NOTES

CONSTITUTIONAL LIMITS ON ANTI-GAY-RIGHTS INITIATIVES

I. INTRODUCTION

In the last two decades, at least 139 jurisdictions in the United States have enacted laws that protect lesbians, bisexuals, and gay men from various forms of discrimination.[1] These laws grew out of an increasing recognition that gay people[2] are routinely subject to violence and discrimination in contexts such as employment, housing, education, and public accommodations.[3]

Recently, rallying against the establishment of "special rights,"[4] some right-wing, fundamentalist Christian groups have embarked on extensive campaigns to curtail the civil rights of lesbians and gay men.[5] Last November, these groups[6] successfully promoted Colorado Amendment Two, which not only repealed existing state laws that protect gay people from discrimination,[7] but also banned all *future* laws that would recognize such claims by lesbians and gay men.[8]

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[1] *See* NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, LESBIAN AND GAY CIVIL RIGHTS IN THE U.S. 1–4 (1993) (listing laws); *infra* app. at pp. 1923–25.

[2] This Note uses the terms "gay people" and "lesbians and gay men" interchangeably to denote people who are primarily attracted — emotionally and sexually — to others of the same sex. The terms refer to individuals with a same-sex sexual orientation, but not necessarily to all individuals who engage in same-sex acts. *See* discussion *infra* notes 61 & 64.

[3] For a summary of the discrimination faced by lesbians and gay men, see EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW *passim* (1990); and NAN D. HUNTER, SHERRYL E. MICHAELSON & THOMAS B. STODDARD, THE RIGHTS OF LESBIANS AND GAY MEN *passim* (3d ed. 1992).

[4] *See, e.g.*, Gary L. Bauer, *Beware Hidden Gay Agenda*, USA TODAY, Apr. 26, 1993, at 12A (arguing that gays want "special rights").

[5] *See* Donna Minkowitz, *Outlawing Gays*, 255 NATION 420, 420–21 (1992).

[6] Colorado for Family Values, a group associated with the Christian fundamentalist movement, sponsored the campaign to pass Amendment Two. *See infra* notes 125–28.

[7] If upheld, Amendment Two would invalidate parts of Colorado local antidiscrimination laws, state insurance laws, state personnel board regulations, and state professional codes of ethics for lawyers and judges. *See* Colin Crawford, *Gay Rights Wins in Oregon and Portland, Maine; Losses in Colorado and Tampa, Florida*, 1992 LESBIAN/GAY L. NOTES 83, 83.

[8] *See* Amendment Two to COLO. CONST. art. II, § 2 (adopted Nov. 3, 1992). The full text of Amendment Two is as follows:

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

Id. The voters of Colorado approved Amendment Two by a vote of 53% to 47% on November

Since then, groups in at least eight other states have begun to campaign for similar state constitutional amendments.[9]

This Note argues that anti-gay-rights initiatives such as Colorado Amendment Two violate the federal Constitution. Part II of this Note discusses the need for gay-rights laws and argues that such laws do not constitute "special rights." Part III discusses the development of gay-rights laws and the fundamentalist movement's attempts to prohibit them through popular initiatives. Finally, Part IV analyzes how anti-gay-rights initiatives such as Colorado Amendment Two violate the Equal Protection Clause of the Fourteenth Amendment and the Free Speech Clause of the First Amendment.

II. THE NEED FOR PROTECTION

Lesbians and gay men have historically been vilified in the United States.[10] Largely because of the persistence of ignorance and misinformation,[11] lesbians and gay men are often subject to very real harms whenever their sexual orientation is disclosed. For example, gay people are brutally beaten and murdered because of their sexual orientation.[12] Lesbians and gay men are also fired from jobs (both pri-

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3, 1992. *See* Ned Zeman, *No 'Special Rights' for Gays*, NEWSWEEK, Nov. 23, 1992, at 32. On January 15, 1993, a Colorado state district court issued a preliminary injunction against the amendment. *See* Evans v. Romer, No. 92 CV 7223 (Colo. Dist. Ct. Jan. 15, 1993). The preliminary injunction is currently being appealed to the Colorado Supreme Court. *See* Evans v. Romer, No. 93 SA 17 (Colo. filed Jan. 19, 1993).

[9] These groups include Arizonans for Traditional Values (Ariz.), Traditional Values Coalition (Cal.), American Family Association (Fla.), Idaho Citizens' Alliance (Idaho), Michigan Family Values Committee (Mich.), Ohio Pro-Family Forum (Ohio), Oregon Citizens' Alliance (Or.), and Citizens' Alliance of Washington (Wash.). *See* FIGHT THE RIGHT PROJECT, NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, ANTI GAY INITIATIVES UNDER CONSIDERATION 1 (1993) [hereinafter NGLTF FACT SHEET].

[10] *See generally* JONATHAN N. KATZ, GAY AMERICAN HISTORY 11–128 (rev. ed. 1992). For over four centuries, American lesbians and gay men have been:

> condemned to death by choking, burning, and drowning; they were executed, jailed, pilloried, fined, court-martialed, prostituted, fired, framed, blackmailed, disinherited, declared insane, driven to insanity, to suicide, murder, and self-hate, witch-hunted, entrapped, stereotyped, mocked, insulted, isolated, pitied, castigated, and despised . . . . [They were] castrated, lobotomized, shock-treated, and psychoanalyzed . . . .

Id. at 11.

[11] *See generally* Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 138–72 (1991) (refuting eight common myths about lesbians and gay men).

[12] *See, e.g.*, Christopher Muther, *Annual Local, National Violence Stats Rise Again*, BAY WINDOWS, Mar. 11, 1993, at 1 (describing a lesbian couple shot and killed by their neighbor who was "upset by the couple's open displays of affection," a gay man beaten to death by teenagers, and a gay man and a lesbian killed in the firebombing of their house by skinheads). Lesbians and gay men have been characterized as the "Most Violently Attacked Community in America." *See* Nat Hentoff, *The Most Violently Attacked Community in America*, VILLAGE VOICE, Sept. 25, 1990, at 24. Reports of hate crimes against gay people have increased

vate[13] and governmental[14]), refused housing and public accommodations,[15] and denied recognition as families.[16] Additionally, gay people often face a hostile judiciary.[17]

These attitudes are particularly disturbing in light of the strong evidence that sexual orientation, once established, is an immutable characteristic and not a matter of personal choice.[18] Given the status quo of hatred and discrimination, gay people have sought state and local laws that sanction and deter such behavior. These statutes afford lesbians and gay men the same civil rights to which all other groups are entitled: the right to live, love, and work free from violence and invidious discrimination. These rights are not "special rights," but rather human rights.[19]

III. THE STRUGGLE FOR AND AGAINST GAY-RIGHTS LAWS

During the last twenty years, state and local gay-rights laws[20] have developed at a slow but steady pace. Until 1972, no jurisdiction

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dramatically in the last few years. *See, e.g.*, *Anti-Gay Crimes Are Reported on Rise in 5 Cities*, N.Y. TIMES, Mar. 20, 1992, at A12.

[13] *See, e.g.*, Bob Cohn, *Discrimination: The Limits of the Law*, NEWSWEEK, Sept. 14, 1992, at 38 (describing the Cracker Barrel restaurant chain's decision to fire all of its lesbian and gay employees).

[14] *See, e.g.*, Doe v. Gates, 981 F.2d 1316, 1318 (D.C. Cir. 1993) (upholding the CIA's right to fire a gay employee); Padula v. Webster, 822 F.2d 97, 102–04 (D.C. Cir. 1987) (same for the FBI); Dronenburg v. Zech, 741 F.2d 1388, 1396–98 (D.C. Cir. 1984) (same for the Army).

[15] *See, e.g.*, STEPHEN LEBLANC, FENWAY COMMUNITY HEALTH CENTER, EIGHT IN TEN 13 (Robert Weinerman & Joyce Collier eds., 1991) (describing and quoting the personal experiences of gay people denied housing and services at restaurants, motels, bars, and nightclubs).

