule*, CHARLOTTE OBSERVER, May 21, 1996, at 1 [hereinafter Epstein, *High Court*].

[217]Biskupic, *supra* note 14, at 1.

worded,[218] withering,[219] fiery,[220] vitriolic,[221] scathing,[222] barbed,[223] and snide.[224] The words of these dissenting Justices, delivered in the marble and velvet trappings of America's most important courtroom, cut to the core of an impassioned social debate.[225]

Justice Scalia emphatically contradicts a crucial majority notion, concluding, "The amendment prohibits special treatment of homosexuals, and nothing more."[226] The dissent writes:

> The central thesis of the Court's reasoning is that any group is

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[218]Epstein, *Key Justices, supra* note 139, at A7.

[219]Editorial, *Rethinking Equality*, WALL ST. J., May 22, 1996, at A22. "Justice Scalia subjected these arguments to appropriate scorn in a withering dissent of the type to which Court watchers have become too accustomed from him. (It's practically an art form.)" Ramesh Ponnuru, *Kennedy's Queer Opinion*, NAT'L REV., June 17, 1996, at 22.

[220]Paul M. Barrett, *Court Rejects Ban on Laws Protecting Gays,* WALL ST. J., May 21, 1996, at B7.

[221]Taylor, *supra* note 127, at A2.

[222]Denniston, *supra* note 189, at 6A.

[223]Kaplan, *supra* note 205, at 30.

[224]"For those with a taste for jurisprudential acid, Justice Scalia's opinion will be especially satisfying, with its snide disquisition on sodomy and polygamy, and continual belittling of the majority." Tom Stoddard, *The High Court Erases a Stigma,* NAT'L L.J., June 3, 1993, at A19.

[225]Biskupic, *supra* note 14, at 1.

[226]Romer v. Evans, 116 S. Ct. 1620, 1630 (1996) (Scalia, J., dissenting).

> But this is tantamount to describing laws against racial discrimination as creating "special rights" for black people. And Scalia's use of such language is especially misleading in a world in which the employment-at-will doctrine is dead — buried (in Colorado) under a web of laws that bar discrimination on the basis of age, military status, marital status, pregnancy, parenthood, custody of a child, political affiliation, and physical or mental disability, not to mention race, creed, color, national origin and sex.

Taylor, *supra* note 127, at A2 (quoting *Romer*, 116 S. Ct. at 1624 (Scalia, J., dissenting)); *cf.* George Steven Swan, *The Economics of the Retaliatory Discharge Public Policy Action*, 9 ST. LOUIS U. PUB. L. REV. 605, 613-20 (1990).

> denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection.[227]

Next, Scalia addressed whether there was a legitimate rational basis for the substance of Amendment 2, noting, "[i]t is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes."[228] He skewers the majority for declining to cite *Bowers*, emphatically mocking his fellow Justices for indulging in the Supreme Court luxury of ignoring inconvenient precedent.[229] Justice Scalia pronounced, "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct."[230]

Scalia understands there to be nothing un-American in an animosity or animus toward homosexuality. Coloradans are entitled to recoil from homosexual conduct.[231] Scalia concludes:

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[227]*Romer*, 116 S. Ct. at 1630-31 (Scalia, J., dissenting).

[228]*Id.* at 1631 (Scalia, J., dissenting).

[229]*Id.* at 1632 (Scalia, J., dissenting). Supreme Court opinions utilized as authority for a subsequent opinion twice or more are unlikely to be overruled. BRENNER & SPAETH, *supra* note 176, at 12-13 (citing S. Sidney Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. OF PUB. L. 414, 418-23 (1959)). Between 1986 and 1996, the Supreme Court never had cited approvingly the central holding of *Bowers v. Hardwick*, 478 U.S. 186 (1986). Dworkin, *supra* note 127, at 46 (citing Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996)).

[230]*Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting).

[231]*Id.* at 1633 (Scalia, J., dissenting).

> Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.[232]

Apparently, Justice Scalia, as did Justice Scott concurring in *Evans II*[233] and Gale Norton in her brief filed with the United States Supreme Court,[234] relied on the pronouncement of Ely.[235] When inside jokester Scalia (or Scalia's judicial clerks) declares *Evans* has no foundation in constitutional law,[236] and scarcely pretends to have one, Scalia mimics the emphatic Ely of 1973: "It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[237]

VIII. THE RECEPTION OF *EVANS*

A. PROFESSIONAL REACTION TO *EVANS*

Justice Kennedy's opinion was tailored to the narrowest terms

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[232]*Id.* at 1637 (Scalia, J., dissenting).

[233]*See* discussion *supra* Section III.B.

[234]*See* discussion *supra* Section IV.

[235]ELY, DEMOCRACY AND DISTRUST, *supra* note 105.

[236]*See, e.g.*, journalistic commentary on *Romer*, 116 St. Ct. 1620, recounting that Justice Anthony "Kennedy's usual practice is to breathe life into a clerk's draft." Deb Price, *Justice Kennedy Draws the 'Line' Over Which Government Must Not Go*, LIBERAL OPINION WEEK, June 17, 1996, at 11.

[237]Ely, *Crying Wolf*, *supra* note 103, at 947 (emphasis in original) (discussing Roe v. Wade, 410 U.S. 113 (1973)).

possible.[238] Tightly focused upon the Colorado dispute[239] and not mentioning *Bowers*,[240] it appeared to N.Y.U. Law School Adjunct Professor Tom Stoddard[241] as remarkably more notable for what it refused to cite (*Bowers*) than for what it did cite.[242] The repudiation of Amendment 2, under even the rational basis test,[243] left unanswered the question of what review standard is applicable to discrimination on the ground of sexual orientation.[244]

Further, the omission of any reference to *Bowers* might have been the price of a coherent six-Justice majority opinion.[245] *Bowers* endures as valid precedent.[246] Yet at least one attorney familiar with the *Evans* Supreme Court litigation[247] noted that *Evans'* silence regarding *Bowers* signaled that

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[238]Editorial, *Rethinking Equality*, *supra* note 219, at A22.

[239]Barrett, *supra* note 220, at B7.

[240]*Id.*

[241]"I am a lawyer and a law teacher. I care about legal doctrine and process. But I am also a gay man. My gay identity, in the end, drives the way I view *Evans*." Stoddard, *supra* note 224, at A19.

[242]*Id.*

[243]Georgetown University Law Center Professor Chai R. Feldblum believes that *Evans v. Romer*, 116 S. Ct.1620 (1996), importantly reinvigorates rational basis scrutiny. Marcia Coyle, *Court: 'Animus' in Colo. Gay Law*, NAT'L L.J., June 3, 1996, at A11. "This is a very different court from 10 years ago," says Chai Feldman, a former law clerk at the Court. "This is a court that was able to look at the law without an overlay of prejudice." Mauro, *Supreme Court Upholds Gay Rights, supra* note 212, at 2A. Said Ms. Chai, legal counsel to the Human Rights Campaign, regarding *Evans*: "Six justices said what we have been saying all these years. These are not special rights. These are the rights all people already have." Linda Wheeler & Tom Kenworthy, *Gay Rights Groups Hail Decision as Milestone*, WASH. POST, May 21, 1996, at A4.

[244]Stoddard, *supra* note 224, at A19.

[245]Epstein, *High Court, supra* note 216, at 7A.

[246]Stoddard, *supra* note 224, at A19.

[247]This is Michael A. Carvin, Esq., of Shaw, Pittman, Potts & Trowbridge (Washington, D.C.). His firm filed two *amicus* briefs in support of Amendment 2. Coyle, *supra* note 243, at A11.

there are five votes to overrule *Bowers*.[248]

Evans leaves open the door for legislation clearly connected to a legitimate public end.[249] Founder of Coloradans for Family Values, Tony Marco (whose organization presented Amendment 2 before Colorado electors) hoped that Amendment 2 may be rewritten to meet the *Evans* objections.[250] Colorado could win her Amendment 2 goal via a preemptive state statute prohibiting discrimination upon such well-accepted bases as race and religion (but not sexual orientation).[251]

Professor Tribe recalled on the day of the *Evans* decision that the *Bowers* Court had "seemed incapable of applying its normal approach to the law where gays were involved."[252] Of *Evans*, Tribe offered, "This

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[248]*Id.* "[N]o evidence supports a judgment that the [Supreme Court] [J]ustices vote as a unit when acting boldly; *e.g.*, when overruling their own precedents." BRENNER & SPAETH, *supra* note 176, at 12.

> The members of the majority in *Romer v. Evans* may have done more than simply ignore *Bowers*: they may have begun the process of isolating and finally overruling it altogether, an event that would have an enormous impact not only on the civil liberties of homosexuals but . . . on constitutional theory generally.

Dworkin, *supra* note 127, at 50.

> In its ten-year life, the *Bowers* decision has frequently been damned by scholars and commentators for its cramped view of what a free society is and does. It was a 5-4 decision, and Justice Powell, who tipped the balance, said after his retirement that it was the worst mistake of his career. Justice O'Connor, another member of that slim majority, joined Kennedy's opinion in *Evans*, which may suggest that she, too, now has doubts. Perhaps *Bowers* would win only three votes if it were directly challenged now: Justice Scalia and Chief Justice William Rehnquist, who were also members of the original *Bowers* majority, and Justice Thomas, who joined in Scalia's dissent.

Id. at 50.

[249]Editorial, *What the Court Didn't Say*, CHRISTIAN SCI. MONITOR, May 23, 1996, at 20.

