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Lesbian, Gay And Bisexual Rights and "The Civil Rights Agenda"

Margaret M. Russell*

A lot of blacks are upset that the feminist movement pimped off the black movement. Now here comes the gay movement. Blacks resent it very much, because they do not see a parallel, nor do I.¹

When people try to equate the two [racism and sexual-orientation discrimination], all they do is offend some black folks who recognize that it is not the same thing and might be willing to be supportive.²

I
INTRODUCTION

In December 1993, a Colorado state trial court entered a permanent injunction against Amendment Two, an amendment to the state constitution approved by a slight majority of Colorado voters in a referendum thirteen months earlier.³ Amendment Two is, in intent and ef-

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¹ Lena Williams, Blacks Rejecting Gay Rights as A Battle Equal to Theirs, N.Y. TIMES, June 28, 1993, at A1. These comments are attributed to the African-American host of a call-in show on radio station WVON-AM in Chicago.

² Id., quoting Mary Frances Berry, member of the U.S. Commission on Civil Rights and professor at the University of Pennsylvania.

fect, an anti-civil rights (or "pro-discrimination") law pertaining to minority sexual orientation; it both explicitly repeals all existing antidiscrimination ordinances (or sections thereof) prohibiting bias against lesbians, gay men and bisexuals, and prospectively forbids the passage of laws providing protection from such discrimination. Both a rationale and a rallying cry for this sweeping, boomerang-like withdrawal of legal rights are succinctly captured in the provision's title: "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation." The Denver district court's judgment, entered after a two-week trial, deemed Amendment Two to be violative of the Equal Protection Clause of the Fourteenth Amendment on the grounds that it unjustifiably deprived lesbians, gay men and bisexuals of the fundamental right to participate in the political process. Regardless of the final outcome of subsequent appeals, the injunction invalidating Amendment Two stands as a significant landmark in the sharply contested legal and political battle over whether prohibitions against sexual-orientation discrimination lawfully can be either excised from existing civil rights laws or declared void ab initio.

Whatever the ultimate precedential result of this particular litigative struggle, the war over "gay rights as civil rights" is likely to con-

4. The terms "anti-civil rights" and "pro-discrimination" are — like much of the terminology of the "gay rights" debate — matters of considerable contestation. I choose these terms quite deliberately to reflect my pejorative assessment of Amendment Two and initiatives similar in thrust. It is my view that such provisions, by prohibiting explicit legal protections for sexual minorities but not for heterosexuals, not only condone but actually encourage bias against lesbians, gays and bisexuals. For further discussion of this point, see discussion infra notes 38-58 and accompanying text.

5. The entire text of Amendment Two reads:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, 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, § 30b (adopted Nov. 3, 1992). The Colorado Constitution also provides:

The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States.

COLO. CONST. art. II, § 2.

6. For further discussion of this aspect of the decision, see infra notes 98-116 and accompanying text.

7. As this issue proceeds to publication, the U.S. Supreme Court has announced that it will hear Colorado's appeal of Evans v. Romer during the 1995 term. Linda Greenhouse, Supreme Court to Rule on Anti-Gay Rights Law in Colorado, N.Y. TIMES, Feb. 22, 1995, at A17.
tinue in legal and political discourse for quite some time. Not just in Colorado, but throughout the nation, there has been a barrage of efforts to divest sexual minorities of — or prevent them from ever obtaining — legal protections against invidious discrimination on the basis of sexual orientation. As of January 1994, at least seven states, in addition to Colorado, featured such initiatives at various stages of active development, at the local or statewide level. Through the con-

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certed organizing efforts and considerable funding resources of various conservative organizations, the attempted evisceration of sexual minorities' rights through state and local initiatives is likely to remain one of the most divisive legal and political battles of the decade.

A separate but related issue — and one, I think, of great importance in the reformulation of a civil rights agenda for the 1990s and beyond — is the ongoing debate concerning the inclusion of lesbian, gay and bisexual rights as part of a mainstream civil rights movement that historically has focused primarily, if not solely, on the rights of racial minorities. Certainly, one of the least disputed premises bequeathed to civil rights activists and scholars of the 1990s is that there is no singular, monolithic "civil rights community," even among people of color. In fact, much scholarly attention (including this symposium) continues to be devoted to the question of what "civil rights" means and should mean in an era of Rehnquist Court judicial retrenchment and virtually stagnant legislative reform. Moreover, even before the advent of a vocal and politically viable gay movement, several other communities of activists — particularly feminists, disability rights advocates, and the aged — had already begun to stake their own claims, both moral and political, to membership in a civil rights movement previously focused primarily on racism. Such a strategy implicitly analogized the plight of these disadvantaged groups to that of victims of

(1993).


