Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law

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

On January 15, 1993, Judge Bayless, of the Colorado District Court, issued a preliminary injunction preventing the addition of Amendment 2 to the Colorado Constitution. Amendment 2 was passed by a fifty-three percent vote. Amendment 2 to Article II of the Colorado Constitution provides:

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

Colo. Const. art. II (as amended by Amendment 2).


See supra note 2 for the text of Amendment 2.

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

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Court of Colorado affirmed this preliminary injunction and on No-

vember 1, 1993, the United States Supreme Court denied Colorado's
petition for certiorari, requesting a review of this preliminary order.6

On December 14, 1993, the Colorado District Court found the amend-
ment unconstitutional and imposed a permanent injunction.7 Colo-
rado’s Attorney General has announced that the state will appeal the
ruling to the Colorado Supreme Court, but said that “the court has
already indicated that it would almost certainly strike down” Amend-
ment 2.8

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

6 Evans v. Romer, 854 P.2d 1270, 1272, 1286 (Colo. 1993) (holding that Amendment 2, "to
a reasonable probability, infringes on a fundamental right protected by the Equal Protection
Clause of the U.S. Constitution").

7 Evans, 1993 WL 518586, at *12.

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

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

10 Justin Blum, Anti-Gay Rights Vote Has Unleashed Harassment, Boycott, Gannett News Serv.,

11 Measure No. 9, in Voters’ Pamphlet, State of Oregon General Election November
3, 1992, 93, 93 (1992). Measure No. 9, proposed by initiative at the Oregon general election,
would amend the Oregon Constitution by creating a new section providing:

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

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

(3) State, regional and local governments and their departments, agencies and
other entities, including specifically the State Department of Higher Education and
vote, its sponsors, heartened by the success of Amendment 2, have announced plans to put a toned-down version on the ballot in 1994.\textsuperscript{12} To date, groups in over a dozen states are planning ballot measures to pass amendments similar to Colorado's Amendment 2.\textsuperscript{15} Additionally, the outcome of this challenge will also influence other gay rights issues across the country.\textsuperscript{14}

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

I. MODERN EQUAL PROTECTION LAW

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that "[n]o State shall . . . deny the public schools, shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided. (4) It shall be considered that it is the intent of the people in enacting this section that if any part thereof is held unconstitutional, the remaining parts shall be held in force.

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

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


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

16 See infra notes 21–165 and accompanying text.

17 See infra notes 166–208 and accompanying text.

18 See infra notes 209–98 and accompanying text.

19 See infra notes 299–344 and accompanying text.

20 See infra notes 345–66 and accompanying text.
to any person within its jurisdiction the equal protection of the laws."21 This clause does not deny states the ability to classify a group of people and treat them differently from the rest of the population.22 Rather, it denies states the power to accord differential treatment on the basis of classifications that are unrelated to the promotion of a legitimate state interest.23 To be valid, a classification must be reasonable and must have a fair and substantial relation to the state's objective, so that persons similarly situated are treated alike.24 In determining whether an action violates the Equal Protection Clause, courts apply different levels of scrutiny depending upon the nature of the action involved and the classification it draws.25 Equal protection analysis thus involves two steps.26 First, the court must determine whether the action deserves heightened judicial scrutiny.27 Second, the court must determine whether, under the applicable standard of review, the law deprives a class of persons of equal protection of the law.28 This section discusses modern equal protection law. Part A reviews the basic levels of judicial scrutiny used in equal protection cases.29 Part B discusses the types of discriminatory behavior that are considered state action and therefore fall within the scope of the Equal Protection Clause.30 Finally, part C analyzes equal protection law where state action decreases a class' political power.31

A. The Standards of Equal Protection Review

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

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

\[\text{\textsuperscript{22} Reed v. Reed, 404 U.S. 71, 75 (1971).}\]

\[\text{\textsuperscript{23} Id. at 75-76 (holding that a state could not give men preference over women in choosing an estate's administrator).}\]

\[\text{\textsuperscript{24} Id. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).}\]

\[\text{\textsuperscript{25} See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).}\]

\[\text{\textsuperscript{26} See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (attacking Texas system of financing public education).}\]

\[\text{\textsuperscript{27} See id.}\]

\[\text{\textsuperscript{28} See id.}\]

\[\text{\textsuperscript{29} See infra notes 32-89 and accompanying text.}\]

\[\text{\textsuperscript{30} See infra notes 90-128 and accompanying text.}\]

\[\text{\textsuperscript{31} See infra notes 129-65 and accompanying text.}\]
Court in a footnote in the 1938 case of *United States v. Carolene Products*.

In this case, the Court held that a law that prohibited the interstate shipment of filled milk did not violate equal protection. The Court reasoned that legislation affecting commercial transactions is assumed to be constitutional unless it has no rational basis. In footnote four of its opinion, the Court suggested that some legislation may be subject to a greater degree of judicial review.

Although this footnote was only dictum mentioning the possibility of more rigorous judicial review, it has become the paradigm for heightened equal protection scrutiny of laws involving certain groups and fundamental rights.

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

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304 U.S. 144, 152, n.4 (1938); see also Encyclopedia of the American Constitution 214 (Leonard W. Levy et al. eds., 1986).

Carolene Prod., 304 U.S. at 148.

Id. at 152.

See id. at 152 n.4.


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

Id. at 153 n.4.

Id. at 152 n.4; see also Encyclopedia, supra note 32, at 214.