[16] *See, e.g.*, Dean v. District of Columbia, Civ. No. 90-13892, slip op. at 26 (D.C. Sup. Ct. Dec. 30, 1991) (refusing to issue a marriage license to two men); Roe v. Roe, 324 S.E.2d 691, 693–94 (Va. 1985) (creating a presumption against granting child custody to gay parents).

[17] For example, one judge said that he gave a lenient sentence to a convicted murderer because the two victims were "'queers.'" *Judge Says Word Choice Was 'Poor,'* WASH. POST, Dec. 24, 1988, at A7.

[18] For a summary of recent studies on the biological causes of homosexuality, see Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, Mar. 1993, at 47, which concludes that "it is becoming ever clearer that biological factors play a role in determining human sexual orientation." *Id.* at 65; *see also* Herek, *supra* note 11, at 148–52 (concluding that "the assertion that homosexuality is a choice that can be changed is erroneous for the vast majority of lesbians and gay men").

[19] That is, when victims of irrational discrimination demonstrate that protection is warranted, they do not receive "special rights." Rather, they merely take on the *same* burden-free status as the majority. *See* Hunter v. Erickson, 393 U.S. 385, 391 (1969) ("The majority needs no protection against discrimination."). For further discussion, see note 35 below.

[20] This Note uses the term "gay-rights laws" to refer to statutes, ordinances, and plans adopted by various legislative bodies as well as to executive orders and proclamations issued by governors and mayors.

had laws that explicitly protected gay people.[21] In 1972, supporters of lesbian and gay rights in East Lansing, Michigan, successfully lobbied for the first gay-rights law in the United States.[22] In 1974, Hennepin County, Minnesota, became the first county and, in 1982, Wisconsin became the first state to enact gay-rights legislation.[23] As of May 1993, at least 139 jurisdictions had adopted some form of protection against discrimination based upon sexual orientation.[24] Today, supporters of lesbian and gay rights seek the passage of a national gay-rights bill,[25] which has been introduced in Congress repeatedly since 1975.[26]

For almost as long as lesbians and gay men have sought equal treatment under the laws, the political and religious right has fought those civil rights.[27] The first wave of anti-gay-rights activity began in 1977, when evangelist singer Anita Bryant successfully led a grassroots campaign to repeal a six-month old gay-rights ordinance in Dade County, Florida.[28] The anti-gay movement ended temporarily in 1979, with the collapse of Bryant's organizations and with the defeat of anti-gay-rights initiatives in California and Seattle, Washington.[29]

The second wave of anti-gay-rights activity arrived with the political rise of the New Right in 1980.[30] Unlike the first wave, however,

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[21] For a discussion of the significant obstacles that gay-rights advocates have had to overcome in the legislative process, see Peter M. Cicchino, Bruce R. Deming & Katherine M. Nicholson, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 563–99 (1991).

[22] *See* LYNNE Y. FLETCHER, THE FIRST GAY POPE 77 (1992).

[23] *See* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., A NATIONAL SUMMARY OF ANTI-DISCRIMINATION LAWS 6, 12 (1991).

[24] At least 19 states (eight through legislation — Cal., Conn., Haw., Mass., Minn., N.J., Vt., Wis. — and 11 through executive orders or civil service rule interpretations), the District of Columbia, and 119 cities and counties have adopted laws or policies that provide varying degrees of protection against discrimination on the basis of sexual orientation. *See infra* app. at pp. 1923–25. Even among these jurisdictions, there is a vast difference as to which activities are covered. For example, whereas approximately 60% of the United States population is protected by gay-rights laws in the area of public employment, only 20% is protected by gay-rights laws in the area of housing. *See id.*

[25] *See* H.R. 423, 103d Cong., 1st Sess. (1993). If passed, the Civil Rights Amendments Act of 1993 would amend existing civil-rights legislation to prohibit private discrimination on the basis of sexual orientation. *See id.* §§ 2–3. The federal courts have refused to extend the protections of the Civil Rights Act of 1964 to lesbians and gay men. *See, e.g.*, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979).

[26] *See* FLETCHER, *supra* note 22, at 77.

[27] *See, e.g.*, BARRY D. ADAM, THE RISE OF A GAY AND LESBIAN MOVEMENT 102–20 (1987); ROSALYN RICHTER, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., ANTI-GAY LEGISLATION 1–4 (1982).

[28] *See* ADAM, *supra* note 27, at 103–04. This campaign inspired other successful gay-rights repeal campaigns in St. Paul, Minnesota; Wichita, Kansas; and Eugene, Oregon. *See id.*

[29] *See id.* at 104–06.

[30] *See, e.g.*, RICHTER, *supra* note 27, at 1–4.

the second wave works through a sophisticated network of at least fifteen national organizations with right-wing Christian fundamentalist agendas.[31] These groups frequently distort the true nature of their organizations,[32] rely upon discredited experts[33] and facts,[34] and conceal from voters the true purpose of their legislation.[35] Because of such tactics, these groups have achieved significant successes[36] — such as the recent passage of Colorado Amendment Two. In the wake of these successes, more anti-gay-rights groups are mobilizing.[37]

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[31] These organizations include Pat Robertson's Christian Coalition, Donald Wildmon's American Family Association, and Lou Sheldon's Traditional Values Coalition. *See* POLITICAL RESEARCH ASSOCIATES, ORGANIZATIONS CURRENTLY TARGETING LESBIANS, GAY MEN, AND BISEXUALS 1–6 (1993) (describing the activities of more than 30 anti-gay religious and political groups). For a concise summary of the new right's anti-gay-rights agenda, see MAB SEGREST & LEONARD ZESKIND, QUARANTINES AND DEATH: THE FAR RIGHT'S HOMOPHOBIC AGENDA *passim* (1989).

[32] For example, although the anti-gay-rights movement claims to result from local grassroots efforts, it actually relies upon a sophisticated national network of conservative fundamentalist Christian organizations for funding, organization, and support. *See* Jean Hardisty, *Constructing Homophobia*, PUBLIC EYE, Mar. 1993, at 1, 4. Many of these organizations utilize "stealth" tactics to hide their political activities. *See, e.g.*, Frederick Clarkson, *Inside the Covert Coalition*, CHURCH & STATE, Nov. 1992, at 4, 7 (quoting Ralph Reed, the Executive Director of the Christian Coalition, who said that "'[w]e've learned how to move under the radar in the cover of the night'").

[33] For example, one such "expert" — Dr. Paul Cameron — was expelled from the American Psychological Association in 1983 for ethical violations, disassociated by the Nebraska Psychological Association, and criticized by the American Sociological Association. *See* SEGREST & ZESKIND, *supra* note 31, at 19–20; *see also* Baker v. Wade, 106 F.R.D. 526, 536 (N.D. Tex. 1985) ("[T]here has been no fraud or misrepresentations [in this case] except by Dr. Cameron.").

[34] *See, e.g.*, COLORADO FOR FAMILY VALUES, WHAT'S WRONG WITH "GAY RIGHTS"? YOU BE THE JUDGE (1992) (arguing that gay people "incorporate children into their sexual practices" and "engage in deviant sexual behaviors like . . . ingesting feces and urine"). More subtle misrepresentations include the claims that homosexuality is a matter of choice and that gay people are not a persecuted minority group. *See id.* Numerous empirical studies have shown that the outrageous claims made by opponents of gay-rights laws are not true. *See infra* pp. 1915–16.

[35] For example, although the anti-gay-rights movement uses the no "special rights" slogan, *see, e.g.*, Fundraising Letter of Bill Armstrong, Board Member of Colorado for Family Values 2 (1992), it deliberately refrains from using that phrase in its initiatives because it actually wants to abolish *all* the rights of gay people. One legal adviser to the sponsors of Colorado Amendment Two wrote: "I believe 'No Special Privileges' is a good motto for the amendment's public campaign, but I fear the possible legal ramifications if it is included in the amendment itself. The language of the amendment should prohibit homosexuals from claiming *any* rights regarding employment, education, housing or status." *Evidence Offered That Anti-Gay Group Misled Colorado Voters*, BAY WINDOWS, Feb. 25, 1993, at 1 (quoting Letter from Brian M. McCormick, Staff Attorney for National Legal Foundation, to Tony Marco, Co-Chairman of Colorado for Family Values (June 13, 1992) (emphasis added)).