For arguments that other disadvantaged minorities should be considered part of the "traditional" civil rights movement, see generally Joseph P. Shapiro, No Pity: People with Disabilities Forging a New Civil Rights Movement (1993); Robert Davids & Michael Nava, Created Equal: Why Gay Rights Matter to America (1994); Richard D. Mohr, A More Perfect Union: Why Straight Americans Must Stand Up for Gay Rights (1994). For an argument that a civil rights agenda that does not include gays or other "outsider" groups is not "under-inclusive," see Roy L. Brooks, Race As An Under-Inclusive and Over-Inclusive Concept, 1 Afr.-Am. L. & Pol'y Rep. 9 (1994).

racism, particularly African-Americans, and argued the necessity of parallel legal protections and political mobilization to ameliorate the harms fostered by such additional dimensions of discrimination.

However, unlike comparisons between race and gender, disability, or age, the attempted use of analogies between race and sexual orientation has engendered fierce controversy bordering on enmity, both within and outside of the loosely-defined "civil rights community." Certainly, even compared with the long-standing and well-publicized criticism of feminists for allegedly "bootstrapping" their gains to the struggles of African-Americans and other racial minorities,\textsuperscript{13} the animosity accorded those who assert that homophobia is "comparable" to racism is remarkable in its prevalence and intensity in contemporary discourse. In a provocative recent essay, Professor Jane Schacter refers to this use of comparability/analogy as the "discourse of equivalents."\textsuperscript{14} Professor Schacter posits that the results of constructing the debate in this manner are that gays are often locked into using conceptual categories of discrimination that may or may not fit their experiences, and that gay rights advocates cannot gain support for initiatives unless they successfully analogize such initiatives to existing antidiscrimination laws.\textsuperscript{15}

Resistance to notions of comparability and equivalency between gays and racial minorities in legal and policy debates is strong, even when only partial political or historical analogies are used. The requirement of exact "likeness" is impossible to achieve, and accordingly its evanescence provides an oft-invoked rationale for denying sexual minorities protections under the law. For example, in defending an absolute ban on gays in the military, General Colin L. Powell vigorously denied that such a policy mirrored the past exclusion of African-Americans: "Homosexuality is not a benign . . . characteristic, such as skin color or whether you're Hispanic or Oriental. . . . It goes to one of the most fundamental aspects of human behavior."\textsuperscript{16} In testifying against S. 2238, the proposed Employment Non-Discrimination Act of 1994 (which would prohibit employment discrimination against lesbians, gays and bisexuals), Professor Joseph E. Broadus refuted proponents'
arguments that the Act was justified as a "Title VII"\(^{17}\) for sexual minorities:

[When it enacted Title VII], Congress acted to express the national moral consensus that race was irrelevant to career opportunity. It acted to correct the burden that was imposed on millions of Americans by virtue of skin color alone and to create an opportunity for them to both contribute to and share in the nation's wealth. Congress adopted Martin Luther King's proposition that men should be judged by the content of their character.

The present legislation is not on an equal footing with Title VII. It cannot express a national moral consensus that homosexuality and homosexual practices are irrelevant to an evaluation of character. The issue is not one of status as with race but one of lifestyle choice and behavior. Americans are deeply split over the moral significance of the behavior this legislation seeks to shelter from evaluation.

Further, this legislation will not open doors for those previously denied meaningful opportunity to participate in our economy. It will result in special privileges for an elite group that has unjustly played the victim card to advance.\(^{18}\)

Such policy pronouncements, however well-cloaked in ostensibly "neutral" views, are not terribly different from the bluntly stated concerns of activist Phil Burress, who organized the successful effort to repeal Cincinnati's sexual orientation-inclusive antidiscrimination ordinance in 1993: "Homosexuals should not be mistreated. They should not be abused or bashed. They're Americans and they're covered by the Constitution. But should their chosen sexual appetite elevate them to the same status as African-Americans?"\(^{19}\)

The reasons for resistance to analogies between racism and homophobia are varied and complex. At one end of the spectrum one finds what might be called a strand of progressive anti-essentialism; this position, while strongly supportive of full civil rights for gays, lesbians and bisexuals, disputes as problematic and potentially condescending the notion that racism, sexism, heterosexism and other "isms" are truly comparable in a political, historical or experiential sense.\(^{20}\)

\(^{17}\) See Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (West 1988 & Supp. 1994) (making it an unlawful employment practice for an employer to discriminate against employees based on "race, color, religion, sex, or national origin").


\(^{19}\) Stephen Hudak, Oberlin Joins Cities in Gay-Rights Proposal, Plain Dealer, July 10, 1994, at 5B.

\(^{20}\) See Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms), 1991 Duke L.J. 397, 398. The authors caution against self-serving attempts to analogize one disadvantaged group's oppression to another's:

The 'analogizer' often believes that her situation is the same as another's. Nothing in
noting a certain degree of usefulness of analogy-drawing between race and sexual orientation (or between race and other categories such as gender and disability), these critics fear that such comparisons may ultimately work to reinforce racist notions that racism is neither unique nor particularly deleterious in our society. According to this view, a frequent pitfall of facile attempts at comparing racism with some other form of bias is eclipsed or diminished attention to the importance of racism altogether. The other end of the spectrum might be characterized by positions such as those articulated above by Powell and Broadus. These advocates, who oppose the notion of “gay rights as civil rights,” assert that race and sexual orientation are decidedly different as a matter of law, politics, morality and public policy; they argue further that minority sexual orientation raises concerns not of status but of behavior, and that public disapproval of sexual minorities provides ample justification for the refusal to treat lesbian, gay and bisexual rights as a “civil rights” issue.