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

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


Id. at 215. In a dissenting opinion to the 1970 case of *Dandridge v. Williams*, Justice Thurgood Marshall suggested replacing this multi-tiered approach with a "sliding-scale" approach. 397 U.S. 471, 520–21 (1970). Under this approach, instead of pigeon-holing a classification into a level of scrutiny, courts would weigh the character of the classification, the relative...
Most equal protection challenges fall within the rational basis test, wherein courts will presume an action to be valid and sustain it if the classification it draws is rationally related to a legitimate state interest.\(^\text{44}\) This interest can be the stated purpose of the act, but need not be.\(^\text{45}\) In fact, courts have even provided hypothetical interests to justify the disparate treatment when the state has not given any.\(^\text{46}\) Almost every case that has used this standard has upheld the challenged action.\(^\text{47}\) The United States Supreme Court, however, has struck down laws under this standard when they are based on illegitimate objectives, such as “a bare desire to harm a politically unpopular group.”\(^\text{48}\)

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


\(^{46}\) See, e.g., Fritz, 449 U.S. at 178–79 (upholding retirement system’s different treatment of different classes on the basis of a hypothetical state purpose); Williamson v. Lee Optical of Okla., 348 U.S. 483, 490 (1956) (upholding statute making it unlawful for anyone other than a licensed ophthalmologist or optometrist to fit eyeglass lenses on the basis of hypothetical state purposes).

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

\(^{48}\) Cleburne, 473 U.S. at 446–47 (quoting Moreno, 413 U.S. at 534).

\(^{49}\) Id. at 450.

\(^{50}\) Id. at 442.

\(^{51}\) Id. at 450.

\(^{52}\) Id. at 448.

\(^{53}\) Cleburne, 473 U.S. at 450.
Similarly, in 1973, in *United States Department of Agriculture v. Moreno*, the United States Supreme Court held that a law that had the intent and effect of discriminating against hippies violated the Equal Protection Clause.\(^{54}\) *Moreno* addressed a provision of the Food Stamp Act of 1964, which excluded from participation in the food stamp program any household containing unrelated persons.\(^{55}\) The Court applied the rational basis equal protection analysis, stating that to be valid, the classification must rationally relate to a legitimate governmental purpose.\(^{56}\) The Court reasoned that the classification was not related to the stated purpose of the act, minimizing fraud, or to any other legitimate governmental goal.\(^{57}\) According to the Court, the purpose of the act was to keep hippies and "hippie communities" out of the food stamp program.\(^{58}\) It reasoned that this objective could not support the law, because the desire to harm an unpopular group is not a legitimate governmental purpose.\(^{59}\) Hence, the Court concluded that there was no rational basis for the classification, and it therefore violated the Equal Protection Clause.\(^{60}\)

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

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\(^{54}\) *Moreno*, 413 U.S. at 538.

\(^{55}\) Id. at 529.

\(^{56}\) Id. at 533.

\(^{57}\) Id. at 537-38.

\(^{58}\) Id. at 534.

\(^{59}\) *Moreno*, 413 U.S. at 534.

\(^{60}\) Id. at 538.


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

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

\(^{64}\) *Cleburne*, 473 U.S. at 440.
society; (2) whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes; (3) whether the trait defining the class is immutable; and (4) whether the class is a politically powerless minority. No one factor is determinative. For example, the Supreme Court has indicated that immutability is not a necessary element for suspect class status. Taken together, however, these elements establish whether a classification is suspect and therefore subject to the application of strict judicial scrutiny.

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

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

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


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

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

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

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

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

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

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

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76 Id. at 626.
77 Id. at 622.
78 Id. at 628.
79 Id.
80 *Kramer*, 395 U.S. at 626-27.
82 Id. at 668.
83 Id. at 666-67.
84 Id. at 670.
85 Dunn v. Blumstein, 405 U.S. 330, 342, 345 (1972) (one-year residency requirement invalid as not necessary to achieve a compelling state interest).
strict scrutiny and rational basis.\textsuperscript{87} It requires that the classification be "substantially related to a sufficiently important governmental interest."\textsuperscript{88} Courts generally reserve this level of scrutiny for classifications based on gender, illegitimacy and sometimes alienage.\textsuperscript{89}

\section*{B. State Action}

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

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

\begin{itemize}
\item \textsuperscript{87} See Miller, \textit{supra} note 47, at 811.
\item \textsuperscript{88} City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); see also Craig v. Boren, 429 U.S. 190, 192, 204 (1976) (no valid purpose in prohibiting sale of beer to males under the age of twenty-one but allowing its purchase by females over the age of eighteen).
\item \textsuperscript{89} See Hogan, 458 U.S. at 724 (gender); Mills, 456 U.S. at 99 (illegitimacy); Cabell v. Chavez-Salido, 454 U.S. 432, 442 (1982) (alienage); Boren, 429 U.S. at 204 (gender); see also Miller, \textit{supra} note 47, at 811.
\item \textsuperscript{90} E.g., Lugar v. Edmondson Oil, 457 U.S. 922, 924-25, 937 (1982) (state officers acting jointly with private party in securing privately disputed property was state action); Jackson v. Metropolitan Edison, 419 U.S. 345, 347, 351 (1974) (termination of service by a heavily regulated utility with a partial monopoly was not state action).
\item \textsuperscript{91} See Jackson, 419 U.S. at 349; Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).
\item \textsuperscript{92} See infra notes 93-122 and accompanying text for a discussion of factors used to determine whether an action can be attributed to the state.
\item \textsuperscript{93} 489 U.S. 189, 195 (1989). Although this was a due process case, its state action analysis is analogous to that of equal protection, as they both rely on the applicability of the first clause of the Fourteenth Amendment. See \textit{id.}.
\item \textsuperscript{94} \textit{id.} at 191.
\item \textsuperscript{95} \textit{id.}
\item \textsuperscript{96} \textit{id.} at 196.
\end{itemize}
did nothing that rendered the child more vulnerable to them.\textsuperscript{97} The Court also noted that the fact that the state once took temporary custody of the child did not mean that it had a duty to protect him.\textsuperscript{98} According to the Court, a state need not protect an individual's safety simply because it has done so in the past.\textsuperscript{99} The Court therefore concluded that a state's failure to protect a person against private conduct did not constitute state action.\textsuperscript{100}