[250]Maria Goodavage & Bill Celis, *For Gay Rights Activists, a Long Overdue Decision*, USA TODAY, May 21, 1996, at 2A.

[251]Kaplan & Klaidman, *supra* note 205, at 26.

[252]Greenhouse, *Gay Rights*, *supra* note 186, at C19.

doesn't resolve all the other cases but it means the courts are now willing to listen."[253] Of future cases brought by homosexuals before the Supreme Court, Tribe predicted that "they will not have the door slammed in their face . . . . But they won't have a red carpet out, either."[254] Stanford Law School Professor Sullivan proposed that *Evans* calls into question state statutes against same-sex marriages as well as the Defense Department's policy[255] of excluding open homosexuals from active military service.[256]

Stanford Law School Visiting Professor William Rubinstein agreed, suggesting the Supreme Court hereafter will "scrutinize any prejudice"[257] factored into those two policies.[258] Rubinstein is former Director of the Lesbian and Gay Rights Project of the American Civil Liberties Union.[259] Matthew Coles, the current Director, surmised that the undemocratic Supreme Court's decision in *Evans* has "applications [that] are as limitless as the weaknesses of our legislative bodies."[260] U.C.L.A. political science Professor John Petrocik believed *Evans* might fortify "a kind of social norm that will in some sense increase the social space that gays and lesbians have."[261] Executive Director of the Los Angeles Gay and Lesbian Community Services Center Lorri Jean celebrated *Evans*, stating, "This is a decision of symbolic significance unlike anything our community has ever seen."[262] Lawyer for the Lamda Legal Defense and Education Fund

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[253]Savage, *supra* note 169, at A14.

[254]Mauro, *Supreme Court Upholds Gay Rights*, *supra* note 212, at 2A.

[255]10 U.S.C. § 654 (West Supp. 1993).

[256]Savage, *supra* note 169, at A14.

[257]Aaron Epstein, *Anti-Gay Amendment Struck*, THE HERALD-SUN (Durham, N.C.), May 21, 1996, at 1, A3 [hereinafter Epstein, *Anti-Gay Amendment*].

[258]*Id.*

[259]*Id.*

[260]Coyle, *supra* note 243, at A11. Legislatures are weak insofar as federal courts disregard democracy. *Id.* That disregard as to social issues is a point of the contemporary interbranch division of labor. *Id.*

[261]Bettina Boxall, *Gay-Rights Advocates Rejoice at Ruling*, L.A. TIMES, May 21, 1996, at A14.

[262]*Id.*

Suzanne Goldberg, a member of the legal team prevailing in *Evans*, crowed, "This is the most important victory ever for gay and lesbian rights."[263]

President of the Family Research Council Gary L. Bauer, however, characterized *Evans* as the spawn of "an out-of-control, unelected judiciary," which "should send chills down the back of anyone who cares whether the people of this nation any longer have the power of self-rule."[264] Jay Sekulow of the American Center for Law and Justice admitted of *Evans*, "This . . . send[s] a signal to America that there's been a shift of momentum towards the homosexual community, there's no doubt about it."[265]

B. PUBLIC REACTION TO *EVANS*

Evans bolstered the crusade of gays and lesbians for protected status.[266] That campaign already has produced laws precluding discrimination based on sexual orientation in nine states, in the District of Columbia, and in 157 counties and cities.[267] Further, the gay rights movement has successfully prevented the passing, in ten other states, of provisions similar to Colorado's Amendment 2.[268] For example, Maine's voters had defeated a similar proposal in 1995.[269] At the time the *Evans* opinion was released, petitions to place similar referenda on the ballot circulated in Idaho, Oregon and Washington.[270] Presumably, these referenda will become moot.

Governor Roy Romer, who ironically had opposed Amendment 2 in public but defended it in court, welcomed *Evans*. Romer announced, "Let's

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[263]*Killing Anti-Gay Law Not End of Fight*, ATLANTA CONST., May 21, 1996, at A3. The New York-based Lamda Legal Defense Fund is the premiere gay legal organization. Paul M. Barrett, *How Hawaii Became Ground Zero in Battle Over Gay Marriages*, WALL ST. J., June 17, 1996, at 1, A4.

[264]Denniston, *supra* note 189, at 6A.

[265]*Killing Anti-Gay Law Not End of Fight*, *supra* note 263, at A3.

[266]Barrett, *supra* note 220, at B1.

[267]Epstein, *Anti-Gay Amendment*, *supra* note 257, at 1.

[268]Barrett, *supra* note 220, at B7.

[269]Greenhouse, *Gay Rights*, *supra* note 186, at 1.

[270]*Id.*

stop litigating and legislating and see if we can bring people together."[271] Mayor William Webb of Denver, a defender of Denver's 1990 ordinance, called May 20, 1996, a "day of celebration."[272]

According to Tom Cochran of the U.S. Conference of Mayors, a boycott following Amendment 2 had been a serious problem for many mayors.[273] Thirty-one large conventions had been cancelled in protest of Amendment 2, costing Denver alone an estimated $38 million in tourism.[274] Much of Denver's business community was relieved at the demise of Amendment 2. Rich Grant of the Denver Metro Convention and Visitors' Bureau cheered *Evans*, stating, "Now we don't have to worry about this ever resurfacing."[275]

Portions of the mainstream national media have hailed *Evans* as one of the Supreme Court's finer moments.[276] Some commentators wondered whether *Evans* compares with either *Brown v. Board of Education*,[277] or with *Roe v. Wade*.[278] Assaults against *Brown* are taboo,[279] although this

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[271]*Id.* at C19.

[272]Wheeler & Kenworthy, *supra* note 243, at A4.

[273]Tony Mauro, *Colorado Ruling Called Historic,* USA TODAY, May 21, 1996, at 1.

[274]Goodavage & Celis, *supra* note 250, at 2A.

[275]*Id.*

[276]Editorial, *Victory for Fairness*, N.Y. TIMES, May 21, 1996, at A10.

[277]347 U.S. 483 (1954).

[278]410 U.S. 113 (1973).

[279]Yale Law School Prof. Stephen L. Carter holds of *Brown v. Board of Education*, 347 U.S. 483 (1954), "[e]veryone is required to accept it." STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 121 (1994).

> Certain decisions . . . are so basic to our understanding of the Constitution or have so changed American society that the probability of their being overruled approximates zero. Law Professor Henry Paul Monaghan, for example, argues that it is inconceivable that the [Supreme] Court will overrule *Brown v. Board of Education*, 347 U.S. 483 (1954) . . . .

BRENNER & SPAETH, *supra* note 176, at 4 (citing Henry Paul Monaghan, Stare Decisis *and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 744-45 (1988) (footnote omitted)).

is far from so regarding *Roe*.[280] Newsweek conceded, in measuring *Roe* against *Evans*: "*Roe's* flawed reasoning wounded the high court's prestige for a generation."[281]

IX. THE MEANING OF CONSTITUTIONAL POLITICAL ECONOMY

A. CONSTITUTIONAL ECONOMICS

Constitutional political economy,[282] an important, emerging economic subdiscipline, reassesses the regulatory, fiscal, and monetary powers of the federal government.[283] Notwithstanding the recent development of this subdiscipline, the constitutional economics theory subscribed to by economists, political scientists and legal scholars has, at its foundation, a solid base of scholarship.[284]

Several economists, social theorists, and philosophers claim that arguments premised on the consent of the governed provide the justification for the existence of the constitutional system of governance. Their assertion is that the framework of rules constituting the constitutional structure is justified because the governed have freely consented to such a system.[285] Further, specific institutional policies are also justified because such policies

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[280]CARTER, *supra* note 279, at 119.

[281]Kaplan & Klaidman, *supra* note 205, at 30.

[282]This subdiscipline is also referred to as constitutional economics. "The discipline termed political economy examines the relationship of individuals to society, the economy, and the state." Peter A. Gourevitch, *Political Economy*, *in* THE OXFORD COMPANION TO POLITICS OF THE WORLD 715 (Joel Krieger ed., 1993).

[283]RICHARD B. MCKENZIE & GORDON TULLOCK, THE BEST OF THE NEW WORLD OF ECONOMICS . . . AND THEN SOME 278 (5th ed. 1989). Richard B. McKenzie and Gordon Tullock are economists at the University of California at Irvine and the University of Arizona, respectively.

[284]"[T]he overall impact of the importing of economic concepts to law was to make respectable once again the unified or monistic approach to law." ROBERT STEPHENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 272 (1983).

[285]JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 134 (1988).

are demanded by those rules that have received prior consent.[286] In a sense, constitutional economics means the application of the principles of economics to decisions over the popular choice of institutions.[287]

The foundation of constitutional economics includes the lifelong contributions of Nobel laureates in economics such as Douglass C. North,[288] James Buchanan,[289] Milton Friedman, and the late Friedrich A. Hayek.[290] The contemporary scholars of constitutional economics are profoundly intent upon redirecting professional attentions from short-term policy issues to long-run constitutional checks upon government.[291]

B. THE EXIT OPTION

An economic reason for why a government can coerce its populace to obey laws is the cost absorbed by persons escaping their government.[292] For example, local governments compete for residents by enticing

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[286]*Id.* at 134-35.

[287]*Id.* at 135.

[288]*See, e.g.*, DOUGLASS C. NORTH & ROGER LEROY MILLER, THE ECONOMICS OF PUBLIC ISSUES (5th ed. 1980); DOUGLASS C. NORTH, GROWTH AND WELFARE IN THE AMERICAN PAST: A NEW ECONOMIC HISTORY (1966). "The economics of nonmarket behavior has burgeoned in recent decades." PHILIPSON & POSNER, *supra* note 13, at 6.