Between these positions, however, lies a large, diverse and perhaps somewhat muddled gray area of debate. Many in this middle ground wonder whether the “comparability” question is even the right one to

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the comparison process challenges this belief, and the analogizer may think that she understands the other’s situation in its fullness. The analogy makes the analogizer forget the difference and allows her to stay focused on her own situation without grappling with the other person’s reality.

*Id.* For an additional perspective that embraces gay rights but questions whether these rights should be compared to those of ethnic or racial groups, see *Frank Browning, The Culture of Desire: Paradox and Perversity in Gay Lives Today* 5 (First Vintage 1994) (1993).

21. Grillo & Wildman, *supra* note 20. The authors note with concern their own well-intentioned attempts to initiate or participate in discussions comparing racism with sexism, and describe the ensuing phenomenon as follows:

In each setting, although the analogy was made for the purpose of illumination, to explain sexism and sex discrimination, another unintended result ensued — the perpetuation of racism/white supremacy. When a speaker compared sexism and racism, the significance of race was marginalized and obscured, and the different role that race plays in the lives of people of color and of whites was overlooked. The concerns of whites became the focus of discussion, even when the conversation had been supposedly centered on race discrimination. Essentialist presumptions became implicit in the discussion; it would be assumed, for example, that all women are white and all African-Americans are men (footnote omitted). Finally, people with little experience in thinking about racism/white supremacy, but who had a hard-won understanding of the allegedly analogous oppression (sexism or some other -ism), assumed that they comprehended the experience of people of color and thus had standing to speak on their behalf.

*Id.* at 399.

22. See John S. Butler, *Homosexuals and the Military Establishment, Society, Nov.-Dec.* 1993 at 13, 15-19. The author claims that the gay community is improperly appropriating the “just like the blacks” metaphor to legitimate its struggle for equality. He asserts that any such analogy trivializes the history of blacks in America, because “[o]ne cannot compare an achieved behavior [homosexuality] that runs through all racial groups with an ascribed characteristic like race.”
pose in seeking resolution of complex issues of group cultural identity and intergroup conflict. In ameliorating the present effects of past discrimination, what does it mean to inquire whether the category of sexual orientation (or gender, or age, or class) is "like" the category of race? Is one "obscuring the importance of race" in so structuring the debate? Can comparisons be made in a way that can help resolve the ongoing controversy about "gay rights as civil rights," without ignoring differences between racism and homophobia?

This Article is intended to address the above questions in the context of the current debate surrounding anti-gay initiatives such as Colorado's Amendment Two. As one concerned with the uniquely debilitating characteristics of both racism and homophobia, I find certain aspects of this debate very troubling. On the one hand, I agree with the observation of Professors Grillo and Wildman that an "analogy problem" in feminist discourse unfortunately has operated to dilute the significance of race by encouraging a sloppy equation between racism and sexism. Similar dangers exist in superficially analogizing sexual-orientation discrimination to racism. On the other hand, lesbians, gays and bisexuals suffer daily and grievously from the failure of others — whether tactically or unwittingly — to draw upon the legal, moral and political powers of analogy in order to see the ways in which gay rights are, quite simply, a question of civil and human rights. In a society marked by mounting evidence of hate crimes, dismissals from employment, and other forms of discrimination targeted against sexual minorities, the question of whether or not homophobia can or should be analogized to other widely-reviled types of group bias is of far more than semantic or metaphorical significance. Rather, its resolution may

23. See Grillo & Wildman, supra note 20. See also Brooks, supra note 11, at 19 n.51 (arguing that due to the special history of African-Americans in this country, it is improper for other oppressed groups to seek rights claiming they are "just like blacks").

24. For instance, note the following response to General Powell's claim that race is essentially different from sexual orientation because the latter is a chosen course of conduct: Recognition of these differences need not debase the human dignity of and the respect due any person; the fallacy that there is no difference would yield to a new argument that there are no meaningful differences in terms of human dignity for each individual. Charles F. Abernathy, When Civil Rights Go Wrong: Agenda And Process In Civil Rights Reform, 2 TEMP. POL. & CIV. RTS. L. REV. 177, 197 (1993). See also Thomas, supra note 9, at 1435 (arguing that when states, through homosexual sodomy statutes, single out gay and lesbian sexual behavior as uniquely deviant, they serve "to legitimize homophobic violence and thus violate the right to be free from state-legitimated violence at the hands of private and public actors").

offer valuable lessons about the roles of both group solidarity and intergroup coalition in forging a common civil rights agenda for the decades ahead. Further, careful consideration of such arguments of "comparability" may help to uncover the intersectional experiences of those who are both racial and sexual minorities, and who may perceive themselves as doubly and differently excluded from the mainstream.26 Finally, and most disconcerting of all, I am concerned that the manner in which the entire "sexual orientation vs. race" debate has been constructed and continues to unfold in a host of contexts27 is neither accurate nor helpful; rather, it invites hostilities among and against members of both communities by subtly undermining their shared commitments to equal treatment under the law.