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

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

\textsuperscript{97} \textit{Id.} at 201.
\textsuperscript{98} \textit{DeShaney}, 489 U.S. at 201.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.} at 197.
\textsuperscript{101} 432 U.S. 464, 470 (1977).
\textsuperscript{102} \textit{Id.} at 464, 470; see also \textit{Rust v. Sullivan}, 111 S. Ct. 1759, 1776 (1991) (federal government not obligated to fund abortions at family-planning clinics).
\textsuperscript{103} \textit{Maher}, 432 U.S. at 474.
\textsuperscript{104} \textit{Id.} at 470; see also \textit{Rust}, 111 S. Ct. at 1776.
\textsuperscript{105} 365 U.S. 715, 725 (1961).
\textsuperscript{106} \textit{Id.} at 716, 719–20 (restaurant refused to serve blacks).
\textsuperscript{107} \textit{Id.} at 725.
\textsuperscript{108} \textit{Id.}
Additionally, state encouragement of private action can bring that action within the scope of the Fourteenth Amendment. For example, in the 1964 case of *Robinson v. Florida*, the United States Supreme Court held that, when encouraged by an otherwise valid state regulation, private discrimination can be attributed to the state. In *Robinson*, the Court said that the private discrimination of a restaurant in not serving Negroes could be attributed to the state due to a state health regulation requiring separate lavatories for each race. Although the Court did not find the regulation invalid in itself, it reasoned that the regulation encouraged private discrimination to a degree sufficient to support a finding of state action. Therefore, the Court held the private policy of the restaurant to be state action.

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

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

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110 *Id.* at 156–57.
111 *Id.*
112 *Id.*
113 *Id.*
serve blacks would not be permitted. The Court reasoned that, despite the fact that they were not supported by law, the announcements had great coercive effect in promoting continued segregation. The Court recognized the effect of the "voice of the state" on private actions and imputed the segregation encouraged by the announcements to the state.

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

### C. Equal Protection of Political Power

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

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120 Id. at 270–71.
121 Id. at 273.
122 Id. at 274.
124 Id.
125 Id. at 430–31.
126 Id. at 431.
127 Id. at 433.
128 *Palmore*, 466 U.S. at 433.
polls. In the 1964 case of Anderson v. Martin, the United States Supreme Court held it unconstitutional to require a candidate's race to be printed on election ballots. In Anderson, African-Americans who sought election to a school board challenged a statute that required the race of all candidates to be printed on the ballots. The Court examined the law in light of attitudes toward and pressures on blacks at the time and found that it would have a repressive effect. The Court reasoned that the law was a vehicle for prejudice that could influence elections along racial lines and therefore held it to be invalid.

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

130 Anderson, 375 U.S. at 403, 404.
131 Id. at 404.
132 Id. at 401.
133 Id. at 403.
134 Id. at 402.
135 See Hunter, 393 U.S. at 393; Reitman, 387 U.S. at 376.
136 387 U.S. at 371, 376.
137 Id. at 371. The provision, submitted as proposition 14 in the 1964 election, provided: Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
138 Id. at 370–71 (quoting Cal. Const. art. I, § 26).
139 Id. at 371.
140 Id. at 372.
141 Id. at 374.
142 Reitman, 387 U.S. at 374–76.
reasoned that the amendment did much more than repeal existing anti-discrimination laws; it embodied the right to discriminate "in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." 142 According to the Court, the amendment had the effect of allowing those who wanted to discriminate to do so free from any official interference. 143 The Court held that the measure significantly involved the state in private discrimination and therefore violated the Equal Protection Clause. 144

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

142 Id. at 377.
143 Id.
144 Id. at 381.
146 Id. at 386.
147 Id. at 386-87. Akron City Charter § 137 provided:
   Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.
   Id. at 387.
148 Id.
149 Hunter, 393 U.S. at 387; Reitman, 387 U.S. at 370-71.
150 Hunter, 393 U.S. at 387; Reitman, 387 U.S. at 371.
151 Hunter, 393 U.S. at 390.
stated that the amendment affected racial minorities and placed special burdens on them within the governmental process. The Court reasoned that this was no more permissible than denying minorities the right to vote.

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

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

152 Id. at 391.
153 Id.
154 Id. at 392.
155 Id.; see also Lucas v. Forty-fourth Gen. Assembly of Colo., 377 U.S. 713, 736-37 (1964) (“[a] citizen’s constitutional rights can hardly be infringed simply because a majority of the people chose that it be”).
156 Hunter, 393 U.S. at 392.
157 Id. at 398.
158 See Reed v. Reed, 404 U.S. 71, 75-76 (1971).
160 See id. at 440.
161 See id.
actions can bring them within the scope of this clause. Furthermore, state actions that reduce the political power of a class deny the class equal protection of the laws and are therefore unconstitutional.