[289]Buchanan is the best-known of the economists exploring constitutional restraints upon the legislative command of economic policy. FISCHEL, *supra* note 166, at 118. Buchanan also been referred to as "the leading constitutional economist." COLEMAN, *supra* note 285, at 139.

[290]MCKENZIE & TULLOCK, *supra* note 283, at 278.

[291]*Id.* at 279. Meanwhile, the study of law and economics makes its sway palpable throughout legal education. According to Touro College Jacob D. Fuchsberg School of Law Professor Deborah W. Post: "My students employ economic models, the rhetoric of choice, assent, and efficiency; and their heroes are Richard Epstein and Richard Posner." Deborah W. Post, *in* LOUISE HARMON & DEBORAH W. POST, CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING 128 (1996). Finds Yale Law School student Betty Hung: "If you're interested in law and economics, there are 15 professors to choose from." *'In' Box*, CHRONICLE OF HIGHER EDUCATION, May 24, 1996, at A15, col. 1.

[292]RANDALL G. HOLCOMBE, THE ECONOMIC FOUNDATIONS OF GOVERNMENT 89 (1994).

prospective citizens with valuable combinations of local goods and services.[293] Small populations can tyrannize their members by preventing members from exacting concessions by threatening departure to a more appealing alternative.[294] This exit option of people fleeing a local tyranny is never cheap. Nevertheless, it is still less expensive to quit from a local government than to emigrate from the oppression of a very large jurisdiction.[295]

The framers of the United States Constitution, notably including James Madison, established a network of competitive governments.[296] This competitive framework is the most persuasive of all practical arguments for American federalism.[297] Thereunder, governments are controlled not by ballots alone but by their people's capacity to move to another state when they are dissatisfied.[298] The United States federal structure generates

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[293]*Id.* (citing Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416-24 (October 1956)).

[294]RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 44 (1995) [hereinafter EPSTEIN, SIMPLE RULES].

[295]*Id.* The exit option is consistent not only with concessions revising the status quo, but with a status quo enduring because persons capable of reform desert the relevant circle of decisionmakers. TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 105 (1995) (citing ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970)). What would have been the political history of 1815-1914 Europe sans such overseas emigration outlets as Canada, the United States, Argentina, Australia, etc.?

[296]MCKENZIE & TULLOCK, *supra* note 283, at 259.

[297]RICHARD NEELY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 112 (1988). Finds Yeshiva University Benjamin N. Cardozo School of Law Professor John O. McGinnis: "Forcing state governments to compete for the capital and skills of a national citizenry imposes substantial limits on a state government's ability to expropriate." John O. McGinnis, *Restraining Leviathan*, NAT'L REV., March 11, 1996, at 40, 42.

[298]MCKENZIE & TULLOCK, *supra* note 283, at 259. Montreal, Quebec, once was the largest Canadian city, yet today the 3.3 million people of greater Montreal are outnumbered by the 4.2 million of greater Toronto, Ontario. Mark Clayton, *Montreal Sees Jobs, Status Drain Away*, CHRISTIAN SCI. MONITOR, May 30, 1996, at 8. "People ask why this has happened," says Peter Trent, mayor of Westmount, the affluent heart of Montreal's English-speaking community. *Id.* "It began after the first language laws, to promote the French language by requiring it in schools and business, came into effect in the early 1970s. *Id.* The big exodus occurred between 1976 and 1980, although there is a continuing dribble of individuals and businesses" out of Quebec. *Id.* The Quebec-

interstate governmental competition just as free enterprise inspires competition among private businesses.[299]

For example, should a city increase its tax rate, or diminish the quality of municipal services, taxpayers can depart to the suburbs.[300] By contrast, the consolidation by a metropolitan government of many suburbs feeds governmental monopoly power.[301] This is not just an economic theory. Evidence suggests a one-to-one relationship between governmental unit size and governmental service costs.[302] According to Professor John Hart Ely, the choosing of values is a decision which should be left to the popular vote, and any member of the community who unavailingly exercised the "voice option" has the option of exiting and relocating to a community whose values he or she finds more compatible.[303] Here, Ely has captured a

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nationalist Parti Quebecois was elected to power on November 15, 1976. It fruitlessly appealed to the Quebec electorate to give the P.Q. government (by a May 20, 1980, referendum) a mandate to negotiate with Ottawa's federal government. George Steven Swan, *Article III, Section 2, Exceptions Clause Canadian Constitutional Parallels: Canada Teaches the United States an American History Lesson*, 13 CAL. W. INT'L L.J. 37, 52 (1983).

[299]NEELY, *supra* note 297, at 112. In the model of natural selection in economic and organizational evolution, "States compete by producing efficient law. States that fail to provide efficient law get less of the regulated activity." Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 642 (1996). "Recessive genes and sexual reproduction increase the chance that diverse life forms will survive and flourish later. Law's rough equivalent for preserving diversity is federal competition." *Id.* at 643 n.4.

[300]MCKENZIE & TULLOCK, *supra* note 283, at 259.

[301]*Id.* at 260.

[302]*Id.* at 260-61 (citing ROBERT L. BISH AND VINCENT OSTRUM, UNDERSTANDING URBAN GOVERNMENT: METROPOLITAN REFORM RECONSIDERED, chs. 4 and 6 (1973)).

[303]ELY, DEMOCRACY AND DISTRUST, *supra* note 105, at 179. Ely espouses that,

> Precisely *because* the choosing of values is a prerogative appropriately left to the majority (so long as it doesn't by law or administration provide different rules for others than it does for itself), a dissenting member for whom the "voice" option seems unavailing should have the option of exiting and relocating in a community whose values he or she finds more compatible. I am aware that increased communication, to say nothing of the homogenizing pressure of vastly increased federal regulation, has diminished the differences among the states, but some differences remain — relating perhaps most pertinently to the extent to which deviance of various sorts is

rationale[304] for an otherwise theoretically problematic[305] constitutional guarantee: the guarantee that "all citizens be free to travel throughout the length and breadth of our land."[306]

There remains, however, the Supreme Court's distinction between the virtually unqualified right to interstate travel (often linked with federalist principles)[307] and the alleged right to international travel.[308] The latter, as a liberty interest under the Due Process Clause of the Fifth Amendment, can be regulated within the bounds of due process.[309] The Supreme Court has nothing to lose from the free flow of interstate travel because it is supreme over persons in any state. But as an arm of the national government, the Supreme Court would be less able to restrict parties that are free to exit internationally. Every economic theory of government posits, necessarily, that those in power, such as the Supreme Court Justices, rule primarily to promote their private[310] ends.[311]

> tolerated or repressed by law or enforcement policy, and indeed to the scope of such government services as education and welfare.

Id. (emphasis in original). Ely, as does Timur Kuran, *supra* note 295, draws upon the work of Albert Hirschman. *Id.* at 178-79 (citing ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970)).

[304]*Id.* at 179.

[305]*Id.* at 177; *see also* TRIBE, 2nd edition, *supra* note 134, at 1378-84, 1456, 1646.

[306]Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

[307]Zobel v. Williams, 457 U.S. 55, 67 (1982) (Brennan, J., concurring).

[308]TRIBE, 2nd ed., *supra* note 134, at 1379 n.8.

[309]Haig v. Agee, 453 U.S. 280, 307 (1981).

[310]At least three Supreme Court Justices (O'Connor, Kennedy and Souter) of the majority in *Romer v. Evans*, 116 S. Ct. 1620 (1996), starkly subordinate their oath to enforce the Constitution, U.S. CONST., art. VI, cl. 3, Judicial Oath, Judiciary Act of 1789, 28 U.S.C. § 453 (1992), beneath maintaining the institutional credibility of their Court (i.e., of themselves).

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.

C. IMPERFECT MOBILITY AND CONSTITUTIONAL RULES

Given imperfect mobility,[312] or even geographic preferences independent of governmental behavior, the political economy competitive theory of local government proves defective. Some unhappy factions (perhaps not unlike local minorities in Aspen, Boulder and Denver) endure unsatisfactory rule.[313] Putting down roots renders future relocation so expensive that a guarantee of the government's subsequent behavior is requisite to the citizen's decision where to live.[314] A constitutional provision, such as Amendment 2, therefore substitutes for costless mobility; with less mobility, the constitutional mandates are more critical.[315]

Such *local* constitutional rules entail less import than does a *national* constitution because it is easier to elude a local government than a countrywide one.[316] The price of emigration from the territory of one's

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Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992) (O'Connor, Kennedy and Souter, JJ., concurring) (citing Roe v. Wade, 410 U.S. 113 (1973)). Ironic are the words of Georgia State University Law School Professor Steven Wermeil, of Souter: "He belongs to a conservative tradition that wants to protect the court from politics." Robert Marquand, *A 'Yankee Republican' In Conservative Court*, CHRISTIAN SCI. MONITOR, May 28, 1996, at 1, 4.

[311]ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 291 (1957). This treatise constitutes one of the basic texts of the subdiscipline of constitutional political economy. MCKENZIE & TULLOCK, *supra* note 283, at 279 n.2.

[312]Mobility means human capital moves with the human being:

> [I]t is possible to separate a human being from his physical wealth but not from his human wealth. The individual always needs to accompany his human capital wherever it is employed. This means that a whole spectrum of personal benefits and costs (often called psychic income) becomes relevant in determining where to employ human capital. Personal benefits and costs are much less relevant in physical investments, since an individual can invest in an area without having to accompany his investments physically.