This Article is divided into five parts. In the next part, I discuss the "gay rights as civil rights" controversy as constructed and manipulated in public discourse by proponents of Amendment Two; instrumental to these advocates' approach was the adoption of the "Equal Rights, Not Special Rights" slogan, which simultaneously appealed to heterosexuals' fears of gay sexuality, African-Americans' fear of further dilution of political power, and whites' resentment of affirmative action programs. In part III, I address the legal implications of Amendment Two proponents' "No Protected Status" strategy in the context of the Evans trial itself. In part IV, I offer my own observations regarding the significance of the "comparability" debate in fostering African-American empowerment and the reformulation of a civil rights agenda for the 1990s and beyond; I conclude by arguing for inclusion of lesbian, gay and bisexual rights as a full and important prerequisite for the realization of that agenda.


27. Perhaps with even greater frequency and intensity than in the area of anti-gay initiatives, comparisons between sexual-orientation discrimination and racial discrimination have arisen in the context of President Clinton's "Don't Ask, Don't Tell" policy regarding gays and lesbians in the military. For insightful analyses of the comparability of sexual orientation and race in this context, see William N. Eskridge, Jr., Gaylegal Narratives, 46 STAN. L. REV. 607 (1994); William N. Eskridge, Jr., Race and Sexual Orientation in the Military: Ending the Apartheid of the Closer, RECONSTRUCTION, No. 2 (1993), at 52; Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. REV. 499 (1991); Valdes, supra note 9.
II
AMENDMENT TWO IN THE PUBLIC EYE: "EQUAL RIGHTS, NOT SPECIAL RIGHTS" AND THE CONSTRUCTION OF AN ANTI-GAY RHETORIC OF "NON-COMPARABILITY"

It [Amendment Two] simply says that a very wealthy group of people linked together by nothing else but horniness should not on that basis be granted protections equivalent to those of disadvantaged minority groups.
— Tony Marco, founder of Colorado for Family Values, in defense of Amendment Two

A. Background: Gay Rights Laws and the Codification of "Comparability"

When right-wing conservative groups, such as Colorado for Family Values, the Traditional Values Coalition, the National Legal Foundation, and the Free Congress Foundation, chose the apparently "liberal" state of Colorado as their first major target for an anti-gay rights initiative in 1992, many observers were surprised, amused, and quick to predict failure. However, Colorado proved to be an optimal testing ground for a number of reasons, not the least of which was precisely its record as a state very much in the vanguard of establishing legal protections for lesbians, gays and bisexuals. Boulder and Aspen were two of the first cities in the United States to expand their antidiscrimination ordinances to include sexual orientation; Denver's 1990 antidiscrimination law evinced a similarly strong stance. Also in 1990, Governor Roy Romer issued an executive order barring sexual-orientation discrimination in state employment practices. Health insurance companies were prohibited under state law from using sexual orientation as a factor in assessing eligibility for insurance; numerous sub-entities of the state adopted policies and practices similarly proscribing the consideration of sexual orientation in housing, education and employment.

29. For background information on these and other far right organizations with an explicitly anti-gay agenda, see MAB SEGREST & LEONARD ZESKIND. QUARANTINES AND DEATH: THE FAR RIGHT'S HOMOPHOBIC AGENDA (1989); POLITICAL RESEARCH ASSOCIATES. ORGANIZATIONS CURRENTLY TARGETING LESBIANS, GAY MEN, AND BISEXUALS (1993).
32. Executive Order in Celebration of Human Rights, Governor Roy Romer (signed December 10, 1990). Ironically, Romer — as governor of the state defending the constitutional validity of Amendment Two's repeal of laws such as his executive order — is now named defendant in the judicial challenge to Amendment Two.
Finally, various state and local agencies began recording statistics of complaints of sexual-orientation bias and hate crimes. Significantly, the Denver Agency for Human Rights and Community Relations reported that nearly one-half of their complaints for the year 1991 concerned allegations of sexual-orientation discrimination. The passage of Amendment Two on November 3, 1992, by a voting margin of 53.4% to 46.6%, repealed all of the above protections regarding minority sexual orientation and foreclosed the possibility of any similar legislation in the future.