II. EQUAL PROTECTION TREATMENT OF HOMOSEXUALS

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

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

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166 See High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (Supreme Court never subjected homosexual classifications to heightened review).
167 See, e.g., LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1616 (2d ed. 1988) (homosexuals should be deemed a suspect class); High 'Tech Gays, 895 F.2d at 571 (rational basis review is proper for examination of denial of security clearances due to homosexuality); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (rational basis review proper for examination of discharge from Army due to homosexuality), cert. denied sub nom., Ben-Shalom v. Stone, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same for discharge from Navy), cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (same level of review for refusal to employ homosexual as FBI agent); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (upholding Texas statute prohibiting sexual intercourse with another individual of the same sex), cert. denied, 478 U.S. 1022 (1986).
168 E.g., Ben-Shalom, 881 F.2d at 465 (rational basis exists for dismissing soldier from army due to homosexuality); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (same).
169 See, e.g., Ben-Shalom, 881 F.2d at 465 (Army); Rich, 735 F.2d at 1229 (same).
170 Ben-Shalom, 881 F.2d at 465; Rich, 735 F.2d at 1229. In Rich, the court said that the special government interest was so compelling that the dismissal of a soldier from the army due to homosexuality would even withstand strict scrutiny review. 735 F.2d at 1229. The constitutionality of banning homosexuals from military service is once again being reviewed due to the recent public debate over and change in the military's policy on homosexuals. See supra notes 291-98.
171 478 U.S. 186 (1986); see, e.g., High Tech Gays, 895 F.2d at 571 (referring to Hardwick); Ben-Shalom, 881 F.2d at 464 (same); Woodward, 871 F.2d at 1075 (same); Padula, 822 F.2d at 103 (same).
to privacy does not include a fundamental right to engage in homosexual sodomy. The defendant in *Hardwick* was charged with violating a Georgia statute by committing sodomy with another male in the privacy of his bedroom. The Court refused to expand the reach of the Due Process Clause by adding a new fundamental right and found that even if the law was based purely on morality, that was an adequate rationale to support it. Hence, the Court held that the criminalization of homosexual sodomy did not violate due process.

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

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

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

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

175 *Id.* at 196.

176 *Id.* at 190.

177 See *id.*

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


180 See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied sub nom.,
For example, in 1987, in Padula v. Webster, the United States Court of Appeals for the District of Columbia Circuit held that homosexuals do not constitute a suspect class for equal protection purposes. Padula addressed equal protection under the Fifth Amendment. In Padula, an applicant for a position as a special agent with the Federal Bureau of Investigation brought suit claiming that she was denied employment because of her homosexuality. The Padula court reasoned that, although Hardwick did not address the issue of equal protection, its reasoning foreclosed homosexuals from gaining suspect class status. The court said that it would be anomalous to give strict scrutiny under the Equal Protection Clause to a group defined by conduct that states may constitutionally criminalize. The court explained that it is unjustifiable to discriminate invidiously against a suspect class. After Hardwick, however, states can validly discriminate against homosexuals by making the conduct that defines them criminal. The court therefore concluded that, in order to be logically consistent with Hardwick, homosexuals cannot be afforded suspect or quasi-suspect class status for equal protection purposes.

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

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181 Id. at 103.
182 Id. at 101. This is not an important distinction, however, as courts afford the same treatment to Fifth Amendment equal protection claims as they do to equal protection claims brought under the Fourteenth Amendment. Id. at 101 n.5.
183 Id. at 98.
184 Id. at 103.
185 Padula, 822 F.2d at 103.
186 Id.
187 Id.
188 See id. at 103–04.
190 Id. (Norris, J., concurring).
191 Id. at 701.
concurring opinion. Judge Norris stated that, as it only held that the Due Process Clause provided no substantive privacy protections for acts of homosexual sodomy, *Hardwick* did not suggest that states may penalize homosexuals for their sexual orientation. He pointed out that *Hardwick* dealt with homosexual conduct, not orientation, and was decided on due process, not equal protection grounds. He also pointed out that the motivation behind the Court's decision in *Hardwick* was its concern with the expansion of fundamental due process rights, not an antipathy toward homosexuals.

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

192 Id. at 711, 716-31 (Norris, J., concurring). The court relied on common law estoppel grounds to hold that the army could not deny reenlistment; it did not address the issue of equal protection. See id. at 711.
193 Id. at 716 (Norris, J., concurring).
194 Watkins, 875 F.2d at 716-17 (Norris, J., concurring).
195 Id. at 720 (Norris, J., concurring).
196 Id. at 718 (Norris, J., concurring).
197 Id. (Norris, J., concurring).
198 Id. at 718-19 (Norris, J., concurring).
199 Watkins, 875 F.2d at 719 (Norris, J., concurring).
200 Id.
protected by the Due Process Clause is a different question from what level of scrutiny should apply to homosexuals under the Equal Protection Clause, *Hardwick* did not preclude the application of strict scrutiny to homosexuals as a class.202

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

### III. Homosexuality

#### A. The Nature Of Homosexuality

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

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202 *Watkins*, 875 F.2d at 719 (Norris, J., concurring).
204 *Id.* at 667.
205 *Id.* at 660.
206 *Id.* at 666.
207 *Id.* at 667.
208 *Robinson*, 370 U.S. at 667.
211 *Id.*
212 *Id.*
sitions and inclinations.\textsuperscript{213} It is a fundamental part of personal identity, which has "a pervasive and profound impact on" one's "self-perception, group affiliation, and identification by others."\textsuperscript{214} Homosexuality is thus a major part of one's personhood.\textsuperscript{215} A precise definition of homosexuality is not necessary for the purposes of this Note, however, as Colorado's Amendment 2, by its very nature, can only apply to openly homosexual persons and those publicly believed to be homosexual.\textsuperscript{216}