LESTER C. THUROW, GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY 18 (1975).

[313]HOLCOMBE, *supra* note 292, at 89.

[314]*Id.*

[315]*Id.*

[316]*Id.*

oppressor can mean abandonment of home, property, family, and friends.[317] University of Chicago Law School Professor Richard A. Epstein warns that even within a federalist framework, when an individual is permitted to shift freely across *state* borders, her exit option cannot shield her from loss of such assets as land, or local business licenses, which are not transferable among states.[318]

X. THE COMPARATIVE ADVANTAGE OF CONSTITUTIONAL COURTS

Dartmouth College economist William A. Fischel, discerned that the state police power is what economists style "regulatory authority."[319] Fischel praises Professor Ely because, unlike numerous other constitutional scholars, "Ely did not fall into the error of making a distinction between economic and other types of regulation."[320] Amendment 2 exemplifies an exercise of the local police power at an intersection of economic issues and social issues regulation.

A. THE TRANSACTION COSTS PRINCIPLE

In economic terms, transaction costs may be defined:

> Transaction costs, like production costs, are a catch-all term for a heterogenous assortment of inputs. The parties to a contract have to find each other, they have to communicate and to exchange information. The goods must be described, inspected, weighed and measured. Contracts are drawn up, lawyers may be consulted, title is transferred and records have to be kept. In some cases, compliance needs to be enforced through legal action and breach of contract may lead to litigation.[321]

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[317]EPSTEIN, SIMPLE RULES, *supra* note 294, at 44.

[318]*Id.* at 249.

[319]FISCHEL, *supra* note 166, at 15.

[320]*Id.* at 132.

[321]Jürg Niehans, 4 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 676 (John Eatwell, Murray Milgate and Peter Newman eds. 1987) (defining "transaction costs").

James Madison[322] grasped that the sheer transaction costs[323] of recruiting a despoiling majority, over a large and diverse polity, ordinarily must be prohibitive.[324] Courts of law are to afford greater attention to regulatory takings at the local level than at the state level.[325] This is because politics statewide offers a greater chance for property owners to defend themselves from unreasonable regulation.[326]

Recall that *Evans I* discerned that the immediate goal of Amendment 2 was to override legal authorities in Aspen, Boulder and Denver. These, *inter alia*, curtailed market options in housing.[327] The *Evans II* dissent

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[322]THE FEDERALIST NO. 10, *supra* note 89.

[323]"The assumption of zero transaction costs obviously is unrealistic in many conflict situations. At the very least, the disputing parties usually would have to spend time and/or money to get together to discuss the dispute." A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (2d ed. 1989).

[324]*See, e.g.*, THE FEDERALIST NO. 10, *supra* note 89, at 81-83; *cf.* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 110-13, 165-68 (1970). It is interesting to note that while the *Evans* majority focuses heavily upon democratic equality, the founding fathers only make one reference to equality in all of the FEDERALIST PAPERS. KURAN, *supra* note 295, at 314 (citing J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 121-22 (1978)).

[325]FISCHEL, *supra* note 166, at 10. The rationality test is more likely to be candidly deployed regarding enactments by bodies of limited legislative jurisdiction, because the limited number of legislative goals ascribed to those bodies impedes their denomination of a permissible goal to cloak their unconstitutional true aim. ELY, DEMOCRACY AND DISTRUST, *supra* note 105, at 146, 246 n.38 (citing Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 229 (1975)).

[326]FISCHEL, *supra* note 166, at 10.

> Much of the theory of the current federal-state balance proceeds directly from the wisdom of *Federalist 10* (Madison), where it is pointed out that it is more unlikely that a faction (distributional coalition) will take control at the national level (where there are more balancing constituencies) than at the state level, where one narrow constituency (like farmers or industrial workers) can command a plurality. The genius of the federal structure, then, is that because most of the subjects that distributional coalitions wish to control (like job security) must be controlled at the state level, distributional coalitions are usually weak at the national level.

NEELY, *supra* note 297, at 116.

[327]Evans v. Romer, 854 P.2d 1270, 1284 (Colo. 1993).

recognized that in Aspen even church facilities were controlled.[328]

Justice Scalia's dissent draws upon the record, finding that because homosexuals in disproportionate numbers tend to reside in specific communities, and care far more "ardently"[329] than the public at large about homosexual rights issues, they wield political power in such localities much beyond their numbers.[330] Justice Scalia stated:

> That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides.[331]

Amendment 2's allocation of policymaking to the state constitutional level afforded a greater prospect for citizens to defend themselves from burdensome regulation. It did so, in economic terms, because the transaction costs to self-serving lobbies seeking governmental intervention in the market were greater at the state constitutional level than at the local (i.e., Aspen, Boulder and Denver) legislative level.

B. THE INELASTICITY PRINCIPLE

Elasticity signifies sensitivity to price changes.[332] In economic terms, elasticity of supply may be defined as follows:

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[328]Evans v. Romer, 882 P.2d 1335, 1363 (Colo. 1994) (Erickson, J., dissenting).

[329]Romer v. Evans, 116 S. Ct. 1620, 1633 (1996) (Scalia, J. dissenting). If the decreasing cost of divorce reduces the importance of marriage, and if both spouses are led to invest themselves in the marketplace (not in family relationships), then the spousal benefit of insisting sexual activity be restricted to spouses declines. One might hypothesize, then, an increasing tolerance of homosexuality. George Steven Swan, *The Political Economy of American Family Policy, 1945-85*, 12 POPULATION AND DEVELOPMENT REV. 739, 749 (1986).

[330]*Romer*, 116 S. Ct. at 1637 (1996) (Scalia, J. dissenting). Scalia's argument in this passage draws fire: "The dissent, while eloquent and forceful, betrays some animus of its own. . . . Substituting, say, 'Jewish' for 'homosexual' puts this language in a disturbing light." Editorial, *Law and Justice*, NAT'L L.J., June 3, 1996, at A18, col. 1.

[331]*Romer*, 116 S. Ct. at 1634 (Scalia, J., dissenting).

[332]ERWIN ESSER NEMMERS, DICTIONARY OF ECONOMICS AND BUSINESS 140 (1970).

> The responsiveness of the quantity supplied to a change in the price of that factor, good or service. In the short term, supply can be increased only by using existing factors of production more intensively (e.g. by overtime working); in the long term supply can be increased by increasing factor supply (e.g. recruiting and training more workers, increasing the capital stock). Supply elasticities increase as the time period lengthens . . . .[333]

Fischel's review of land use regulation indicates that larger governments (defined by both population governed, and by land area)[334] deliver a more protective climate for assets inelastic in supply than do smaller lawmaking entities.[335] How relevant, in analyzing *Evans*, is Fischel's attention to supply elasticity in land use regulation?

Fischel's elasticity principle applies in analyzing *Evans*. Fischel observed that racial or religious discrimination is deemed reprehensible because racial characteristics or religious orientation are practically immutable.[336] Sexual orientation presumably is similar:

> "Immutable" in economic terms means "perfectly inelastic." In some ways, the notion of inelasticity improves on the term, since inelasticity can come from the insensitivity of either the quantity supplied or the quantity demanded to changes in rewards and penalties. Inelasticity may be the result of facts of nature (the stock of land is fixed) or because of behavioral characteristics (the demand to maintain one's choice of religion seems highly inelastic). Inelasticity of the supply of land is half of the reason that landowners sometimes need the protection of judges in the same way that racial minorities sometimes do.[337]

As landowners cannot slip land into or from a geographic jurisdiction,

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[333]DONALD RUTHERFORD, DICTIONARY OF ECONOMICS 145-46 (1992).

[334]*But see* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (stating that "[l]egislators represent people, not trees or acres").

[335]FISCHEL, *supra* note 166, at 289; *cf. id.* at 139.

[336]*Id.* at 135. Evidence indicative of the near-immutability of homosexual orientation is reviewed in RICHARD A. POSNER, SEX AND REASON 101-05, 295-99 (1992).

[337]FISCHEL, *supra* note 166, at 135.

so the members of a particular race, religion, or sexual orientation cannot readily melt into a counterpart demographic group. The defining characteristics being virtually immutable, the "supply" of members of a particular race, religion, or sexual orientation is, in the short run, inelastic.[338] A requirement that certain legislation be statewide assigns such lawmaking to the decisional level which can be more tolerant regarding inelastic behavioral characteristics.

C. DEFERENCE TO STATES OVER LOCALITIES

The legitimacy of judicial review informs much of Fischel's treatise.[339] Fischel's overriding theme is that the comparative advantage of constitutional courts, as in *Evans*, is to intervene when the economic device of exit and the political tool of Ely's "voice" option are attenuated.[340] Exit and voice are effective methods of insulating property rights, at least, from depredations by state and national legislation, but their

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[338]Other authority agrees that the immutability of racial characteristics means that a racial group is in an inelastic supply:

> Discrimination is being practiced in a country where whites predominate numerically and are possessed of much larger stocks of both physical and human capital on a per capita basis. Given these circumstances, blacks have no option but to trade with (i.e., work in and borrow from) the white community. Of necessity, blacks must offer a relatively inelastic supply curve.

THUROW, *supra* note 312, at 158 (citing Marvin Kosters, *Effects of Income Tax on Labor Supply*, *in* THE TAXATION OF INCOME FROM CAPITAL 301 (Arnold Harberger and Margin Bailey eds. 1969)); *cf.* RICHARD H. LEFTWICH & ANSEL M. SHARP, ECONOMICS OF SOCIAL ISSUES 217 (5th ed. 1982) ("The supply of physicians is inelastic in the short run.").