[36] For example, in 1989, these organizations succeeded in repealing local gay-rights laws in California, and, in 1992, local laws in Florida. *See* Crawford, *supra* note 7, at 83–84; Bruce Mirken, *Hell-Raiser*, L.A. READER, Aug. 2, 1991, at 6, 7 (describing the Anaheim-based Traditional Values Coalition's role in defeating ordinances in Concord and Irvine, California).

[37] *See* NGLTF Fact Sheet, *supra* note 9, at 1.

IV. CONSTITUTIONAL LIMITS ON ANTI-GAY-RIGHTS INITIATIVES

The homophobic right has succeeded not only in repealing existing gay-rights laws, but also in amending at least one state constitution to prohibit any *future* protection of gay people from discrimination.[38] This Part argues that such restrictive initiatives violate the Equal Protection Clause and the Free Speech Clause of the United States Constitution.[39]

A. Equal Protection

Anti-gay-rights initiatives violate the Equal Protection Clause because they discriminate according to a suspect classification, because they are not rationally related to a legitimate state objective, and because they unduly burden the fundamental right of lesbians and gay men to equal participation in the political process.

1. State Action. — Because the Equal Protection Clause only governs discriminatory action on the part of the government, any challenge to anti-gay-rights amendments must first establish discriminatory state action. One might argue that such initiatives do not involve discriminatory state action because the state has no affirmative duty to protect gay people.[40] Discriminatory state action can be established, however, because anti-gay-rights initiatives go beyond the mere repeal of existing laws; by blocking the passage of future gay-rights laws, the initiatives affirmatively encourage and facilitate public and private discrimination against lesbians and gay men.

For example, challengers to an anti-gay-rights initiative might show state discrimination by demonstrating that the initiative establishes an affirmative state policy to discriminate against lesbians and gay men in the provision of public employment or services. That is, because anti-gay-rights initiatives insulate state officials from liability for discriminatory acts, these laws send a message that discrimination is not only tolerated but encouraged.[41]

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[38] *See supra* note 8 (discussing Colorado Amendment Two). For the text of the anti-gay-rights initiative that failed in Oregon, see Timothy Egan, *Oregon Measure Asks State to Repress Homosexuality*, N.Y. TIMES, Aug. 16, 1992, §1, at 1, 34. For the text of an unsuccessful anti-gay-rights initiative on the city level, see the proposed ordinance reprinted in Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rep. 2d 648, 663 (Cal. Ct. App. 1991).

[39] *See* U.S. CONST. amend. XIV, § 1; *id.* amend. I. Popular initiatives are often constitutionally suspect and should be subject to closer judicial scrutiny. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1504–08 (1990).

[40] *Cf.* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199–200 (1989) (finding no affirmative duty on the part of the state to protect citizens who are not in its custody).

[41] *See, e.g.*, Dirk Johnson, *A Ban on Gay-Rights Laws Is Put on Hold in Colorado*, N.Y. TIMES, Jan. 16, 1993, § 1, at 6 (reporting a lesbian police officer who fears for her life at work as a result of Amendment Two).

Alternatively, the Supreme Court has held that initiatives like these could amount to state discrimination if the state's encouragement of and involvement in private discrimination is sufficiently great.[42] For example, in *Reitman v. Mulkey*,[43] the Court held that a facially neutral amendment to the California state constitution, which would have prevented the state from interfering with a person's "absolute" right to sell or rent property to whomever she wanted, constituted discriminatory state action.[44] The Court reasoned that there was discrimination by the state not because the amendment repealed existing antidiscrimination laws, but because the amendment was intended to facilitate private discrimination and would in fact "encourage and significantly involve" the state in such discrimination.[45]

Colorado Amendment Two meets the test for discriminatory state action established in *Reitman*. Like the California amendment, Amendment Two actually encourages private discrimination by making discrimination against gay people a "basic polic[y] of the state."[46] In fact, Amendment Two provides an even stronger case for state involvement with private discrimination than the amendment at issue in *Reitman* because the Colorado amendment explicitly singles out lesbians and gay men as a group, whereas the California amendment was facially neutral.[47] Contrary to its campaign slogan, Amendment Two is not about preventing "special rights"; by making all private discrimination against lesbians and gay men "immune from legislative, executive, or judicial regulation at any level of the state government,"[48] the amendment actually *facilitates* private discrimination.

The substantial increase in assaults and gay-bashings in Colorado that immediately followed the passage of Amendment Two also supports a finding of state encouragement and significant involvement with private discrimination.[49] Within days of Amendment Two's passage, numerous gay-affiliated groups were subjected to anonymous

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[42] *See* Reitman v. Mulkey, 387 U.S. 369, 375 (1967); *cf.* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

[43] 387 U.S. 369 (1967).

[44] *See id.* at 380–81.

[45] *Id.* at 376–78. Although the *Reitman* Court was concerned with racial discrimination, the threshold question of state action is independent of the subsidiary question whether the discrimination is actually unlawful. Thus, the fact that the Colorado amendment involves gay people (and not racial minorities) is irrelevant to the initial state action inquiry.

[46] *Id.* at 381.

[47] *See id.* at 371 n.2.

[48] *Id.* at 377. Indeed, the sponsors of Amendment Two and their legal advisers admit to this point in their written correspondence. *See supra* note 35.

[49] *See* John Wilkens, *A Deceitful Anti-Gay Campaign*, DALLAS MORNING NEWS, Jan. 12, 1993, at 15A (reporting a 400% increase in violence and harassment against gay people in Colorado after the passage of Amendment Two).

phone threats, bomb threats, and property damage.[50] In the three weeks following the election, at least twenty-three hate crimes against gay people in the state were reported.[51] Since then, anonymous groups have targeted gay-owned Colorado businesses with posters that call for the death penalty against gays as "prescribed in the Bible" and for Ku Klux Klan participation.[52] These incidents demonstrate that Amendment Two goes far beyond inaction; by implementing an anti-gay-rights initiative that bans future antidiscrimination laws, the state affirmatively encourages discrimination against lesbians and gay men.[53]

2. Unlawful Discrimination. — (a) Suspect Classification. — The Supreme Court has held that certain groups are so disfavored by society that any state action that singles them out is inherently suspect under the Equal Protection Clause. Some have argued that gay people, like racial minorities and women, should be treated as a suspect class.[54] Like those groups, lesbians and gay men are often politically powerless and have "historically been the object of pernicious and sustained hostility."[55] Furthermore, like those groups, gay people are defined by immutable traits that bear no relationship to their ability to perform or function in society.[56]

Despite the views of numerous commentators that laws classifying on the basis of sexual orientation should be subjected to heightened scrutiny,[57] no federal appellate court has yet adopted this posi-

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[50] For example, a Denver women's bookstore was subjected to a series of anonymous phone threats that included epithets such as "You queer dyke bitches!" Another bookstore was threatened with a bombing: "You got too many fags and queers working there." The Denver Gay and Lesbian Community Center was threatened by a caller who said "We're going to blow up your f[ucking] building." Windows were broken on cars outside gay bars, and the Denver Center for the Performing Arts was vandalized with the words "faggots get out of the arts" scribbled on a classroom blackboard. *See* Zeman, *supra* note 8, at 32 (internal quotes omitted).

[51] *See id.*; *cf.* Johnson, *supra* note 41, at 6 (reporting, in the wake of Amendment Two, a gay man considering suicide).

[52] Kristina Campbell, *Around the Nation*, WASH. BLADE, Apr. 23, 1993, at 80, 81 (internal quotes omitted).

[53] *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1462–70 (1992) (demonstrating the link between state action and anti-gay violence).

[54] *See, e.g.*, Watkins v. United States Army, 875 F.2d 699, 711–24 (9th Cir. 1989) (Norris, J., concurring), *vacating* 847 F.2d 1329 (9th Cir. 1988), *cert. denied*, 498 U.S. 957 (1990); Jantz v. Muci, 759 F. Supp. 1543, 1551 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992); Kentucky v. Wasson, 842 S.W.2d 487, 501 (Ky. 1992).