It is worth noting the manner in which pro-gay rights advocates originally relied on arguments of "comparability" in amending these laws to include sexual orientation as a protected class. As feminists and disability rights activists had asserted in preceding battles to add "gender" and "disability" as grounds for discrimination complaints, the addition of a new "protected" category (in this case, sexual orientation) was not premised upon that category's similarity to the category of "race"; rather, the focus was on the comparable irrationalities of sexual-orientation bias and racial prejudice, the irrelevance of both race and sexuality to individual ability, and finally the history of physical, psychological and legal victimization shared by both groups (and other groups as well). Gay rights advocates argued that in these respects, lesbians, gays and bisexuals were surely as entitled as racial minorities to explicit protection under the law; the issues were equality, not sameness, and justice, not privilege. Authors Robert Dawidoff and Michael Nava have summarized the "comparability" argument as follows:

The parallels between gay rights and traditional civil rights causes are real. Slavery and racial segregation were defended from the pulpit using some of the same biblical texts, including Leviticus, that are used to stigmatize gays. The major obstacle to gay rights is prejudice, supported, as is racial prejudice, through stereotypes. Like blacks, gays are regularly subjected to grotesque sexual slander. Like the notorious color line that enacted segregation, sodomy laws, state and local propositions and the ban against gays in the military enforce a lavender line of inequality for gays. The threat of violence easily gives way to violent acts against lesbi-

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36. Interestingly, by focusing exclusively on "homosexual, lesbian, or bisexual orientation," Amendment Two effectively forbade protections for minority sexual orientations, while preserving the possibility that laws might be adopted and construed to protect heterosexuals from sexual-orientation bias. This choice of wording illustrates an implicit norm of heterosexuality that underlies much public discourse about gay, lesbian and bisexual rights. See infra note 41 and accompanying text.
Thus, pre-Amendment Two efforts to codify notions of "comparability" between race discrimination and sexual-orientation discrimination represented an assimilative strategy on the part of gay rights advocates — an attempt to draw comparisons not necessarily between the cultural identities of racial minorities and sexual minorities, but between the legacies of ignominious harms suffered by both at the hands of a white and/or heterosexual majority. The legal protection of lesbians, gays and bisexuals required not "special" or "different" legislation, it was stressed, but rather the simple insertion of a few words into existing provisions and the aggressive enforcement of those provisions in their entirety.

The counter-strategy of Colorado for Family Values, the official ballot sponsor of Amendment Two, was, quite simply, a public campaign to turn the "comparability" argument on its head from a range of perspectives, and to distance gay rights advocates as much as possible from mainstream "civil rights" discourse. Fundamentally, the objections of Colorado for Family Values and other key Amendment Two proponents stemmed not from a differing "civil rights" philosophy, but rather from the following strongly held religious beliefs: (1) that, according to the Bible, homosexuals are dangerous, deviant sinners whose behavior is an abomination unto God and must be curtailed through the force of law; and (2) that the supremacy of scriptural authority over human law fully justifies state-sanctioned discrimination against sexual minorities. Lacking public consensus in Colorado that religious
tenets merited an amendment to the state constitution, Colorado for Family Values and other Amendment Two supporters consciously employed a civil rights-based rhetoric of "non-comparability" to advance their anti-gay objectives. Critical to the achievement of these goals was the courting of not only the extreme right, but also conservatives, moderates, liberals and progressives whose susceptibility to various aspects of a "non-comparability" argument rendered them vulnerable to the "Equal Rights, Not Special Rights" approach. Three dimensions of this anti-gay rhetoric are discussed below.

B. "Behavior, Not Status": "Non-Comparability" And The Anti-Sodomy Agenda

In the context of Amendment Two, as well as other anti-gay efforts, proponents have placed particular emphasis on the argument that homosexuality connotes not a status or immutable condition (like race or gender), but a specific form of voluntary behavior that historically has rightly been subject to societal opprobrium. According to this view, gays, lesbians and bisexuals are defined as legal actors (or illegal actors, or legal non-actors, as the case may be) by their sexual activity. By contrast, heterosexuals (or, more broadly, all others who do not identify themselves as sexual minorities) are not subjected to such definitional scrutiny; rather, they benefit from a sort of sexual "invisibility" and immunity accorded adherents of an unspoken majoritarian norm. Through their strict bifurcation of status and conduct — and insistence that the latter was squarely at issue — Amendment Two proponents artfully constructed their first "non-comparability" argument, the central premises of which were: (1) that declaring one's minority sexual orientation, unlike acknowledging one's minority race, was a conscious choice to behave in a stigmatized manner (after all, one "couldn't do anything about" being African-American or Latino); (2) that the pu-
tative "civil right" protected by the inclusion of "sexual orientation" in antidiscrimination laws was actually the right to engage in "deviant" sexual relations; and (3) that such behavior constituted not an "equal right" in the sense in which traditional antidiscrimination laws had been crafted, but rather an unwarranted "special right" to "flaunt" an unconventional lifestyle.

With the key issues thus redefined, the campaign for Amendment Two changed from a referendum on invidious discrimination to one on sexual behavior. Janet E. Halley opines that the "debate," in reality, was about the mainstream public's feelings about homosexual sodomy:

The "special right" sought by gay activists, it seems, is sodomy . . . . The special rights rhetoric that has buoyed proposed constitutional amendments, defeated in Oregon but adopted in Colorado, actually requiring state discrimination against gay men, lesbians, and bisexuals repeatedly discerns the unregulated practice of sodomy to be the "special right" sought by the gay-rights movement. Buttons distributed by proponents of Oregon Measure 9 announced, "Sodomy Is Not A Special Right." Sodomy in these formulations is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym.

race is "by and large, not a choice"). It is certainly plausible to infer from comments such as these that racial minorities are to be pitied because they would undoubtedly choose to be a different color if they could.