[339]FISCHEL, *supra* note 166, at 3.

[340]*Id.* at 5. The arrival to our shores of many of the forebears of white Americans resulted from the failure of the threat of exit to discipline bad governments in Europe. *Id.* at 289. On the other hand, when African-Americans escaped deprivation and discrimination in the South by moving to Northern cities, Swan, *supra* note 80, at 19, they not only alleviated the burdens carried by African-Americans, but caused economic problems for the Southern states. FISCHEL, *supra* note 166, at 138. In political economy terms, emigrant African-Americans voting in the North helped influence the national government's liquidation of Southern white supremacist state and local distributional coalitions. NEELY, *supra* note 297, at 115. The federal apparatus intruded into Southern racial relations to diminish economic benefit allocations based on color. *Id.* at 115-16.

effectiveness is more limited at the local level.[341]

In *Evans*, the U.S. Supreme Court adjudged an intrastate policymaking controversy. Therein, Coloradans statewide disavowed legal anti-discrimination status for a specified class of individuals. Coloradans' statewide disclaimer effaced the local policymaking of Aspen, Boulder, and Denver. The Supreme Court of Colorado based its *Evans II* decision on the right of citizens to participate in the governmental process. While the implicated citizens did retain such an equal right statewide on a one-person/one-vote basis,[342] as was demonstrated during the Amendment 2 voting itself, the majority of the Supreme Court of Colorado perceived Amendment 2 to mandate, *inter alia*, that group's unsuccessful local political participation.

Should the judicial blessing run to local, or to statewide, policymaking?[343] *Evans* is concerned with, *inter alia*, behavioral characteristics; the maintenance of one's sexual orientation seems stubbornly inelastic. Larger governments can deliver the more sheltering climate respecting inelastic behavioral characteristics like sexual orientation.

This principle is congruent with *Evans* given that the disproportionately heavy concentration of homosexuals in some localities[344] necessitates their disproportionately light distribution in localities elsewhere. Colorado is an entity more sheltering of homosexuals than might be the latter localities. In reality, Scalia's dissent found homosexuals on a Colorado-wide basis politically strong beyond their numbers.[345]

A majoritarian-model government selects a "public goods" level maximizing the welfare of the voting majority, paying scant heed to the welfare of a taxed minority.[346] This model best applies to local

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[341]FISCHEL, *supra* note 166, at 9.

[342]Lucas v. Forty-Fourth Colorado Gen. Assembly, 377 U.S. 713 (1964). "The Court [in *Romer v. Evans*] stated a blanket rule that a law that makes it more difficult for one group to obtain government aid than others is by definition a denial of equal protection." David Forte, *Illiberal Court*, NAT'L REV., July 29, 1996, at 40, 42.

[343]Fischel notes, "[a]t the most general level, all local regulation can be superseded by state regulation." FISCHEL, *supra* note 166, at 321.

[344]Presumably such localities are Aspen, Boulder, and Denver.

[345]Romer v. Evans, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting).

[346]FISCHEL, *supra* note 166, at 204.

government, while a pluralistic model[347] mainly applies to the central government.[348] The size of government could be a continuous factor of the factual judicial inquiry into takings.[349] The federal establishment nearly would receive a free pass, as would most states.[350]

Big counties and cities should not enjoy the judicial deference to regulatory initiatives enjoyed by entire states.[351] For cost/benefit internalization of regulation, geographic size counts as well as population.[352] Most U.S. big cities comprise under 50 percent of their metropolitan area (both in population and land area).[353]

True, during 1990 there were eight states of less than one million population, and eight municipalities with more. Yet for most purposes this

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[347]Pluralism has been described as,

> The concept that modern society is made up of heterogeneous institutions and organizations that have diversified religious, economic, ethnic, and cultural interests and share in the exercise of power. Democratic pluralism is based on the assumption that democracy can exist in a society where a variety of elites compete actively in the decision process for the allocation of values, and that new elites can gain access to power through the same political processes. The countervailing theory of pressure politics posits that competition among major interest groups tends to balance power against power, with the result that none is able to dominate the American political system. Some analysts reject the theory and have described the American political system as one dominated by a power elite of military, business, and governmental groups and organizations.

JACK C. PLANO & MILTON GREENBERG, THE AMERICAN POLITICAL DICTIONARY 133 (4th ed. 1976); *cf.* Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984) ("Certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.").

[348]FISCHEL, *supra* note 166, at 328.

[349]*Id.*

[350]*Id.* A few small states might be subject to a closer inquiry. *Id.*

[351]*Id.* at 329.

[352]*Id.*

[353]*Id.*

overlap appears insignificant.[354] In 1990, Colorado's population of 3,294,394 ranked her twenty-sixth among the fifty states.[355] This size impact upon the cost/benefit internalization of regulation might be the answer to Justice Stevens' oral argument question of whether Coloradans outside Aspen should be permitted by the federal judiciary to tell the people of Aspen that they cannot enact a sexual orientation ordinance.[356]

Moreover, there is only slight justification for enhanced judicial scrutiny of land use regulations when these are created by statewide popular vote rather than by the legislature.[357] The rule respecting statewide initiatives should be that such initiatives are treated by judges with a respect equal to that accorded to state legislative outcomes.[358] The interest group influence characteristic of legislatures appears attenuated in popular initiatives.[359] In referenda or initiatives, logrolling and lobbying are bootless; logrolling and lobbying are Madisonian transactions.[360]

The majoritarian model of government applicable to localities signals the propriety of an exacting judicial review of local legislation. But the pluralistic model of government more applicable primarily to Washington argues for a lenient judicial review of federal lawmaking. The intermediate polity is at the state level, i.e., that of Colorado.

Ely apprehends the enduring efficiency of the interstate exit option (albeit this positive reality is compromised by the federalist-systemic concerns cited by Epstein). And Fischel points to cost/benefit pressures to illustrate that states deserve a judicial deference to state-level regulatory moves that is broader than the judicial deference given to counties or big cities. Appropriately enough, the elemental building block of democracy under the

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[354]*Id.* at 328.

[355]THE WORLD ALMANAC AND BOOK OF FACTS 1993, 189 (citing U.S. Bureau of the Census).

[356]Greenburg, *Court Strikes Down Ban, supra* note 216, at 5.

[357]FISCHEL, *supra* note 166, at 333.

[358]*Id.* at 333-34.

[359]*Id.* at 245.

[360]*Id.* at 298. *See* discussion *supra* Section X.A.

U.S. Constitution[361] is neither the locality with its majoritarian-model government, nor the central government with its circumscribed exit option, but the state.[362]

D. THE ECONOMICS OF INITIATIVES

An initiative is a mechanism through which a specified number or proportion of voters by means of petition may, as in *Evans*,[363] place a state constitutional amendment (or a state law) on the ballot for adoption *vel non* by the state electorate.[364] The referendum is a mechanism through which the electorate must endorse legislative decisions prior to their becoming part of either the state constitution or the state law.[365]

Desire for reelection pressures state representatives to promote the interests of their constituencies.[366] But each legislator feels at least some leeway in opposing her constituents' interests, due to voter ignorance.[367]

A study of state fiscal behavior between 1960 and 1990 compared state and local finances of "direct legislation" states, where citizens wield the initiative option, and "pure representative" states, allowing laws to be passed only by the elected legislature. The latter have higher levels of governmental expenditures than do the former.[368] The excess approximates four percent for combined local-state expenditures, and twelve percent for state

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[361]"The ratification of the Conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same." U.S. CONST. art. VII.

[362]*Cf.* Texas v. White, 74 U.S. 227, 237 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.").

[363]Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993). "That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference." *Id.* at 1286.

[364]THOMAS R. DYE, POLITICS IN STATES AND COMMUNITIES 41 (7th ed. 1991).

[365]*Id.*

[366]John G. Matsusaka, *The Economic Approach to Democracy*, *in* THE NEW ECONOMICS OF HUMAN BEHAVIOR 140, 147 (Mariano Tommasi & Kathryn Ierulli eds. 1995).

[367]*Id.* at 147-48.

[368]*Id.* at 148.

governmental expenditure.[369] The initiative really can be more evocative of the popular will than is representative democracy.

This is not merely an economic theory limited to fiscal matters. One reason a prospective voter abstains from voting is because she knows she cannot affect the outcome.[370] The differences between voters and refrainers[371] are not due to socioeconomic disparities, but attitudinal.[372] For those who vote, most believe life to be a matter of planning; less than two-fifths believe life is more a matter of chance.[373] For refrainers, conversely, most find life largely a matter of luck and under two-fifths believe in planning ahead.[374]

Another rationale for a potential voter's abstention is that she presumes the result will be satisfactory anyway.[375] Consensus initiative topics elicit high abstention rates. At the opposite extreme are moral issues of basic disagreement. Regarding these, prospective voters are less likely to abstain, and so delegate their moral decision to other voters.[376]

One study broke down the 871 measures appearing as California ballot propositions between 1912 and 1989. Citizens were 10 percent more likely to vote on issues encompassing basic disagreements than they were on

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[369]*Id.* (citing John G. Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence From the Last 30 Years*, U.S.C. SCHL. OF BUS. ADMIN. WORKING PPR. No 93-17, March 1994).

[370]Matsusaka, *supra* note 366, at 142.