[55] Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from the denial of certiorari); *see supra* pp. 1906–07.

[56] *See, e.g.*, *Watkins*, 875 F.2d at 725–26 (rejecting common myths about gay people and homosexuality).

[57] *See, e.g.*, Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 U.C.L.A. L. REV. 915, 922–23 (1989); Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 543–44 (1992); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal*

tion.[58] Those courts have reasoned that the Supreme Court's validation of a sodomy statute in *Bowers v. Hardwick*[59] forecloses the possibility of heightened scrutiny for gay people under the Equal Protection Clause.[60]

Hardwick is not dispositive of the equal protection issue, however, because whereas *Hardwick* was about the act of same-sex sodomy, anti-gay-rights initiatives are about the status of sexual orientation.[61] In *Robinson v. California*,[62] the Supreme Court held that a person cannot be punished for her status as a drug addict, even though the act of drug use may be illegal.[63] Because the status of drug addiction is even more strongly defined by drug use than the status of homosexuality is defined by same-sex sodomy,[64] *Hardwick* cannot be controlling.[65] Furthermore, *Hardwick* only concerned a Due Process Clause challenge, which leaves the equal protection question unanswered.[66] The two clauses are fundamentally different; whereas the Due Process Clause is backward-looking (protecting individuals against excessive state deviation from historical practices), the Equal Protection Clause is forward-looking (protecting individuals under evolving standards of equality).[67] In sum, judicial recognition of homosexuality as a suspect classification is not precluded by *Hardwick* and is supported by the similarity of sexual orientation to other recognized suspect classifications.

If gay people are deemed a protected class, then anti-gay-rights initiatives almost certainly will not meet the strict scrutiny to which

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Protection, 55 U. CHI. L. REV. 1161, 1178–79 (1988); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1285–88 (1985).

[58] *See, e.g.*, High-Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 573–74 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 465–66 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 103–04 (D.C. Cir. 1987).

[59] 478 U.S. 186 (1986).

[60] For a thorough discussion of this position, see Watkins v. United States Army, 847 F.2d 1329, 1353–62 (9th Cir. 1988) (Reinhardt, J., dissenting).

[61] *See, e.g.*, Hunter, *supra* note 57, at 531 (discussing the act-status distinction); *infra* note 64. That is, even in the absence of sexual acts, gay people are acutely aware — and persecuted because of — their attraction to individuals of the same sex.

[62] 370 U.S. 660 (1962).

[63] *See id.* at 667.

[64] That is, many heterosexual people engage in same-sex sodomy — for example, through experimentation or in same-sex environments such as prisons — whereas many gay people do not — for example, through celibacy or through the practice of safer-sex activities such as mutual masturbation.

[65] In other words, the broader legal significance of a criminalized act (for example, sodomy) is limited by the act-status distinction.

[66] *Cf. Hardwick*, 478 U.S. at 214–20 (Stevens, J., dissenting) (criticizing the selective application of sodomy statutes against gay people).

[67] *See* Sunstein, *supra* note 57, at 1161.

they will be subjected.[68] The first prong of that scrutiny requires the state to show a compelling interest, which in this case is not supported by the evidence.[69] Even assuming, *arguendo*, that proponents of these initiatives could show a compelling state interest, anti-gay-rights initiatives still would fail strict scrutiny because they are much too broadly drawn. That is, even if some gay people threatened the public health (or engaged in promiscuous behavior, or molested children), they would be at most a small percentage of all lesbians and gay men.[70] State discrimination against all gay people punishes the large percentage of lesbians and gay men who never engage in such behaviors. A more rational solution to these problems would be to isolate and target harmful behaviors for punishment or regulation.[71]

(b) Rational Basis Scrutiny. — Even if lesbians and gay men did not constitute a protected class, states that adopt anti-gay-rights laws still must — at a minimum — articulate and demonstrate a rational basis for the discriminatory classification. Although the courts normally uphold legislation on rational basis review,[72] they are more likely to strike down laws that discriminate against groups that suffer from a great deal of irrational prejudice.[73] For example, in *City of Cleburne v. Cleburne Living Center*,[74] the Supreme Court used this standard of review to strike down a zoning law that prohibited mentally retarded individuals from residing in certain areas of the town.[75] Although the Court refused to hold that mental retardation was a suspect classification, it reasoned that a law would not survive rational scrutiny if the law were based upon an illegitimate state interest —

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[68] *See, e.g.*, Guido Calabresi, *The Supreme Court, 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 94 n.41 (1991) (noting that Korematsu v. United States, 323 U.S. 214 (1944), was the only time that invidious state action against a protected class has survived strict scrutiny).

[69] *See infra* pp. 1915–16.

[70] For example, only approximately 11% of gay men — and virtually no lesbians — in the United States are knowingly HIV-positive. *See* OVERLOOKED OPINIONS, INC., LEVELS OF HIV AND UNSAFE SEX AMONG GAY MEN 4 (1992). In any case, studies have shown that high-risk sexual behavior in gay men has dropped by 90% between 1978 and 1985. *See* PAUL H. DOUGLAS & LAURA PINSKY, THE ESSENTIAL AIDS FACT BOOK 16 (rev. ed. 1992).

[71] *See* WILLIAM B. LOCKHART, YALE KAMISAR, JESSE H. CHOPER & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW 1210–12 (7th ed. 1991) (discussing the problem of overinclusion).

[72] This "conceivable" rationality standard of review applies primarily to laws concerning social welfare and economic regulation. *See* United States R.R. Retirement Board v. Fritz, 449 U.S. 166, 174 (1980). Under this standard, the courts will uphold a law if the state can assert any conceivable rationale for such a law, even if the rationale is unsupported by the actual evidence or is concocted after the fact.

[73] Indeed, invalidation under this "active" rationality standard of review is most appropriate in situations in which — as in the case of lesbians and gay men — antipathy is present toward the class. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439–47 (1985).

[74] 473 U.S. 432 (1985).

[75] *See id.* at 439–47.

such as the "'bare . . . desire to harm a politically unpopular group.'"[76] Furthermore, even if the law were based upon a legitimate state interest, it still would not survive if the classification's relationship to an asserted goal were "so attenuated as to render the distinction arbitrary or irrational."[77]

Anti-gay initiatives violate the rational scrutiny test articulated in *Cleburne*. To the extent that these initiatives are based exclusively upon dislike for gay people — such as "irrational fears"[78] or the bare "'desire to harm a politically unpopular group'"[79] — they cannot claim a legitimate governmental interest.[80] Although supporters of anti-gay-rights initiatives might argue that the initiatives are based upon a legitimate state purpose (for example, that gay people threaten children, that gay people threaten family values, that gay people are a threat to the public health, and so on), their arguments are refuted by the empirical evidence.

For example, with respect to children, gay people are no more likely to molest children than are heterosexuals. In one study of 175 adult males in Massachusetts convicted of sexual assault against a child, none had an exclusively homosexual adult sexual orientation.[81] Other studies have found no evidence showing that gay parents or role models harm children[82] or influence the development of a child's sexual orientation.[83] With respect to family values, studies have shown that lesbians and gay couples have the same range of stability and diversity in relationships as do heterosexual couples.[84] With respect to public health, every major study has concluded that AIDS cannot be transmitted through the workplace, the home, or casual conduct.[85] Finally, morality arguments fail in light of recent evidence

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[76] *Id.* at 447 (quoting United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)); *see also* Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655–56, 658–59 (Cal. Ct. App. 1992) (invalidating an anti-gay-rights initiative under a rationality standard of review); Jester v. City of Concord, No. C91-05455, at 3–4 (Cal. Super. Ct. Nov. 16, 1992) (same).

[77] *Cleburne*, 473 U.S. at 446.

[78] *Id.* at 473 (Marshall, J., concurring in part and dissenting in part).

[79] *Cleburne*, 473 U.S. at 447 (quoting *Moreno*, 413 U.S. at 534).

[80] *See id.*; *cf.* Parr v. Municipal Court, 479 P.2d 353, 355, 360 (Cal. 1971) (holding that a state may not pass laws that are "expressions of hostility or antagonism to certain groups of individuals" who are "deemed pariahs").