44. Note Tony Marco's scornful characterization of gays, lesbians and bisexuals as a "very wealthy" group united by "horniness," supra note 28. This aspect of the "Equal Rights, Special Rights" campaign also invokes the spectre of the Court's peculiar logic in Bowers v. Hardwick, 478 U.S. 186 (1986). It was in this case that Justice White insisted that the core issue was not whether Michael Hardwick had a constitutional right to privacy, but rather whether he had a "fundamental right to engage in homosexual sodomy." Id. at 190-92. By redescribing Hardwick's "rights" so as to place them squarely outside the ambit of liberties "'deeply rooted in this Nation's history and tradition,'" id. (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)), the Court used what was essentially a "special rights" rhetorical ploy similar to that used in the Amendment Two debate.

45. Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, supra note 9, at 1736 (footnotes omitted). She further explains:

In the post-Hardwick environment, what Justice White described as "homosexual sodomy" has become homosexuals as sodomy. Several federal courts have held that Hardwick forecloses heightened equal protection scrutiny of the discrimination disadvantageous to gay men, lesbians and bisexuals on the ground that sodomy is the "behavior that defines the class" of homosexuals. Id. at 1734 (emphasis in original) (footnote omitted).

For other insightful analyses of the significance of Bowers v. Hardwick to lesbian, gay and bisexual rights, see Cain, supra note 9, at 1612-40; Fajer, supra note 9; Anne B. Goldstein, Reasoning About Homosexuality: A Commentary on Janet Halley's Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 VA. L. REV. 1781 (1993); Kendall Thomas, The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick, 79 VA. L. REV. 1805
The calculated brilliance of Colorado for Family Values' anti-sodomy campaign lay not so much in its demagogic appeal to the traditionally anti-gay right wing (people from whom, after all, gay rights advocates could hardly have expected support), but rather in its fracturing of traditional civil rights coalitions. Particularly in its appeals to African-American churches, Colorado for Family Values attempted to cloak its opposition to gay rights as a civil rights crusade, by suggesting that gay rights advocates deliberately sought to undermine the gains of the Black civil rights movement by equating a contestable issue of sexual morality with the historic struggle for racial equality. To a certain extent, these tactics proved successful; although some African-American leaders decried this attempted manipulation of Black churches, and noted with skepticism Colorado for Family Values' supposed concern for safeguarding the traditional civil rights legacy, others were persuaded by such an approach. In developing this strand of the controversy over "comparability," the right had thus succeeded in constructing a critical element of anti-gay rhetoric.

C. "Is King A Gay Rights Hero?" "Non-Comparability" And The Appropriation Of Civil Rights Symbolism

Emphasis on a "behavior, not status" rationale is but one part of a broader "wedge" approach designed by proponents of anti-gay initiatives to alienate African-Americans from accepting lesbian, gay and bisexual rights as relevant to a mainstream civil rights agenda. The primary strategy in this regard relies on the accusation that gay rights advocates are trying to "steal the thunder" of the African-American civil rights movement by falsely claiming a minority status of victimhood; the clear message underlying this approach is that African-Americans who fail to repudiate gay rights are themselves opening the door to the plundering of their own hard-won gains.46 Such divisive tactics, developed and refined in the Amendment Two campaign, have since expanded in reach and efficacy to become a major weapon in the arsenal of anti-gay organizers.

Shortly before the Amendment Two election, anti-gay advocates in Colorado facilitated wide distribution of a video cassette entitled "The Gay Agenda."47 In it, David Llewellyn, president of the Western...
Center for Law and Religious Freedom, puts forward the proposition that gays, far from being a "legitimate" minority deserving of protection, are instead a privileged and powerful class with far more money and opportunities than racial minorities and poor whites.\textsuperscript{48} To underscore this point, "The Gay Agenda" includes ample footage of gay rights parades featuring carefree drag queens and transvestites, suggesting that the gay rights movement is nothing more than a wild, bacchanalian party for an elite few. This portion of the film is also interspersed with self-described "expert" testimony from psychologists and "formerly gay" men about the "abnormality" of the gay lifestyle.

In more recent publications and videos, proponents of Amendment Two and other anti-gay initiatives have responded even more harshly to attempts to analogize the cause of gay, lesbian and bisexual rights to the African-American civil rights movement. For example, in April 1993, the Traditional Values Coalition released "Gay Rights, Special Rights," a video crafted specifically to foster the impression that sexual minorities seek to take over the civil rights movement,\textsuperscript{49} and that racial minorities — particularly African-American religious leaders — regard gays' and lesbians' use of civil rights analogies as an affront. The video particularly scorns two examples of gay and lesbian activists' use of civil rights landmarks: (1) the planning of a gay and lesbian national demonstration modelled upon the 1963 March on Washington; and (2)