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

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

\textsuperscript{214} Id. at 1305–04.
\textsuperscript{215} Id. at 1305.
\textsuperscript{216} See supra note 2 for the text of Amendment 2.
\textsuperscript{218} Id.
\textsuperscript{219} West, supra note 210, at 86, 94.
\textsuperscript{220} Id. at 86.
\textsuperscript{223} See, e.g., Green, supra note 222, at 568–69 (data points to some contribution of genetics or hormones to homosexuality); LeVay, supra note 222, at 1034–35 (difference in structure of part of brain found in homosexual men); Silberner, supra note 222, at 198 (homosexuals demonstrate a difference in biological response to sex hormone).
\textsuperscript{224} Silberner, supra note 219, at 198.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
men are injected, their response is in between that of women and that of heterosexual men.\textsuperscript{228}

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

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

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

\begin{footnotes}
\footnotetext{228}{Id.}
\footnotetext{229}{See LeVay, supra note 222, at 1034.}
\footnotetext{230}{Id.}
\footnotetext{231}{Id.}
\footnotetext{232}{Id. at 1036.}
\footnotetext{233}{Denise Grady, The Brains of Gay Men, DISCOVER, Jan. 1992, at 29.}
\footnotetext{235}{Kirsch & Weinrich, supra note 234, at 14–15 (homosexual behavior observed in bulls, cows, stallions, donkeys, cats, rams, goats, pigs, antelope, elephants, hyenas, monkeys, apes, rabbits, lions, porcupines, hamsters, mice and porpoises).}
\footnotetext{236}{See id.}
\footnotetext{237}{See Green, supra note 222, at 542.}
\footnotetext{238}{See West, supra note 210, at 65.}
\footnotetext{239}{See Rivera, supra note 179, at 84; see also Chandler Burr, Homosexuality & Biology, ATLANTIC MONTHLY, Mar. 1993, at 65 (“[f]ive decades of psychiatric evidence demonstrates that homosexuality is immutable”).}
\footnotetext{240}{See id. But see Nungesser, supra note 221, at 22 (“[p]reference in sexual behaviors and partners may change over a person’s lifetime”).}
\end{footnotes}
support such immutability. This position is also supported by those believing that homosexuality is acquired.\textsuperscript{241} There is no anomaly in this theory, as learned phenomena, especially those learned at an early age, can be extremely resistant to change.\textsuperscript{242} The permanence of homosexuality is also supported by the poor results of attempted "treatments."\textsuperscript{243} Even where it is possible for a homosexual to adopt apparently heterosexual behavior, the trait is still essentially unchangeable due to the arduousness and painfulness of this process.\textsuperscript{244}

B. Homosexuals and Society

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

\textsuperscript{241} See Green, \textit{supra} note 222, at 568-69.
\textsuperscript{242} \textit{Id. at} 565.
\textsuperscript{244} See Green, \textit{supra} note 222, at 569.
\textsuperscript{245} \textit{Tribe, supra} note 167, at 1616.
\textsuperscript{248} Green, \textit{supra} note 222, at 558.
\textsuperscript{249} \textit{Note, supra} note 213, at 1285, 1302.
\textsuperscript{250} \textit{Id. at} 1285 n.3.
at a job, service in the armed forces, and the status of formally recognized committed relationships. 251

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

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

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

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

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


256 Id.

257 See Knickerbocker, supra note 18, at 1 (Klanwatch reports that recent gay-rights ballot initiatives and the controversy over homosexuals in the military corresponds to an increase in the number of attacks on homosexuals); Honor the Boycott of Colorado, STAR TRIB., Feb. 1, 1993, at 8A (upturn of violence against homosexuals one result of the passage of Amendment 2); Paul McEnroe, Violence Is Apparent Fallout of Colorado Law on Gays, STAR TRIB., Jan. 25, 1993, at 1A ("[I]t appears to have been unleashed by Amendment 2"); Tony Freemantle, The Hate State Label Dividing Colorado, HOUS. CHRON., Jan. 17, 1993, at A1 (gay-rights groups report a sharp rise in hate crimes against homosexuals as well as those who opposed Amendment 2); Mark Shaffer, Colorado Grapples With Fallout From Anti-Gay Ordinance, HOUS. CHRON., Jan. 3, 1993, at A16 (Sue Anderson, executive director of Denver's Gay and Lesbian Community Center, said that hate crimes against gays reached 45 in the month Amendment 2 was passed, three times as many as the 1991 monthly average).

258 See John Balzar, Why Does America Fear Gays?, L.A. TIMES, Feb. 4, 1993, at A1 (cruel phobias against homosexuals such as regarding gay men as "obsessive predators with their eyes on America's children" and lesbians as "anti-social battle-axes"); Miller, supra note 47, at 822-23
sexuals try to convert children to homosexuality. This stereotype is unfounded, both in the belief that homosexuals do this and in the belief that such behavior can be successful. Other unfounded stereotypes are that homosexuals are more likely to be child molesters than heterosexuals and that homosexuality is a mental disease. Such stereotypes are merely the result of widespread prejudice against and misunderstanding of homosexuals.