[81] *See* Herek, *supra* note 11, at 154 (citing A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 ARCHIVES SEXUAL BEHAV. 175, 176–77 (1978)).

[82] *See id.* at 157 (citing Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 AM. PSYCHOLOGIST 941, 946 (1989)).

[83] *See id.* at 159 (citing Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 693 (1978)).

[84] *See id.* at 161 (citing Letitia A. Peplau, *Lesbian and Gay Relationships*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 177 (John C. Gonsiorek & James D. Weinrich eds., 1991)).

[85] *See* DOUGLAS & PINSKY, *supra* note 70, at 8–9; *see also* Citizens for Responsible Behavior

that sexual orientation is immutable and not a matter of volition;[86] being gay is no more immoral than having black hair or brown skin.[87]

Courts have already indicated that they will be more attentive in their application of rational basis scrutiny to state action that classifies individuals on the basis of sexual orientation. In *Pruitt v. Cheney*,[88] for example, the Ninth Circuit refused to grant summary judgment in favor of the Army's ban on lesbians and gay men without actual evidence that justified the army's purported rationales for exclusion.[89] Similarly, in *Citizens for Responsible Behavior v. Superior Court*[90] and *Jester v. City of Concord*,[91] two California state courts struck down proposed anti-gay-rights amendments under the rational basis scrutiny test.[92]

(c) Fundamental Rights. — Finally, the Supreme Court has held that laws that discriminate against any "independent identifiable group"[93] with respect to certain fundamental rights receive strict scrutiny, whether or not the group is part of a traditionally suspect class.[94] One of these fundamental rights is the right to equal participation in the political process.[95] That is, a state may not single out a particular group and impose discriminatory political burdens on the group with-

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v. Superior Court, 2 Cal. Rptr. 2d 648, 658–69 (Cal. Ct. App. 1992) (rejecting as irrational the link between gay people and the AIDS epidemic).

[86] *See supra* note 18. Under accepted norms of moral judgment, involuntary acts cannot be "immoral." *See, e.g.*, SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 923–24 (5th ed. 1989) (discussing legal excuse for involuntary actions). By contrast with sodomy statutes, for which morality is a legitimate justification for state regulation, *see* Bowers v. Hardwick, 478 U.S. 186, 196 (1986), anti-gay-rights initiatives concern the *status* of homosexuality, which is not volitional and thus cannot be intrinsically immoral. *See* HOMOSEXUALITY AND ETHICS 149–167, app. at 235–43 (Edward Batchelor, Jr., ed., 1980).

[87] In any event, "moral judgment" cannot *automatically* provide a rational basis for every law. Otherwise, all laws could be characterized as such and would thus be insulated from judicial review.

[88] 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

[89] *See id.* at 1165–66; *see also* Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993) (holding that there is no rational basis for the military's ban on lesbians and gay men).

[90] 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991).

[91] No. C91-05455 (Cal. Super. Ct. Nov. 16, 1992).

[92] *See Citizens*, 2 Cal. Rptr. 2d at 655; *Jester*, No. C91-05455, at 3–4. Again, it should be noted that Bowers v. Hardwick, 478 U.S. 186 (1986), does not foreclose the use of *Cleburne* rational basis scrutiny to strike down anti-gay-rights initiatives. *See Pruitt*, 963 F.2d at 1166 n.5 ("*Hardwick* is therefore even less of a barrier to active rational basis review in this case than it was in [the strict scrutiny cases]."); *supra* TAN 61–68.

[93] Gordon v. Lance, 403 U.S. 1, 5 (1971).

[94] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629–33 (1969) (right to interstate travel); Harper v. Virginia, 383 U.S. 663, 670 (1966) (right to vote).

[95] *See* Hunter v. Erickson, 393 U.S. 385, 393 (1968). For a general discussion of this principle, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-17, at 1482–88 (2d ed. 1988).

out a compelling justification.[96] Thus, for example, although a state might make political participation more difficult for everyone, it may not make participation more difficult only for *some* groups.

Anti-gay-rights initiatives violate this norm because they deny lesbians and gay men equal participation in the political process. Under these initiatives, no branch of the state government can adopt legislation, enforce laws, or hear claims that would protect gay people from discrimination. Although other groups can vote for and lobby officials to help end discrimination against them, lesbians and gays must go through the arduous process of passing state constitutional amendments to address their claims of discrimination. Thus, anti-gay-rights initiatives dilute the votes of gay people and effectively strip them of important benefits of voting under a representative system of government.[97]

Under this very reasoning, the Supreme Court, in *Hunter v. Erickson*,[98] invalidated a city charter amendment that repealed existing local anti-discrimination ordinances and that required future voter approval of any city ordinance dealing with racial, religious, or ancestral discrimination in housing.[99] In striking down the amendment, the Court held that "the State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[100] In similar contexts, the Court has held that the right to equal participation in the political process extends to groups other than traditionally protected classes.[101]

The similarities between the initiative at issue in *Hunter* and current anti-gay-rights initiatives such as Colorado Amendment Two are striking. If anything, Amendment Two imposes an even more burdensome requirement than the *Hunter* amendment because, rather than requiring a majority of a particular city, any successful repeal effort requires the approval of an entire state.[102]

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[96] *See, e.g.*, Washington v. Seattle School Dist., 458 U.S. 457, 467–70 (1982); Reynolds v. Sims, 377 U.S. 533, 565 (1964); United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

[97] That is, the right to vote ensures an effective representative government. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969); *Reynolds*, 377 U.S. at 555. But the right to vote for a representative government is diluted if the representatives are forbidden to address important concerns of their constituents.

[98] 393 U.S. 385 (1969).

[99] *Id.* at 393.

[100] *Id.* (emphasis added).

[101] *See, e.g.*, *Kramer*, 395 U.S. at 630–31 (non-property owners); Avery v. Midland County, 390 U.S. 474, 484–86 (1968) (urban residents); Carrington v. Rash, 380 U.S. 89, 96–97 (1965) (military personnel); *Reynolds*, 377 U.S. at 568 (urban residents).

[102] For example, opponents of Amendment Two must obtain the two-thirds approval of both

At least one court has relied upon *Hunter* to strike down an anti-gay-rights initiative. In *Citizens for Responsible Behavior v. Superior Court*,[103] a California appellate court refused to certify an initiative that would have banned the Riverside city council from passing, among other things, any law that "[p]romotes, encourages, endorses, legitimizes or justifies homosexual conduct" without the approval of city voters.[104] The court reasoned that requiring such future voter approval "raises obstacles in the path of persons seeking to have such [laws]."[105] The *Citizens* court found that the initiative did not withstand rational, much less strict, scrutiny because there was no rational relationship between the stated public health objective of the ordinance and its use of sexual orientation as a classification.[106]

It might be argued that no constitutional amendment that takes any important issue out of the realm of a legislature's delegated powers could be upheld under this "equal participation" theory; any constituency affected by an initiative could claim that its votes were diluted. For example, if an initiative were passed that prohibited the legislature from legalizing toxic pollution, then toxic polluters might claim that their votes were being diluted.

This argument is not persuasive, however, because toxic polluters are not an "independent identifiable group" beyond the specific controversy addressed by the initiative. Toxic polluters are defined solely by what the hypothetical initiative outlaws (the ability to engage in toxic polluting). By contrast, lesbians and gay men are defined by *more* than just what the anti-gay-rights initiatives outlaw (the ability to enact gay-rights laws); gay people are defined by the broader criterion of sexual orientation. This distinction is important because it shows that, unlike the hypothetical initiative, anti-gay-rights initiatives are aimed at diluting the political power of a particular group and not the regulation of an activity.[107]

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houses of the state legislature or go through the petition process simply to get their question on the ballot. *See* COLO. CONST. art. IV, § 1; *id.* art. XIX, § 2. The Colorado legislature has already refused to refer such a question to the people. *See* Jennifer Gavin, *Effort to Put Amend. 2 on Ballot Fails*, DENVER POST, Apr. 13, 1993, at A1.

[103] 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991).

[104] *Id.* at 651.

[105] *Id.* at 655.