[371]The difference between nonvoters and refrainers is that, "[n]onvoters are commonly thought to lack something. The term is derogatory. . . . In preference, those who do not vote will be called "refrainers." Refraining makes no moral judgments." ARTHUR T. HADLEY, THE EMPTY VOTING BOOTH 28-29 (1978).

[372]*Id.* at 30, 118, 126. A new League of Women Voters survey reportedly finds that "Nonvoters often fail to connect the ballot box with their lives." *Pick One: A Shopping Mall or Voting Booth*, U.S. NEWS & WORLD REPORT, June 10, 1996, at 11.

[373]HADLEY, *supra* note 371, at 31.

[374]*Id.* Some five percent of California's refrainers had not registered to vote so as to avoid jury duty. *Id.* at 72-73.

[375]Matsusaka, *supra* note 366, at 143.

[376]*Id.*

consensual topics.[377] This implies the greater democratic legitimacy of Amendment 2.

XI. THE TRIBALIST LOGIC OF *EVANS*

A. THE EXCEPTIONS CLAUSE ANALOGY

In democratic communities, such as Colorado, the state can draw the line between free market outcomes (i.e., post-Amendment 2) and governmental restrictions (i.e., pre-Amendment 2). In so doing, the issue arises whether or not a majority will honor the integrity of each social member.[378]

Does Amendment 2 curb "the rights of homosexuals"? Recall Tribe's emphatic *amicus curiae* pronouncement:

> To decree that some identifying feature or characteristic of a person or group may not be invoked as the basis of any claim of discrimination under any law or regulation enacted, previously or in the future, by the state, its agencies, or its localities—is, *by definition*, to deny the 'equal protection of the laws' to persons having that characteristic.[379]

The Tribe reasoning seems to be that even as Colorado's Constitution cannot deny equal legislative access to racially different *persons* ("equal

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[377]*Id.* (citing John G. Matsusaka, *Economics of Direct Legislation*, 107 QTRLY. J. OF ECON. 541, 541-71 (1992)). Colorado's sharply divided Amendment 2 electorate, by 53.4 percent to 46.6 percent, produced a turnout dividing 813,966 to 710,151. Evans v. Romer, 882 P.2d 1335, 1338 (Colo. 1994). This compared with 1,545,316 Colorado voters splitting among the three major 1992 presidential candidates. THE WORLD ALMANAC AND BOOK OF FACTS 1993, *supra* note 355, at 76.

[378]DAVID P. LEVINE, WEALTH AND FREEDOM: AN INTRODUCTION TO POLITICAL ECONOMY (1995). According to Professor David Levine of the University of Denver:

> We have good reason to protect members from the decisions of their community even if we believe the community is the framework of the life of the member. Popular referenda in the state of Colorado limit the rights of homosexuals . . . . These are . . . instances among many in which democratic processes endanger the integrity of the citizens.

Id. at 167.

[379]64 U.S.L.W. 3177 (U.S. September 26, 1995) (emphasis in original).

protection"), so Amendment 2 cannot deny equal legislative treatment premised on subject matter ("characteristic . . . invoked as the basis of any claim") for different legislative proposals.

This difficulty already has been resolved in the academic disputation[380] over proposed congressional reform of the appellate jurisdiction of the Supreme Court under the Constitution's Article III, Section 2, Exceptions Clause.[381] It had been speculated that even as Congress cannot deny equal jurisdictional treatment for racially different litigants, so Congress cannot deny equal jurisdictional treatment premised on subject matter for different litigations.[382] But rights don't have rights, people[383] or, rather,

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[380]*See, e.g.*, Swan, *supra* note 298.

[381]U.S. CONST. art III, § 2, cl. 2.

[382]RALPH ROSSUM, CONGRESSIONAL CONTROL OF THE JUDICIARY: THE ARTICLE III OPTION 29-30 (Ctr. for Judicial Studies 1988) (citing William W. Van Alstyne, *A Critical Guide to* Ex Part McCardle, 15 ARIZ. L. REV. 229, 265 (1973); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 142-46 (1981); Lawrence Gene Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 70 (1981); Brilmayer & Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Rules and Conflict of Laws*, 69 VA. L. REV. 819, 849 (1983)).

[383]*But see* Quill v. Vacco, 80 F.3d 716, 729 (2 Cir. 1996) (citing *In re* Quinlan, 70 N.J. 10, 41, *cert. den.* 429 U.S. 922 (1976)).

> [T]he state's contention has been that its principal interest is in preserving the life of all its citizens at all times and under all conditions. But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes.

Id. The Second Circuit's final phrase echoes *Roe v. Wade*, 410 U.S. 113, 163-65 (1993).

Cf. Compassion in Dying v. Washington, 79 F. 3d 790, 831 (9 Cir. 1996) ("The slippery slope fears of *Roe*'s opponents have, of course, not materialized. The legalization of abortion has not undermined our commitment to life generally; nor, as some predicted, has it led to widespread infanticide."). This March 6, 1996 opinion ("slippery slope") foreshadowed President Clinton's April 10, 1996 veto of the Partial Birth Abortion Bill. *Message to the House of Representatives Returning Without Approval Partial Birth Abortion Legislation*, Weekly Compilation of Presidential Documents, April 15, 1996, at 645.

constitutional persons[384] have rights:[385] "A right itself has no right to equal treatment vis a vis other rights."[386]

Homosexuals are owed the equal protection of the laws. But a political topic like homosexuality is not itself owed treatment equal to other legislative issues. Amendment 2 classified no persons (e.g., homosexuals) at all. It debarred homosexuality (Tribe's "characteristic") from serving as basis for legal intervention (Tribe's "regulation").[387]

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[384]Santa Clara County v. Southern Pac. R. Co., 118 U.S. 394, 396 (1886); Levy v. Louisiana, 391 U.S. 38, 70 (1968); and Roe v. Wade, 410 U.S. 113, 158 (1973). The late Justice William O. Douglas's discussion of *Santa Clara County* indicated that this opinion cannot be overruled, because doing so would revise the economic system fundamentally. BRENNER & SPAETH, *supra* note 176, at 4 (citing William O. Douglas, Stare Decisis, 49 COLUMBIA L. REV. 735, 737 (1949)); *cf.* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT (rev. ed. 1996).

Even women have been thought less than full persons by the Supreme Court, according to the sad (if amusing) misguided fulminations of one Chairman of the U.S. Senate Subcommittee on Constitutional Amendments (Sen. Birch Bayh), *Hearings before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary on S.J. Res. 6, S.J. Res. 10 and 11, and S.J. Res. 91, Part IV*, 94th Cong., 1st Sess. 231-32 (1976), and one First Lady of the United States. ROSALYNN CARTER, FIRST LADY FROM PLAINS 287 (1984).

[385]ROSSUM, *supra* note 382, at 30 (citing Martin Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 907, 917 (1982)). It is legal positivism (the most prominent modern exponent of which was the late jurisprudent Hans Kelsen) that distinguishes between persons with rights and mere human beings. JOHN T. NOONAN, JR., A PRIVATE CHOICE 13-19 (1979).

[386]Rossum, *supra* note 382, at 30. To the notions that (1) legal *issues have a right* to the equal protection of the laws (in context of Supreme Court appellate jurisdiction), and that (2) homosexual *issues have a right* to disposition in Colorado beyond the reach of Amendment 2, compare the traditional Roman Catholic teaching whether error has rights. THEODORE M. HESBURGH, GOD, COUNTRY, NOTRE DAME 224 (1990). In identifying abstract issues as themselves rights-bearing, do certain opponents of Supreme Court appellate jurisdictional reform, or of Amendment 2, doctrinally align with the Office of the Holy Inquisition? The more modern thinkers may be the Amendment 2 proponents: "Error is an abstraction and only persons have rights." *Id.* Recall that even post-*Evans*, Colorado can—as observed in Section VIII B, *supra*—pass a preemptive antidiscrimination statute omitting sexual orientation.

[387]Ponnura, *supra* note 219, at 22.

> Amendment 2 did not diminish or dilute anyone's voting power. It did mean that one group - homosexuals - would have to amend the state constitution

B. THE KENNEDY SYLLOGISM

Justice Kennedy's "Tribalist logic"[388] as applied in *Evans* is as follows:

MAJOR PREMISE: Discrimination against legislation ("prohibition on specific legal protections") based on an identifying feature of a group ("a status-based enactment") is discrimination against that group ("special disability upon those persons alone").

MINOR PREMISE: Amendment 2 is discrimination against legislation (of the type found in Aspen, Boulder, and Denver) based on an identifying feature of a group (of homosexuals supportive of said enactments).

CONCLUSION: Amendment 2 is discrimination against that group (homosexuals).

Kennedy's syllogism might be formally valid. Nonetheless, his first premise is ill-chosen, because it proves too much. As Scalia explained in *Evans*,[389] the Establishment Clause[390] precludes local legislative relief for theocrats and the Republican Form of Government Clause[391] and precludes local legislative relief for monarchists. These two clauses embody

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> again to secure legislation of particular concern to it. But no group has a right not to have to amend the constitution to obtain legislation it favors or believes it needs.

Dworkin, *supra* note 127, at 48; *cf.* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 113 (1996).

[388]*See* discussion *supra* Section VI.

[389]Romer v. Evans, 116 S. Ct. 1620, 1634-35 (1996) (Scalia, J., dissenting).