\begin{itemize}
\item \textsuperscript{48} Id. This group generalization of gays and lesbians is far from uncommon. Despite the fact that many gays and lesbians are closeted and therefore beyond the reach of statistical researchers, anti-gay advocates frequently claim that gays and lesbians as a class are more affluent, better educated, and in command of a greater amount of disposable income than heterosexuals. \textit{See}, e.g., Testimony of Joseph D. Broadus, \textit{supra} note 18; Broadus claims: A consensus has developed among several authoritative sources. The Simmons Report, Overlooked Opinions, and other respected market analysts' report similar figures. Fully 49 percent of homosexuals held managerial or professional positions compared with 18 percent for the general population. The average income for homosexual individuals was $36,000 a year compared with $12,287 for the general population. Homosexual households had an average income of $55,400 compared with a national average of $36,500. The San Francisco Chronicle has reported that: "America's gay and lesbian community is emerging as one of the nation's most educated and affluent. Typical of this status is the fact that gays are twice as likely as other Americans to own a vacation home; 4.2 times more likely to travel by air, and 7.5 times more likely to travel to foreign destinations."

These life style advantages were enjoyed because gays were much more likely to be college graduates. Fully 60 percent of gays surveyed were college graduates compared with 18 percent of the general population. \textit{This is not the profile of a group in need of special civil rights legislation in order to participate in the economy or to have an opportunity to hold a decent job. It is the profile of an elite. An elite whose insider status has permitted it to abuse the political process in search, not of equal opportunity, but of special privilege and public endorsement.}

\textit{Id.} (emphasis added).

\item \textsuperscript{49} At one point in the film, gay demonstrators are shown shouting: "We're gonna rule the world!" Boxall, \textit{supra} note 8.
\end{itemize}
the invocation of the words and imagery of Dr. Martin Luther King's famous "I Have A Dream" speech to argue that sexual orientation should be just as irrelevant as race in the realization of King's dream. In this regard, the film accords much attention to quoting African-Americans who angrily report that the gay rights movement is undermining their gains and stealing their heroes.50

In the context of the emerging battle over anti-gay initiatives such as Amendment Two, this dimension of the "non-comparability" argument has proven to be particularly effective in stoking opposition or at least resistance to the concept of lesbian, gay and bisexual rights as civil rights. Like much persuasive propaganda, it draws upon compelling elements of truth — albeit in an artfully manipulative manner — for its implicit (and ostensible) framework for analysis: (1) in this case, that the African-American experience of discrimination is unique in American history;51 (2) that in myriad contexts, African-American history and culture have been appropriated by mainstream society, almost never with due credit to their African-American origins; and (3) that many of the civil rights advances of the 1960s, hard-won through the leadership of Dr. King and other African-American religious activists, have lost momentum and influence in the 1990s.52 Once this tone of apparent sympathy with African-Americans has been established, anti-gay activists follow up with the inflammatory and illogical conclusions that the lesbian and gay rights movement is somehow "to blame" for the waning political and moral influence of the African-American civil rights movement, and that Dr. King's memory as a religious, as well as a political figure, is defiled by efforts to compare two radically different experiences.

This multi-layered anti-gay approach not only panders to a wide range of prejudices, but also exploits the ambivalence of those who benefit from the privilege of ignoring homophobia. To those deeply committed to racial justice and unsure of its connection to issues of sexual orientation and gender equality, there is an undeniable truth to claims that the historical experience and culture of African-Americans have

50. Deitcher, supra note 47.
51. For example, in asserting such historical uniqueness, Professor Butler asks of white homosexuals: "Where did these people drink water during the days of segregation?" Butler, supra note 22, at 17. Another critic has stated: "'There are differences in the sense that civil rights was dedicated to the elimination of blatant oppression, the residuals of the slavery era. . . . The gay rights movement is significantly different in that regard: there's nothing comparable to the slavery experience.'" Debbie Howlett, Colorado to Congress, Showdown Over Gay Rights, USA TODAY, Jan. 27, 1993, at 1A (quoting Bill Tidwell of the Urban League) (emphasis added).
52. For example, a recent law review article discusses the decline in the political and legal significance of affirmative action programs. See Daniel A. Farber, The Outmoded Debate Over Affirmative Action, 82 CAL. L. REV. 893 (1994).
been plundered and appropriated for others’ consumption;\textsuperscript{53} therefore, when gays, lesbians and bisexuals are strategically singled out as the appropriating and consumptive “other,” staunch assertions of “non-comparability” seem reflexive and almost necessary to honor the uniqueness of the African-American racial experience. Resentful rejoinders abound: How could people compare the gay, lesbian and bisexual rights movement with the centuries-old struggle against racism? How could Dr. King possibly be a “gay rights hero?”\textsuperscript{54} To supporters and tentative potential supporters of lesbian, gay and bisexual rights, on the other hand, the above-described anti-gay approach can have a profoundly silencing effect, for it suggests that to analogize homophobia to racism is somehow an abandonment (or least a diminution) of commitment to antiracist work. Finally, to those generally hostile to the concept of civil rights (no matter what the claim of societal disadvantage), the pretense of protecting the integrity of a race-focused civil rights approach provides a convenient cover for an overall lack of interest in addressing racism, homophobia, or any other form of invidious discrimination. By appealing simultaneously to all of the above perspectives, the strategy of efforts, such as “The Gay Agenda” and “Gay Rights, Special Rights,” seeks both to magnify the intensity of opposition to (or ambivalence about) gay rights advances, and to portray that opposition as united and uniform rather than fragmented and incoherent.