[106] *See id.* at 656, 658–59.

[107] Furthermore, important factors distinguish anti-gay-rights initiatives from other constitutional enactments. First, unlike toxic polluters, lesbians and gay men have suffered from irrational, historical, and deep-seated discrimination and would find it nearly impossible to repeal such an amendment. *See supra* Part II. Second, unlike the hypothetical initiative, anti-gay-rights initiatives single out and target gay people explicitly and deny them protection from discrimination in fundamental aspects of their lives, *see supra* note 38 — not mere injury to their psychological of professional interests. Third, there are strong reasons to suspect that, unlike the hypothetical initiative, anti-gay-rights initiatives are merely attempts to entrench the effects of private discrimination. *See supra* subsection IV.A.2.(b).

B. Free Expression

Free expression is central to the identity of lesbians and gay men.[108] Without the guarantees of free expression, gay people would be forced to lie constantly about their relationships, their activities, and even themselves. Anti-gay-rights initiatives violate the Free Expression Clause of the First Amendment because they force gay people to censor themselves in order to receive public benefits[109] and because they affirmatively encourage private discrimination against gay people for the content of their speech.[110]

Courts have generally held that speech pertaining to an individual's sexual orientation is protected under the First Amendment.[111] For example, one court held that a public employee could not be fired for telling his superior that he was gay and lobbying for gay rights.[112] Another court held that a public school teacher could not be transferred for making statements in favor of gay rights on television.[113] Thus, most gay speech — ranging from one's political activism to "coming out" speech[114] — is protected, and the state must advance a compelling reason to abridge it.

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[108] *See, e.g.*, LESBIANS, GAY MEN, AND THE LAW 155–242 (William B. Rubenstein ed., 1993) (discussing the relationship between sexual orientation and the First Amendment); Mary C. Dunlap & Jose Gomez, *First Amendment*, *in* NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW §§ 9.01–9.03, at 9-1 to 9-53 (Roberta Achtenberg & Barbara J. Gilchrist eds., 1992) (same).

[109] That is, state action exists to the extent that anti-gay-rights amendments affirmatively encourage state actors to discriminate against lesbians and gay men in the granting of government jobs or services on the basis of speech. *See supra* p. 1910. State action may also exist in the absence of any specific acts by state officials. That is, the self-imposed chilling of protected speech might be traced to "the very existence of a set of rules or lines that the state stands ready to enforce or to draw." Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 26 (1989).

[110] To the extent that the state goes beyond the mere repeal of gay-rights laws to the active encouragement of private discrimination with respect to viewpoint, then by analogy to Reitman v. Mulkey, 387 U.S. 369 (1967), the state is itself burdening speech. That is, anti-gay-rights amendments encourage the private punishment of gay speech because the state makes private discrimination against gay people's speech "immune from . . . regulation at any level of the state government." *Id.* at 377. As a result, gay people are forced to silence themselves for fear of being harmed. *See supra* pp. 1911–12.

[111] For an excellent overview of the intersection between sexual orientation and the First Amendment, see HUNTER, MICHAELSON & STODDARD, cited above in note 3, at 1–14.

[112] *See* Van Ooteghem v. Gray, 628 F.2d 488, 492–93 (5th Cir. 1980), *aff'd en banc*, 654 F.2d 304 (1981), *cert. denied*, 455 U.S. 909 (1982).

[113] *See* Acanfora v. Board of Educ., 491 F.2d 498, 500–01 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974). *But see* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 449 (6th Cir. 1984) (holding that "coming out" speech to an employer is purely personal and thus not protected under the First Amendment), *cert. denied*, 470 U.S. 1009 (1985).

[114] Beyond purely personal considerations, "coming out" speech — the public self-identification of oneself as lesbian or gay — is often intended to further the cause of lesbian and gay rights by making gay people more visible to the public. According to Justice Brennan: "[I]t [is] impossible not to note that a . . . public debate is currently ongoing regarding the rights of

Anti-gay-rights initiatives abridge the speech of lesbians and gay men in several ways. First, to the extent that such initiatives directly chill the speech of openly gay people afraid of losing their public jobs or services because of state-encouraged discrimination, they are unconstitutional.[115] At least one court has invalidated an anti-gay-rights initiative on this rationale. In *Merrick v. Board of Higher Education*,[116] an Oregon appellate court used its state's free speech clause to invalidate a law that would have barred the state from prohibiting discrimination on the basis of sexual orientation for some of its public employees.[117] The court reasoned that the statute impermissibly restricted speech about sexual orientation because it exposed public employees to the increased risk that they might be fired if they engaged in such expression.[118]

Second, to the extent that anti-gay-rights initiatives substantially increase the harm inflicted on speakers by third parties, they are unconstitutional.[119] The substantial harm that falls upon openly gay people and their supporters is evidenced by the significant increase in illegal assaults and hate crimes by homophobes that immediately follow the passage of such initiatives.[120] This disturbing increase can only be explained by the state encouragement of viewpoint discrimination against lesbians and gay men.[121]

At least one court has used the First Amendment to support the invalidation of an anti-gay-rights amendment to a city charter. In *Jester v. City of Concord*,[122] a California trial court held that a

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homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate." *Rowland*, 470 U.S. at 1012 (Brennan, J., dissenting from the denial of certiorari).

[115] *See* Johnson, *supra* note 41, at 6 (reporting, in the wake of Amendment Two, university professors who are afraid to speak out on gay-related topics in class). Anti-gay-rights initiatives may also unequally burden the political speech of lesbians and gay men who seek to repeal these laws through subsequent constitutional amendments.

[116] 841 P.2d 646 (Or. Ct. App. 1992).

[117] *See id.* at 651.

[118] *See id.* at 650–51.

[119] *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 95–102 (1982) (invalidating campaign disclosure requirements that could lead to "threats, harassment, and reprisals"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–66 (1958) (refusing to require the NAACP to disclose its membership list because of "public hostility"); *cf.* Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 208–09, 209 n.24 (N.D. Cal. 1983) (describing the negative consequences of requiring a gay-rights organization to disclose its membership list).

[120] *See supra* pp. 1911–12.

[121] *See id.* Of course, there are limits to the principle of state responsibility for acts that lead to third-party harm. For example, courts might require that the nexus between state action and the harm be clearly established, that the state explicitly target the affected group, or that the group traditionally suffer from societal animus or irrational discrimination.

[122] No. C91-05455 (Cal. Super. Ct. Nov. 16, 1992).

proposed anti-gay-rights ordinance violated the First Amendment.[123] Because the ordinance was also invalid under the Equal Protection Clause, however, the *Jester* court did not have to rely upon the First Amendment to strike down the ordinance.[124]

Finally, although they are beyond the scope of this Note, other constitutional limits might apply to anti-gay-rights initiatives. For example, the Establishment Clause might bar such initiatives because they are primarily motivated by religious organizations[125] — including the groups sponsoring Colorado Amendment Two[126] — that are intent upon codifying their religious beliefs[127] into law.[128] Such a theory

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[123] *See id.* at 4–5.

[124] *See id.*

[125] The link between religious groups and Colorado Amendment Two is clear. For example, Colorado for Family Values turned to the National Legal Foundation, a conservative Christian legal organization founded by Pat Robertson and originally funded by Robertson's Christian Broadcasting Network, to draft the language of Amendment Two. *See* Hardisty, *supra* note 32, at 7. Several board members of Colorado for Family Values are born-again Christians who view homosexuality as a "sin" and as an "abomination of almighty God." *Id.* at 9 (internal quotes omitted).

Although many sponsors of these amendments try to hide their religious motivations, virtually all of them are motivated by Christian fundamentalist ideals. For example, Paul Weyrich, the founder of the Free Congress Foundation, described the goals of his national political organization, which seeks to eliminate civil rights for gay people: "Well, first of all, from our point of view, this is really the most significant battle . . . between the forces of God and the forces against God, that we have seen in our country." *Id.* at 8 (internal quotes omitted). The Concerned Women of America — the self-described "Christian women's answer to the National Organization for Women," *id.* at 6 (internal quotes omitted) — has tried to raise hundreds of thousands of dollars to oppose the "repulsive" gay-rights movement, which "destroy[s] our Judeo-Christian heritage." Letter from Beverly LaHaye, President, Concerned Women for America, to Concerned Friends 2–3 (Feb. 1991). The Traditional Values Coalition "oppose[s] local and statewide legislative attempts to grant . . . protection to homosexuals" because it seeks to "alert and mobilize the evangelical community and marshall its forces for the preservation of traditional Judeo-Christian values." *See* TRADITIONAL VALUES COALITION, MISSION STATEMENT 1 (undated). For other groups, see note 31 above.