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

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

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260 Colman McCarthy, Gay Rights and Gay Acceptance, WASH. POST, Oct. 9, 1982, § 1, at A19 (no evidence that homosexuals are "compulsive recruiters to their orientation").
261 See Miller, supra note 47, at 822-23; see also Bouletier v. INS, 387 U.S. 118, 120, 125 (1967) (holding that homosexual aliens could be excluded from the United States as having psychopathic personalities).
262 See Miller, supra note 47, at 823-24.
264 See Turque, supra note 263, at 36.
265 See id.
266 See id.
267 See Balzar, supra note 258, at A14.
268 See Turque, supra note 263, at 36; Herek, supra note 255, at 61; Scroggins, supra note 263, at A8.
269 See Turque, supra note 263, at 36.
270 See Herek, supra note 255, at 61.
to a national survey would strongly object to working around homosexuals and another twenty-seven percent would prefer not to do so.\textsuperscript{271} Furthermore, two other polls show that a very large portion of the population does not think that homosexuals should be hired in occupations that involve children or delicate personal matters.\textsuperscript{272}

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

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

\textsuperscript{271} Id.
\textsuperscript{272} See \textit{Turq }, \textit{supra} note 263, at 346; Scroggins, \textit{supra} note 263, at A8. The surveys asked whether homosexuals should be hired in each of the following categories (numbers are percent saying yes). The results of one survey were: salesperson - 83%; member of the President's cabinet - 64%; member of armed forces - 59%; doctor - 59%; high school teacher - 54%; elementary school teachers - 51%; clergy - 48%. \textit{Turq }, \textit{supra} note 263, at 36. The results of the other survey, which was only conducted in Atlanta, were: salesperson - 87%; military - 64%; doctor - 56%; high school teacher - 52%; clergy - 50%; elementary school teacher - 45%. Scroggins, \textit{supra} note 263, at A8.


\textsuperscript{274} \textit{High Tech Gays}, 895 F.2d at 578 (citing \textit{RESOLUTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION, January 1975}).

\textsuperscript{275} See McLeod, \textit{supra} note 273, at A1.

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

\textsuperscript{277} \textit{id}. The survey found that 62% of gay males and 59% of gay females have college degrees, while only 24% of all males and only 17% of all females have one. \textit{id}.

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

\textsuperscript{279} \textit{Id}. The survey reported that 87% of gay men and 82% of gay women voted, while only 56% of all men and 58% of all women did. \textit{Id}.

\textsuperscript{280} Compare \textit{High Tech Gays}, 909 F.2d at 378 (Canby, J., dissenting) (homosexuals do not have significant political power) with Ben-Shalom v. Marsh, 881 F.2d 494, 466 (7th Cir. 1989) (homo-
and commentators assert that politics, prejudice and ignorance ensure that gays will not receive legislative or executive aid sufficient to overcome discrimination against them.281 Amendment 2 and the more than a dozen similar measures being proposed across the nation are themselves strong evidence of the political forces against homosexuals.282 Others argue that gays are not without political power.283 The one hundred and forty congressional sponsors to a proposed amendment to the Civil Rights Act that would include homosexuals evidence homosexuals' political influence.284 This amendment, however, is not likely to be passed anytime soon.285 Also reflecting homosexuals' political influence is the growing number of homosexuals in government.286 To date, American voters have elected at least seventy-five open homosexuals into local, state and federal offices.287 Indeed, the political participation and economic power of the homosexual community, and the scores of gay-rights ordinances in place across the country, support the argument that homosexuals have substantial political power.288 Supporters of this view point to the growing strength of homosexuals in the Democratic Party, noting President Clinton's support of gay rights in such issues as the ban on homosexuals in the military and the ban on travelers with AIDS, as well as his appointment of a lesbian and gay-rights activist—Roberta Achtenberg—as the assistant secretary for fair housing and equal opportunity in the Department of Housing and Urban Development.289 On the other hand, despite his strong support, President Clinton has not been able to lift the military's ban on homosexuals or the ban on travelers with AIDS.290

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281 See, e.g., High Tech Gays, 909 F.2d at 378; Green, supra note 222, at 538–39; Miller, supra note 47, at 825–26 (same).
282 See supra notes 1–13 and accompanying text for a discussion of Amendment 2 and the proposal of similar measures.
283 See, e.g., High Tech Gays, 895 F.2d at 574; Ben-Shalom, 881 F.2d at 466.
284 See Knickerbocker, supra note 13, at 4.
285 See Keen, supra note 13, at C3 ("amendment doesn't stand a chance in Congress, at least not this year").
286 See Dart, supra note 254, at A4.
287 Id.
288 See id. (over 130 states, counties and cities have enacted laws protecting homosexuals against discrimination): In Colorado, A Correct Decision, L.A. TIMES, Jan. 19, 1993, at B6 (7 states and over 100 local governments now have gay rights laws). See supra notes 274–79 and accompanying text for a discussion of homosexuals' economic power and political participation.
289 See Kevin Phillips, Gay Clout, Political Dynamite, WASH. POST, Jan. 31, 1993, at C1, C3; Knickerbocker, supra note 13, at 1.
290 Major Garrett, Party's Centrists to Hold Applause, WASH. TIMES, Feb. 21, 1993, at Al (Senate
The weak political position of homosexuals in our society is reflected by the current debate over allowing them into the military. Originally, President Clinton had said that he would lift the military's prohibition of homosexuals. However, after opposition from the military and Congress, he compromised with a “don’t ask, don’t tell” policy. Under this policy, the military will no longer inquire into recruits' or service members' sexual orientation, but will be able to discharge homosexuals on that basis. The language of this final compromise denigrates homosexuality by calling it an “unacceptable risk.” This policy appears to have the full weight of both the executive and legislative branches of the federal government behind it. It was passed by an overwhelming majority in both the House and the Senate. When the policy was temporarily enjoined from going into effect by a federal court, the Clinton Administration appealed the injunction all the way to the Supreme Court. Due to the Supreme Court's emergency reversal of the preliminary injunction, the policy will be in effect, at least until the Ninth Circuit Court of Appeals rules on the matter after a full hearing.