[390]U.S. CONST. amend. I, cl. 1. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

[391]U.S. CONST. art. IV, § 4, cl. 1. ("The United States shall guarantee to every State in this Union a Republican Form of Government. . ."); *cf.* Gordon v. Lance, 403 U.S. 1, 5 (1971) ("[We can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote.").

discrimination against legislation based on the identifying feature of the groups:

> The Court's entire novel theory rests upon the proposition that there is something *special* — something that cannot be justified by normal "rational basis" analysis — in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.[392]

Kennedy's major premise, if consistently applied, would tend to fragment the lawmaking American (or Coloradan) democratic communities into mutually hostile tribes. Each of these lobbies could require not equal protection for its individual members as persons, but equally advantaged lawmaking for its pet bills. No geographic federation with multilevel governments could survive such a principle; none could endure because the geographic distributions of diverse blocs guarantee that any decisional level favors some factions over others.

So the tribalist logic of *Evans* will not be consistently applied. While *Evans* is nominally an equal protection opinion, it is more a sexual revolution precedent.[393] Coming as *Evans* does from the Supreme Court, this means revolution from above.

XII. THE LONGTERM MEANING OF *EVANS*

In Robert H. Weibe's 1995 study *Self-Rule: A Cultural History of*

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[392]Romer v. Evans, 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting). The two foreign countries most like the U.S.—Canada and Australia — are monarchies. Their constitutions do not forbid the establishment of religion.

[393]This author once observed the juxtaposition of *Roe v. Wade*, 410 U.S. 113 (1973), and *Buck v. Bell*, 274 U.S 200 (1927). George Steven Swan, *Compulsory Abortion: Next Challenge to Liberated Women?*, 3 OHIO N.U.L. REV. 152 (1975) (warning against compulsory abortion). Such fears were not realized between 1975 and 1997 because the prognosis relied upon the logical consistency of the judiciary. While *Roe* was nominally a due process opinion, it was more so a precedent for the sexual revolution; *cf.* NOONAN, *supra* note 385, at 95 ("The liberty of abortion became larger than any liberty located in the family structure."). United States Court of Appeals for the Sixth Circuit Judge Noonan is a "noted Catholic opponent of legalized abortion." Dworkin, *supra* note 127, at 46. Nowhere else in Dworkin's seven-page tabloid essay does he hint at anyone's religion (or lack thereof).

American Democracy,[394] and in Michael J. Sandel's 1996 treatise *Democracy's Discontent: America in Search of a Public Philosophy*,[395] the widely-known Northwestern University historian Wiebe[396] and well-known Harvard University Professor of Government Sandel[397] both heed the landmark status of footnote four in *United States v. Carolene Products Co.*[398] The *Carolene Products* opinion signaled unchecked control of national social policymaking (e.g., *Evans*) as *Curtiss-Wright* had signaled unchecked presidential control of foreign policymaking,[399] and *Jones & Laughlin Steel* had signaled unchecked congressional economic policymaking.[400] Justice Harlan Fiske Stone's footnote four carved a post-

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[394]ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY (1995). Professor Wiebe also is the author of THE SEARCH FOR ORDER, 1877-1920 (1967).

[395]MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996). The second of the two parts of Sandel's study is entitled "The Political Economy of Citizenship." *Id.* at 121. Professor Sandel also is the author of LIBERALISM AND THE LIMITS OF JUSTICE (1982).

[396]Yet Wiebe's readings are not to be taken as Gospel. He associates powerlessness with "apathy." WIEBE, *supra* note 394, at 243. However, Professor Post more accurately correlates powerlessness with not apathy, but "fatalism." Post, *supra* note 291, at 146; *cf.* DOWNS, *supra* note 311, at 220-21. "[I]n his influential *An Economic Theory of Democracy*, Anthony Downs concluded that rational consumer-voters should know enough not to squander their resources trying to master the issues around them." WIEBE, *supra* note 394, at 218.

Furthermore, Wiebe states, "At the end of the 20th century, hippie was still a fighting word in local America." *Id.* at 230. This evinces the Evanston gentleman's ignorance either of grassroots America, or of fisticuffs.

[397]Sandel is known among social scientists across America.

[398]304 U.S. 144, 152 n.4 (1938).

[399]Before Pearl Harbor the administration of President Franklin D. Roosevelt already had been "weaving a pattern of secret international decisions leading into war. The executive's clandestine maneuvering simply grew much more elaborate after December 1941." WIEBE, *supra* note 394, at 208; *cf.* George Steven Swan, *Churchill's Finest Hour in Half-Century Perspective*, 5 VALLEY FORGE J. 250 (1991).

[400]Even during the administration of President Ronald Reagan, "[n]ational laws increasingly preempted state and local [economies] in 'business regulation and health and safety.'" WIEBE, *supra* note 394, at 242 (citing WILLIAM GREIDER, WHO WILL TELL THE PEOPLE 181 (1992)).

1937 role for judicial review because majorities might vote preferences at odds with "the right of each person to respect."[401] Just as legislatures curbed the free market, so the post-1938 Constitution would (as, supposedly, in *Evans*) guarantee equal access to the political process and bar popular prejudices from working their way into public policy.[402]

The Supreme Court's post-1938 assumption of social policymaking, long since explained,[403] proved discernable in *Hague v. CIO*;[404] in *Cantwell v. Connecticut*;[405] and in *Skinner v. Oklahoma*.[406] Sandel believes the transition to new constitutional assumptions to be illustrated vividly by the compulsory flag salute cases of *Minersville School District v. Gobetis*[407] and *West Virginia State Board of Education v. Burnette*.[408] The former upheld, but the latter struck down, local or state compulsion of their schoolchildren's pledge of allegiance to the flag.[409]

This latterday trend in constitutional rights, Wiebe surmised, fragmented issues earlier construed in communal terms.[410] Coloradans

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[401]SANDEL, *supra* note 395, at 52 (quoting Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 133-34 (1978)).

[402]*Id.* at 52-53.

[403]George Steven Swan, *The Political Economy of Presidential Foreign Policymaking: The Contemporary Theory of a Bifurcated Presidency*, 21 CAL. W. INT'L L.J. 67, 82-86 (1990).

[404]307 U.S. 496 (1939).

[405]310 U.S. 296 (1940).

[406]316 U.S. 535 (1942).

[407]310 U.S. 586 (1940).

[408]319 U.S. 624 (1943). For a brief discussion of *Minersville School District v. Gobitis* and *West Virginia State Board of Education v. Barnette*, see JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 106-19 (1989).

[409]"With *West Virginia v. Burnette*, [319 U.S. 624 (1943)], the procedural republic had arrived." SANDEL, *supra* note 395, at 54.

[410]WIEBE, *supra* note 394, at 226. In addressing the Court's "aggressive application of the Bill of Rights" to the states via the Fourteenth Amendment, Wiebe explained that the Court multiplied court-protected rights — one of the effects of which was that "matters that had once been construed exclusively in collective terms were now atomized." *Id.* In

themselves once had voted in a one-person/one-vote referendum for a legislature apportioned along federal lines, rather than apportioning both houses according to population. In 1964, the Supreme Court invalidated this democratically chosen format noting that "an individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate."[411] This constitutional trend tends to eviscerate (or at least, transform into appendages[412] of the federal government) institutions like the Colorado legislature mediating between the solitary, atomized individual and the omnipotent central state.[413] Specifically, Colorado's people were unable to democratically form their legislature as they wished, but had to erect it along lines prescribed by Washington.

Even as the scope of constitutional rights declared by the Supreme

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explaining this trend toward the atomization of rights, Wiebe noted:

> Taxation without representation, for example, strictly a group concern when white men complained about it in the 18th century and free black men and white women protested against it in the 19th, was used in the mid-1960s to support each individual's right to an equality in representation — the principle of one person-one vote.

WIEBE, *supra* note 394, at 226; *cf.* Bork, *supra* note 387, at 97 (citing ROBERT NISBET, CONSERVATISM: DREAM AND REALITY 41 (1986)).

[411]Lucas v. Forty-Fourth Colorado Gen. Assembly, 377 U.S. 713, 736 (1964).

[412]Other authority agrees that the modern states are merely appendages of the central government:

> When today's political science professors point out that the federal government is a government of "delegated powers," we all chuckle because by common consent state power has become more a matter of administrative convenience than an element of sovereignty. This has all happened painlessly since Franklin Roosevelt's first administration through the application of the "golden rule." Under the golden rule, whoever has the gold, rules.

NEELY, *supra* note 297, at 108.

[413]Swan, *supra* note 329, at 752-53 (citing JAMES HITCHCOCK, YEARS OF CRISIS 150 (1985)); George Steven Swan, *The Political Economy of Supreme Court Social Policymaking 1987*, 8 ST. LOUIS U. PUB. L. REV. 87, 91-92 (1989); George Steven Swan, *The Political Economy of Supreme Court Social Policymaking 1991*: Payne v. Tennessee, 33 SO. TEX. L. REV. 661, 687-96 (1992).

Court stretched outward, the actual powers of the individual shrank.[414] As Wiebe notes:

> Once individual privacy meant leaving public life and separating oneself from its authorities. Now individual privacy required entering public life and seeking guarantees from its authorities. Here the ends meet: weaker individuals claiming more rights invited a stronger government to assert itself in securing more rights for weaker individuals.[415]

In terms of *Evans*, homosexuals (the "weaker individuals") solicited Aspen, Boulder, and Denver for more rights and, thereafter, entreated the Supreme Court ("a stronger government") to assert itself for them.

Consistent with this scenario is the post-1962[416] Warren Court's ("a stronger government") tie to individuals claiming enhanced constitutional rights,[417] and the post-1963 federal executive's reaching out (under President Lyndon B. Johnson's Great Society) to the poor ("weaker individuals").[418] The federal judiciary and executive both disregarded the mediating institutions of state or local government.