[126] *See* Hardisty, *supra* note 32, at 4–6 (describing anti-gay groups such as Focus on the Family and Summit Ministries that are located in Colorado); *see also* Dirk Johnson, *Rise of Christian Right Splits a City*, N.Y. TIMES, Feb. 14, 1993, § 1, at 24 (describing the impact of the numerous anti-gay groups that are headquartered in Colorado Springs).

[127] Some of these religious tenets are particularly disturbing. For example, Gary DeMar, a leading Christian fundamentalist, explained that "the Bible applies to every facet of life. . . . [T]he Bible lays the death penalty for two men who are engaged in sodomy in public." *Radical Religious Right Responds!*, FREEDOM WRITER, Jan./Feb. 1991, at 1, 1–2.

[128] For example, Kevin Tebedo, the executive director of Colorado for Family Values, described Amendment Two in the following terms:

> It's about whose authority takes precedence in the society in which we live . . . . [I]s it the authority of God? The authority of the supreme King of Kings and Lord of Lords? *You see, we say we should have the separation of church and state, but you see, Jesus Christ is the King of Kings and the Lord of Lords.* That is politics; that is rule; that is authority.

Hardisty, supra note 32, at 9 (emphasis added; internal quotes omitted).

would have to argue that anti-gay-rights amendments do not simply "'coincide or harmonize with the tenets of some or all religions,'"[129] but are motivated by religious purposes.[130]

V. CONCLUSION

This Note has argued that state and local gay-rights laws are both desirable and essential because lesbians and gay men face very real threats of violence and discrimination each day. Far from constituting "special rights," these laws simply ensure that gay people are treated like everyone else with respect to basic human needs such as housing, employment, and physical safety.

Although the Constitution does not mandate gay-rights laws, it does bar the recent wave of anti-gay-rights initiatives sponsored by the fundamentalist right. These initiatives force the state affirmatively to discriminate against gay people and to chill the speech of lesbians and gay men. As such, these initiatives are unconstitutional under the Equal Protection Clause and the Free Speech Clause.

Targeting a specific group endangers not only the freedom of lesbians and gay men, but of all individuals. Only by zealously safeguarding the Constitution and by reinforcing the principle of equality can the judiciary prevent actions by extremist groups that might one day harm us all.[131]

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[129] Harris v. McRae, 448 U.S. 297, 319 (1980) (quoting McGowan v. Maryland, 366 U.S. 420, 422 (1961)).

[130] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 596–97 (1987) (striking down a statute that would have required the teaching of creation science in the Louisiana public schools).

[131] As Martin Niemoeller, a pastor who was persecuted by the Nazis, put it:

> In Germany, they came first for the communists, and I didn't speak up because I was not a communist. Then they came for the Jews and I didn't speak up because I was not a Jew. Then, they came for the trade unionists, and I didn't speak up because I was not a trade unionist. Then, they came for the Catholics, and I didn't speak up because I was a Protestant. Then, they came for me and by that time, no one was left to speak up.

SEGREST & ZESKIND, *supra* note 31, at 36.

APPENDIX

STATE AND LOCAL GAY-RIGHTS LAWS AS OF MAY 1993

Jurisdiction	Population in 1990	Citation If Known	Date of Adoption	Public Empl.	Public Accom.	Private Empl.	Education	Housing	Credit	Union Pract.
Alaska										
Anchorage	226,338		Jan. 93	X						
Arizona										
Phoenix	983,403			X						
Tucson	405,390	Ch. 17	Feb. 77	X						
California	29,760,021	Labor Code	Sept. 92	X	X	X	X			
Berkeley	102,724	Ch. 13.28	Nov. 78	X		X	X	X	X	X
Cathedral City	30,085	Ch. 11.66		X						
Cupertino	40,263	Res. No. 5833	Feb. 75	X						
Davis	46,209	Ch. 7A	Feb. 86	X	X	X		X	X	X
Hayward	111,498			X		X	X	X		
Laguna Beach	23,170	Ch. 1.07	May 84	X	X	X	X	X	X	X
Long Beach	429,433	Ch. 5.09		X		X				
Los Angeles	3,485,398	Ch. IV, Art. 12	June 79	X	X	X	X	X	X	X
Mountain View	67,460	Res. No. 10435	Mar. 75	X						
Oakland	372,242	Art. 20; Ord. No. 10427	Jan. 84	X	X	X		X	X	X
Palo Alto	55,900						X			
Riverside	226,505			X						
Sacramento	369,365	Ch. 14, Ord. No. 86-042	Apr. 86	X	X	X	X	X	X	X
San Diego	1,110,549	Secs. 52.9601 to .9615		X	X	X	X	X	X	X
San Francisco	723,959	Art. 33, Sec. 3501. Admin. Code	Oct. 87	X	X	X	X	X	X	X
San Jose	782,248	Res. No. 58076	Feb. 85	X						
Santa Barbara	85,571	Chs. 9.126, 9.130	Aug. 79	X			X			
Santa Cruz	49,040	Res. No. 15-246	Apr. 83	X						
Santa Monica	86,905	Res. Nos. 781-81; Ch. 9, Secs. 4900-10		X	X	X	X	X	X	X
West Hollywood	36,118	Ord. Nos. 7, 22, 77U	Nov. 84	X	X	X	X	X	X	X
San Mateo County	649,623		Aug. 75	X		X		X		
Santa Barbara County	369,608	Sec. 2.94	Oct. 82	X						
Santa Cruz County	229,734		July 75	X						
Colorado	3,294,394	Exec. Order 90		X						
Aspen	5,049	Ch. 13, Sec. 13-98	Nov. 77	X	X	X		X		
Boulder	83,312	Tit. 12, City Charter	1988	X	X	X				
Denver	467,610	Sec. 28-91	Dec. 83	X	X	X	X	X		X
Telluride	1,292		Spring 93							
Boulder County	225,339			X						
Morgan County	21,939			X						
Connecticut	3,287,116	Ch. 815, Sec.46a-60	May 91	X	X	X	X	X	X	X
Hartford	139,739	Sec. 2-276	Feb. 79	X	X	X	X	X	X	X
New Haven	130,474			X	X	X	X	X	X	X
Stamford	108,056	Ord. 667		X	X	X	X	X	X	X
District of Columbia	606,900	Sec. 1-2541(c)	Dec. 77	X	X	X	X	X	X	X
Florida										
Key West	24,832			X	X	X		X	X	X
Miami Beach	92,639			X	X	X		X		
West Palm Beach	67,643	Empl. Plan 1990		X						
Hillsborough County	834,054	Hum. Rts. Amend. 91-9	May 91		X			X		
Palm Beach County	863,518			X	X			X		
Georgia										
Atlanta	394,017	City Charter, 1973 Ga. L. 2188	Mar. 86	X						
Hawaii	1,108,229	Tit. 21, Secs. 368-1, 378-2	1991	X		X				
Honolulu	365,272	Ord. No. 88-16	Feb. 88	X						
Illinois	11,430,602	Civ. Serv. R. Interp.	Nov 81	X						
Champaign	63,502	Ch. 13; Ord. No. 77-222	July 77	X	X	X		X	X	X
Chicago	2,783,726	Ch. 199	Dec. 1988	X	X	X	X		X	
Evanston	73,233	Ch. 5	1980	X					X	
Oak Park	53,648				X			X		
Urbana	36,344	Ch. 12, Sec. 12-1	1979	X	X	X		X	X	
Cook County	5,105,067			X						