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

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


Id.


Id.

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


Id.

See High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (Supreme Court never held homosexual classifications to heightened review); Ben-Shalom
split on the issue.\textsuperscript{300} This section argues that homosexuals should be deemed a suspect class deserving strict judicial scrutiny under the Equal Protection Clause. Part A argues that the United States Supreme Court's decision in \textit{Bowers v. Hardwick} does not affect this determination.\textsuperscript{301} Part B completes the argument by asserting that classifications based on homosexuality should receive strict judicial scrutiny because homosexuality meets all of the criteria for suspect class status.\textsuperscript{302}

\textbf{A. Hardwick Is Irrelevant to Equal Protection Analysis}

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

\begin{footnotes}
\footnote{v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (discussing \textit{Hardwick}), cert. denied, 494 U.S. 1004 (1990).}
\footnote{300 See supra notes 166-202 and accompanying text for a discussion of the level of equal protection review granted to homosexuals.}
\footnote{301 See infra notes 303-16 and accompanying text.}
\footnote{302 See infra notes 317-44 and accompanying text.}
\footnote{303 See supra notes 166-208 and accompanying text for a discussion of \textit{Hardwick}'s relevance to equal protection scrutiny of homosexual classifications.}
\footnote{304 478 U.S. 186, 190-91 (1986); see also, Watkins v. United States Army, 875 F.2d 699, 718 (9th Cir. 1989) (en banc) (Norris, J., concurring), cert. denied, 498 U.S. 957 (1990).}
\footnote{305 478 U.S. at 196 n.8; see also Watkins, 875 F.2d at 716, 717 (Norris, J., concurring).}
\footnote{306 See supra notes 171-88 and accompanying text for a discussion of decisions holding that \textit{Hardwick} precludes the application of strict scrutiny equal protection review to laws using classifications based on homosexuality.}
\footnote{307 See supra notes 196-202 and accompanying text for a discussion of the difference between due process and equal protection.}
\footnote{308 See supra notes 184-88 and accompanying text for a discussion of this anomalous argument.}
\footnote{309 See supra notes 189-202 and accompanying text for a discussion of this opinion.}
\footnote{310 See id.}
\end{footnotes}
is not anomalous to grant homosexuals suspect class status simply because homosexual sodomy is not protected by the Due Process Clause.\textsuperscript{311}

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

\textbf{B. Homosexuals Deserve Suspect Class Status}

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

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

\textsuperscript{311} See id.
\textsuperscript{312} See supra notes 203–08 and accompanying text for a discussion of the distinction between status and acts.
\textsuperscript{313} 370 U.S. 660, 667 (1962).
\textsuperscript{314} See id.
\textsuperscript{315} See supra note 185 and accompanying text.
\textsuperscript{316} See supra notes 209–44 and accompanying text.
\textsuperscript{317} See supra notes 61–73 and accompanying text for a discussion of the elements of suspectness.
\textsuperscript{318} See supra notes 273–79 and accompanying text for a discussion of homosexuals' ability to contribute to society.
forth, saying that homosexuality implies no impairment in judgment, stability, reliability or general social or vocational abilities.\textsuperscript{319} Furthermore, the fact that homosexuals contribute as much, if not more, to society than heterosexuals, as reflected by their income, education, employment and level of political participation, demonstrates their ability to contribute equally to society.\textsuperscript{320}

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

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

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


\textsuperscript{320} See \textit{supra} notes 275-79 and accompanying text for a discussion of the achievements of homosexuals in these areas.

\textsuperscript{321} See \textit{supra} notes 245-71 for a discussion of prejudice against and stereotypes concerning homosexuals.

\textsuperscript{322} Id.

\textsuperscript{323} Id.


\textsuperscript{325} See \textit{supra} notes 217-44 and accompanying text for a discussion of the causes and immutability of homosexuality.

\textsuperscript{326} See \textit{id}.

\textsuperscript{327} See \textit{supra} note 244 and accompanying text.

\textsuperscript{328} See \textit{Watkins}, 875 F.2d at 726 (Norris, J., concurring).

\textsuperscript{329} See \textit{supra} notes 213-15 and accompanying text.
unchangeable, homosexuality is immutable for equal protection purposes.

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

330 See supra notes 280-98 and accompanying text for a discussion of the political power of homosexuals.
331 See supra note 281.
332 See supra notes 283–89 for a discussion of this position.
333 See supra note 289.
334 See supra note 284 and accompanying text.
335 See supra note 285 and accompanying text.
336 See supra notes 286–87 and accompanying text.
337 See supra notes 291-98 and accompanying text for a discussion of the current battle over allowing homosexuals to serve in the military.
338 Id.
339 See supra note 292 and accompanying text.
340 See supra note 288.
The political powerlessness of homosexuals is underscored by the enactment of Amendment 2. The amendment, by its very nature, limits the political strength of homosexuals and their supporters. The fact that Amendment 2 was enacted and can only be repealed by a constitutional amendment attests to the fact that homosexuals are politically powerless in Colorado. As a result of the amendment, for homosexuals in Colorado, the only avenue for relief from discrimination short of a constitutional amendment resides in the courts. In short, the political power of homosexuals is insufficient to protect them in a state where a majority of the population has voted to change the constitution to limit their rights.