Sandel explains how such fragmentation had informed the *Bowers*

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[414]WIEBE, *supra* note 394, at 227.

[415]*Id.*

[416]Baker v. Carr, 369 U.S. 186 (1962); *cf.* Swan, *The Political Economy of Supreme Court Social Policymaking 1987*, *supra* note 413, at 90 n.20 (citing CLARENCE G. MANION, CANCER IN THE CONSTITUTION 5 (1972)). "[T]he transformation of the Court from moderate to strong support of civil liberties began with the 1961 term." BRENNER & SPAETH, *supra* note 176, at 30.

[417]WIEBE, *supra* note 394, at 229. *See, e.g.*, PHILLIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970).

[418]WIEBE, *supra* note 394, at 229.

> As part of President Lyndon Johnson's War on Poverty, the Office of Economic Opportunity made gestures toward bypassing local powers and dealing directly with groups of the nation's poor. . . . In general, much of Johnson's program for a Great Society was predicated on the assumption that local governments had no purpose higher than to mimic the national government, replicating its goals, supplementing its programs, and copying its taxing philosophy.

Id.; *cf.* Bork, *supra* note 387, at 5.

precedent.[419] The five-Justice Bowers majority disdained any "fundamental right to engage in homosexual sodomy."[420] The respective dissents of Justices Harry Blackmun[421] and Stevens,[422] on the other hand, both concentrated upon each homosexual's individual choice. In striking down Georgia's anti-sodomy statute, the United States Court of Appeals for the Eleventh Circuit[423] cited the Supreme Court's *Griswold v. Connecticut*[424] opinion, which vindicated a constitutional right to privacy within the marital mediating institution. The Eleventh Circuit posited, "For some, sexual activity . . . serves the same purpose as the intimacy of marriage."[425] The Supreme Court's reliance upon a fragmenting approach, rather than upon the Eleventh Circuit's social or mediating institution approach, might have proved costly to homosexuals.[426]

A post-1962 bull market in fresh constitutional rights accompanied an overt aversion to democracy on the part of many constitutionalists.[427] The agenda of supposed rights was promoted through administrative agencies[428]

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[419]SANDEL, *supra* note 395, at 103-08.

[420]Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[421]*Id.* at 217 (Blackmun, J., dissenting).

[422]*Id.* at 218-19 (Stevens, J., dissenting).

[423]Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

[424]381 U.S. 479 (1965).

[425]*Hardwick*, 760 F.2d at 1212.

[426]Sandel precisely locates the shift from a right to privacy within the marital institution to one of individuals' several sexual privacies. SANDEL, *supra* note 395, at 97-98. That shift, in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), turned upon a falsification of *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Id.* at 367 n.30.

[427]WIEBE, *supra* note 394, at 240. Recall the quotation from the A.C.L.U.'s Matthew Cole in Section VIII A, *supra*.

[428]George Steven Swan, *The Political Economy of the Separation of Powers:* Bowsher v. Synar, 17 CUMB. L. REV. 795, 827-29 (1987). "Indeed, administrative law is the fastest-growing body of law in the land." FREDERICK R. LYNCH, INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION 142 (1989).

and the courts.[429] Wiebe found:

> Opinion polls supplied ammunition for this antimajoritarian bias: steady majorities opposed the individualists on such matters as the death penalty, the rights of criminal suspects, open homosexual preferences, and religious exercises in the public schools. An election affecting public policy on any of those issues was dismissively labeled a "plebiscite."[430]

Amendment 2, a product of precisely such a plebiscite over open homosexual preferences, was nullified in *Evans*.

Evans means that the Supreme Court, not the voters, makes American social policy. It does so by means tending to dissolve (or fragment) mediating institutions as small as the marital couple,[431] and as large as Colorado. This longterm practice leaves the citizen increasingly alone (i.e., unreinforced by mediating institutions)[432] before an omnipotent central

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[429]WIEBE, *supra* note 394, at 240-41.

> The Supreme Court struck down the attempt of Colorado to remove the issue of the legitimacy of homosexual conduct from the local political process and lodge it in the state constitution. But in doing so, the Supreme Court itself went far to remove the issue from most of the political process altogether.

Forte, *supra* note 342, at 56.

[430]WIEBE, *supra* note 394, at 240 (citing, *inter alia*, Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. REV. OF BKS., July 18, 1991, at 23, 24).

[431]Planned Parenthood v. Danforth, 428 U.S. 52, 68 (1976) (holding that it is unconstitutional for a state to "require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy"); *cf.* BORK, *supra* note 387, at 6, 96-97, 356-29 (citing ROBERT NISBET, TWILIGHT OF AUTHORITY 223-29 (1975)).

[432]As indicated *supra* Section XI.B., the logic of *Romer v. Evans*, 116 S. Ct. 1620 (1996), would tend to fragment polities into mutually competitive factions. An amorphous voting bloc (like those along racial or gender lines) is not to be confused with authentic contractual mediating institutions with decisionmaking capacity, like the family, trade union, religious congregation, etc. Swan, *supra* note 413, at 87, 97-98, 102, 105.

> [E]thnic groups have associations, and occupations have trade or professional organizations. Many firms are, in effect, collectivities (or sub-collectivities), each equipped with an organized governance. In effect, most collectivities have one or more organizational instruments, which are used to deliberate and to decide (in board meetings, staff conferences, and so on). We

government.

XIII. CONCLUSION

The preceding pages have discussed the landmark *Evans* decision. The protracted litigation history of *Evans* in Colorado climaxed with the Supreme Court of Colorado finding Amendment 2 unconstitutional. The United States Supreme Court likewise adjudged Amendment 2 unconstitutional, as violative of the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy's opinion for the Court in *Evans* drew heavily upon an *amicus curiae* brief penned by Professor Laurence A. Tribe.

But economic reasoning well might inform a scholarly critique of *Evans*. Constitutional economics suggests that a constitutional court confronting the difference between local and statewide government, as in *Evans*, properly blesses the state government. Economic imperatives imply that *Evans* is impaired.

Nevertheless, *Evans* does eminently suit the contemporary interbranch authority rationale. Thereunder, the democratic peoples of the fifty states are prevented, by the federal judiciary, from social policymaking. Sure enough, on June 17, 1996, the six members of the *Evans* majority by unsigned order instructed the U.S. Court of Appeals for the Sixth Circuit to reconsider in light of *Evans*[433] the Sixth Circuit's opinion in *Equality Foundation v. Cincinnati*.[434] That case looked to a municipal charter denial of anti-bias protection to gays.[435] The states, such as Colorado and Ohio, cannot defend themselves from an overweening Supreme Court.

> suggest, for reasons indicated below, that despite the widely held views to the contrary, by using organizations as instruments, *collectivities are* (or at least can be made to be) *more rational than their individual component members*, in most areas of decision-making, those concerning economic behavior included.

AMITAI ENTZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 186 (1988) (emphasis in original).

[433]116 S. Ct. 2519 (1996). Justice Scalia's short dissent was joined by Chief Justice Rehnquist and Justice Thomas. *Id.* at 1629 (Scalia, J., dissenting).

[434]Equality Found. of Greater Cincinnati v. Cincinnati, 54 F.3d 261 (6th Cir. 1995).

[435]*Id.* at 264.

However, Congress, unlike state governments, can strike back[436] when offended by an imperial federal judiciary.[437] This difference means that *Evans* need not be deemed a precedent controlling future congressional,[438] as opposed to state, decisionmaking.[439] As mentioned previously, Congress can retaliate against the Supreme Court for what it feels are "bad opinions" by limiting the Supreme Court's jurisdiction; the states do not have this authority. Congress *spank*!

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[436]This is pursuant to the Article III Exceptions Clause discussed in Section XI, *supra*.

[437]*See, e.g.*, Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959 (1982).

[438]On May 23, 1996, President Clinton announced that he would sign prospective legislation averse to homosexual marriage.

> *Q.* Mr. President, yesterday your Press Secretary said that you would sign a bill banning recognition of same-sex marriages. What do you say to those who feel that this discriminates against gays and lesbians? And how do you respond to the many gays who supported you who now feel betrayed?
>
> *President Clinton.* Well, first of all, as I understand it, what the bill does — let's make it clear. As I understand it, what the bill does is to state that marriage is an institution between a man and a woman, that among other things, is used to bring children into the world. But the legal effect of the bill — as I understand it, the only legal effect of the bill is to make it clear that States can deny recognition of gay marriages that occurred in other States. And if that's all it does, then I will sign it.

The President's News Conference With Chancellor Helmut Kohl of Germany in Milwaukee, Wisconsin, Weekly Compilation of Presidential Documents, May 27, 1996, at 929, 933.

[439]Jeffrey Hart, formerly of the faculty of Dartmouth College, sized up the response of the Supreme Court to anticipated federal legislation unreceptive to homosexual marriage:

> I suppose the court would find a way not to challenge an act of Congress. Historically, it almost never does, because it recognizes the ultimate supremacy of the legislature. Article III, section 2, of the Constitution amounts to a nuclear weapon Congress can use against the court. Under Section 2, Congress can withdraw any matter whatsoever from the court's jurisdiction.

Jeffrey Hart, *Identity Politics Points to Constitutional Crisis*, CONSERVATIVE CHRONICLE, June 12, 1996, at 19. But Hart certainly alludes only to withdrawal of matters from the Supreme Court's appellate (not original) jurisdiction. "[T]he Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." U.S. CONST., art. III, § 2, cl. 2.