Jurisdiction	Population in 1990	Citation If Known	Date of Adoption	Public Empl.	Public Accom.	Private Empl.	Education	Housing	Credit	Union Pract
Iowa										
Ames	47,198			X	X	X	X	X	X	X
Iowa City	59,738	Ch. 18, Sec. 18–1	1977	X	X	X			X	X
Louisiana	4,219,973			X						
New Orleans	496,938			X	X	X		X		
Maine										
Portland	64,358			X	X	X		X	X	
Maryland	4,781,468			X						
Baltimore	736,014	Art 4, Secs 9(101, 128); Ord No. 187	June 88	X	X	X	X	X		
Gaithersberg	39,542		June 87	X		X		X	X	X
Rockville	44,835	Ch. 11, Sec 11-1		X	X	X	X	X	X	X
Howard County	187,328		Oct. 75	X	X	X	X	X	X	X
Montgomery County	757,027	Ch. 27, Sec. 27-1	Sept. 84	X		X		X	X	X
Massachusetts	6,016,425	Chs 151B, 272	Nov. 89	X	X	X	X	X	X	X
Amherst	17,814	Citizen's Comm	May 76	X	X	X	X	X	X	X
Boston	574,283	Tit. 12, Ch. 40	July 84	X	X	X	X		X	X
Cambridge	95,802	Ord No. 1016	Sept 84	X	X	X	X	X	X	X
Malden	53,884	Art IV, Sec 10.13	Feb. 84	X	X	X	X	X	X	
Worcester	169,759			X	X	X	X	X	X	
Michigan	9,295,297	Civ Serv. R Interp.	Mar 81	X						
Ann Arbor	109,592	Tit. IX. Ch 111	July 72	X	X	X		X	X	X
Birmingham	19,997							X	X	
Detroit	1,027,974	Ch 27	Feb 79	X	X	X	X	X	X	X
East Lansing	50,677	Ch 4, Sec 1 120	Mar 72	X	X	X		X	X	X
Flint	140,761	Ch 2		X	X	X	X	X		X
Saginaw	69,512	Art. 1	May 84				X	X		
Ingham County	281,912	EOE Plan	May 87	X						
Minnesota	4,375,099	Minn. Laws	Apr 93	X		X	X	X	X	
Marshall	12,023		Apr 75	X	X	X		X	X	
Minneapolis	368,383	Tit 7, Chs 139, 141	Dec. 75	X	X	X	X	X	X	X
St Paul	272,235	Ch 183	June 90	X	X	X	X	X	X	X
Hennepin County	1,032,431	EEO Policy	1974	X						
Missouri										
Kansas City	435,146	EOE Plan		X						
St Louis	396,685			X	X	X	X	X	X	
New Jersey	7,730,188	Secs 10 2-1, 11 17-1	Jan 92	X	X	X		X	X	
Essex County	778,206			X						
New Mexico	1,515,069	Exec Order 85-15	Apr. 85	X						
New York	17,990,455	Exec Orders 28, 28.1	Nov 83	X						
Albany	101,082			X	X	X		X	X	
Alfred	4,559	Art. II, Sec 1	May 74	X	X	X	X	X	X	X
Brighton	34,455	Empl Policy		X						
Buffalo	328,123	EEO Ord.	Mar 84	X						
East Hampton	1,402	Aff. Action Plan		X	X	X				
Ithaca	29,541	Chs 28, 29	1982	X	X	X	X	X	X	X
New York City	7,322,564	Tit. 8, Ch. 1, Sec. 7 2, Admin Code	Feb 86	X	X	X	X	X		X
Rochester	231,636	Sec. 83-58	Dec 83	X						
Syracuse	163,860	Local Law No 17	1990	X	X	X	X	X		
Troy	54,269	Sec 2-20	Jan 79	X						
Watertown	29,429			X	X	X	X	X	X	
Suffolk County	1,321,864	Sec 84-1	Mar. 88	X						
Tompkins County	94,097	Art 24		X	X	X	X	X	X	X
North Carolina										
Chapel Hill	38,719	Art IV	Sept 75	X						
Durham	136,611	Proclamation	June 86	X						
Raleigh	207,951	Sec 4-1004	Jan 88	X						
Ohio	10,847,115	Exec. Order 83-64	Dec. 83	X						
Columbus	632,910	Ch 2125	Aug 84	X	X	X	X	X	X	
Cincinnati	364,040			X	X	X		X		
Dayton	182,044		Oct 84	X						
Yellow Springs	3,973	Sec 29, Town Charter	Nov 79	X	X	X		X	X	X
Cuyahoga County	1,412,140	Aff. Action Res	Dec. 81	X						
Oregon										
Portland	437,319	Res 31510, Ord No 150630	Dec. 74, May 87	X	X	X		X		
Pennsylvania	11,881,643	Exec. Order	Jan. 88	X						
Harrisburg	52,376	Art 725	Mar 83	X	X	X	X	X	X	X
Lancaster	55,551	Ord. No 11	May 91	X	X	X	X	X	X	X
Philadelphia	1,585,577	Ch. 9–110	Aug. 82	X	X	X		X	X	X
Pittsburgh	369,879	Tit VI, Art V, Ch 651	Apr 90	X	X	X		X	X	X

Jurisdiction	Population in 1990	Citation If Known	Date of Adoption	Public Empl.	Public Accom.	Private Empl.	Education	Housing	Credit	Union Pract.
Pennsylvania (cont'd)										
York	42.192		Spring 93							
Northampton County	247.105	Policy Statement		X						
Rhode Island	1,003,464	Exec Order 85-11	May 85	X						
South Dakota										
Minnehaha County	123,809	County Emp. Pol. Manual	May 79	X						
Texas										
Austin	465,622	Ch. 7-4, Arts II to IV	July 75	X	X	X		X	X	X
Houston	1,630,553		June 84	X						
Utah										
Salt Lake County	725,956			X						
Vermont	562,758	Tit. 21, Sec. 495	1992	X	X	X	X	X	X	X
Burlington	39,127		June 85	X		X				
Virginia										
Alexandria	111,183	Ord. No. 3498	Oct. 88	X	X	X	X	X	X	
Arlington County	170,936		June 84	X						
Washington	4,866,692	Exec. Order 85-09	Dec. 85	X						
Olympia	33,840	Ord. No. 4692	June 86	X						
Pullman	23,479	Ord. No. B-271; Tit 15, Fair Hous. Code	Dec. 81	X			X	X		
Seattle	516,259	Chs. 14.04, 14.08; Ord. No 111714	Sept. 73, 1984	X		X		X	X	X
Clallam County	56,464	Art. X, Pers. System	Nov. 76	X						
King County	1,507,319	Ch. 12.18	1988					X	X	
Wisconsin	4,891,769	Ch. 111, Secs. 111.32-36	Mar. 82	X	X	X	X	X	X	X
Madison	191,262	EO Ord.	July 79	X	X	X		X	X	X
Milwaukee	628,088	Ch. 109-15	Dec. 87	X						
Dane County	367,085	Chs. 19, 31, 74	1986-87	X						

SOURCES: BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING (1993) (CD-ROM) (population); EQUAL EMPLOYMENT ADVISORY COUNCIL, EEAC ANALYSIS OF STATE LAWS BANNING DISCRIMINATION BASED ON SEXUAL ORIENTATION 1-13 (1992) (miscellaneous citations and dates); LYNNE Y. FLETCHER, THE FIRST GAY POPE 77-78, 84 (1992) (miscellaneous dates); NAN D. HUNTER, SHERRYL E. MICHAELSON & THOMAS B. STODDARD, THE RIGHTS OF LESBIANS AND GAY MEN app. C at 204-08 (1992) (citations); LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., A LIST OF STATUTES, ORDINANCES AND EXECUTIVE ORDERS 1-5 (undated) (miscellaneous citations); LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., A NATIONAL SUMMARY OF ANTI-DISCRIMINATION LAWS 1-12 (1991) (citations and dates); LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., LAWS PROTECTING LESBIANS AND GAY MEN 1 (undated) (miscellaneous dates); NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, LESBIAN AND GAY CIVIL RIGHTS IN THE U.S. 1-3 (1993) (jurisdictions and categories).