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

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

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

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

Amendment 2 is state action that discriminates against homosexuals and denies them equal protection of the law. Although the Equal Protection Clause is not implicated by the government’s failure to
protect against private discrimination, or even by the removal of government protection, Amendment 2 does more than just repeal antidiscrimination laws. At the very least, it encourages private discrimination, which is itself sufficient state action. The amendment has the effect of a state declaration that discrimination against homosexuals is permissible. The increase in violence against homosexuals that has accompanied Amendment 2’s enactment evidences its encouragement of private discrimination. Such encouragement is enough to implicate the state in the discrimination.

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

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545 See supra notes 95–104 and accompanying text for a discussion of equal protection and the failure of a state to protect individuals. 546 See supra notes 109–22 and accompanying text for a discussion of state encouragement of discrimination as state action for equal protection purposes. 547 See supra note 257 and accompanying text. 548 See supra notes 109–22. 549 _Reitman_ v. Mulkey, 387 U.S. 369, 377 (1967); see supra notes 1–4 and accompanying text for a discussion of Amendment 2 and its effects. 550 See _Hunter_ v. Erickson, 393 U.S. 385, 387 (1969); _Reitman_, 387 U.S. at 370–71; see supra notes 135–57 and accompanying text for a discussion of _Hunter_ and _Reitman_. 551 See supra notes 1–4 and accompanying text for a discussion of Amendment 2 and its effects. 552 See id.
Like the laws in *Hunter* and *Reitman*, Amendment 2 violates a group's right to equal protection of the law by discriminating against them without justification. The analysis in section IV demonstrates that homosexuals should be deemed a suspect class, and therefore, Amendment 2 should be accorded strict judicial review under the Equal Protection Clause.\(^5\) Even if homosexuals are not a suspect class, strict scrutiny should still be applied as Amendment 2 interferes with the fundamental right of equal political representation.\(^5\) The amendment effectively reduces homosexuals' ability to seek redress in government and is therefore analogous to interference with the right to vote.\(^5\) Amendment 2 eliminates the assumption on which the rational basis test rests, that government institutions are structured to fairly represent the people.\(^5\) By making it harder to seek government assistance or protection, Amendment 2 reduces homosexuals' voice in these institutions and therefore eliminates the grounds for using the deferential rational basis standard of review.\(^5\) Thus, Amendment 2, like voting regulations, should receive strict judicial scrutiny. Under such scrutiny, to survive an equal protection attack, the amendment must be necessary to achieve a compelling state interest.\(^5\) As the Supreme Court held in *Hunter* and *Reitman*, limits on a group's political power are not justifiable by any legitimate state purpose.\(^5\) Thus, Amendment 2 violates the Equal Protection Clause.

In fact, even if homosexuals are not considered a suspect class and no fundamental right is found, Amendment 2 should still be struck down, as it cannot withstand an equal protection attack, even under the deferential rational basis standard of review. Amendment 2 fails to satisfy this test because it does not serve any legitimate governmental purpose.\(^5\) The only objective of Amendment 2 is "a bare . . . desire to harm a politically unpopular group," which is not a legitimate governmental purpose.\(^5\) As the United States Supreme Court said in

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\(^5\) See *supra* notes 299–344 and accompanying text for a discussion of the reasons why classifications based on homosexuality deserve strict scrutiny.

\(^5\) See *supra* notes 74–85 and accompanying text for a discussion of strict scrutiny of acts affecting fundamental rights.

\(^5\) See *supra* notes 1–4 and accompanying text for a discussion of Amendment 2 and its effects.

\(^5\) See *supra* notes 78–80 and accompanying text for a discussion of the foundation of the rational basis test and acts which undermine it.

\(^5\) See *id*.

\(^5\) See *supra* note 80 and accompanying text.

\(^5\) See *Hunter*, 393 U.S. at 393; *Reitman*, 387 U.S. at 376.

\(^5\) See *supra* notes 44–48 and accompanying text for a discussion of the rational basis test.

\(^5\) City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985); *see also* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
Cleburne, "mere negative attitudes, or fear" are not a sufficient justification for the government to discriminate against a class of people. Thus, Amendment 2 cannot be justified, even under the rational basis test.

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

VI. CONCLUSION

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

562 473 U.S. at 448.
563 While the Supreme Court, in Hardwick, has held that morality can be a rational basis for a law, that decision was based on substantive due process, not equal protection, and is therefore inapposite to the challenge to Amendment 2. 478 U.S. at 196. See supra notes 193-98 and accompanying text for a discussion of the different dimensions of due process and equal protection. Furthermore, Amendment 2 does not promote morality, but rather, simply discriminates against a class of citizens due to public dislike for them.
564 See supra notes 168-70 and accompanying text for a discussion of application of the rational basis test to disparate treatment of homosexuals and special considerations that justify such treatment.
565 See supra note 2 for text of Amendment 2.
566 The California Court of Appeals reached this conclusion in a recent case involving a city ordinance similar to Amendment 2. Citizens for Responsible Behavior v. Superior Ct., 2 Cal. Rptr. 2d 648, 650-51, 655 (Ct. App. 1991).
not constitute a suspect class, strict scrutiny should still apply because Amendment 2 infringes upon the fundamental right to equal political representation.

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

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

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