D. “No Protected Status”: “Non-Comparability” and Opposition to Affirmative Action

Finally — and in a vein related to the “Gay Rights, Special Rights” rhetoric described immediately above — the depth and ferocity of opposition to lesbian, gay and bisexual amendments to antidiscrimination laws may be viewed, in some respects, as hostility to the concepts underlying the original laws themselves masquerading as concern for those concepts’ dilution. For example, in the Amendment Two campaign, a primary target of proponents’ energies was affirmative action. Despite the fact that none of the pre-Amendment Two antidiscrimination laws in Colorado required goals or quotas for lesbians, gays or bisexuals, the mere possibility that such remedies might be inferred afforded Amendment Two proponents with another rhetorical weapon — namely, that employers, admissions officers and other entities cov-


\textsuperscript{54} See Dawidoff & Nava, \textit{supra} note 8.
ered by traditional antidiscrimination laws might be "forced" to take minority sexual orientation into account *affirmatively* in hiring or admissions. Throughout the Amendment Two campaign, this highly unlikely interpretation of sexual orientation-inclusive antidiscrimination laws was transmogrified into a veritable "affirmative action" dragon. Accordingly, the dragon-slayers seized the opportunity to capitalize upon mainstream resentment not only of affirmative action for lesbians, gays and bisexuals but of affirmative action itself.56

In this regard, consider the language and structure of Amendment Two:

*No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation.* Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, 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...*56

Arguably, the iteration of the phrases "quota preferences" and "protected status," in addition to "minority status" and "claim of discrimination," is redundant and gratuitous; their inclusion may serve the primary purpose of galvanizing the voters' resentment and opposition. In popular discourse, "quota preferences" is an extremely loaded and pejorative term; witness the success with which the Bush Administration temporarily staved off passage of the Civil Rights Act of 1991 (first introduced as the Civil Rights Act of 1990) by castigating it as a "quota bill."57 Similarly, the phrase "protected status," although a commonly invoked legal term in antidiscrimination doctrine, may conjure in the public eye an image of undeserved pampering and special privileges, rather than of a basic safeguard against prejudicial treatment. By using both of these animus-generating terms, Amendment Two proponents appeared to be championing a stance of neutrality and equal treatment, rather than the "special" (read undeserved) treatment
which affirmative action connotes in the minds of many.

With the electoral stage thus set, Colorado for Family Values and other anti-gay activists accomplished on November 3, 1992, what many political observers thought highly unlikely, if not impossible — the passage of Amendment Two and the repeal of some of the nation’s most progressive lesbian, gay and bisexual rights legislation. As a persuasive tactic, the politics of “non-comparability” had succeeded in swaying voters who may have originally viewed lesbian, gay and bisexual rights as a basic civil rights or human rights issue, but who now were convinced that they were saving their state’s political processes and resources from capture by an undeserving “special interest” group.

III
AMENDMENT TWO IN COURT: “NON-COMPARABILITY,” FUNDAMENTAL RIGHTS AND SUSPECT CLASSIFICATIONS

Disapproval of gays is not like racial or gender discrimination; there is nothing wrong with being black or being a woman, but it is perfectly reasonable to think there is something wrong with being gay.

— Testimony of Professor Harvey C. Mansfield, Harvard University, on behalf of the State of Colorado

A. Avoiding “Suspect Classification”/Comparability Analysis: Evans v. Romer At The Trial Court Preliminary Injunction Stage

Nine days after the election, Colorado voter Richard G. Evans, together with eight additional individual plaintiffs, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen, filed suit in state district court in Denver, Colorado to enjoin the enforcement of Amendment Two, which was scheduled to go into effect on or before January 15, 1993. Plaintiffs sought preliminary and permanent in-

58. Ironically, this date also marked the election of Bill Clinton to the Presidency. Clinton’s victory was attributed in part to extraordinarily strong support from the national lesbian and gay community, to whom he had promised vigorous executive and legislative changes (for example, the lifting of the ban on lesbians’ and gays’ serving openly in the military).


61. The Colorado Constitution states that amendments to the state constitution passed
junctive relief on the grounds that Amendment Two violated various state and federal constitutional provisions.62

Evans and the other plaintiffs premised their contentions on First and Fourteenth Amendment grounds.63 Primary importance was accorded to arguments raised under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution — namely, that Amendment Two deprived lesbians, gays and bisexuals of the right to participate equally in the political process, and that it lacked a rational basis for the burdens imposed on lesbians, gays and bisexuals as a class. In addition, several First Amendment arguments were raised: (1) that Amendment Two violated the Establishment Clause; (2) that it violated the rights of lesbians, gays and bisexuals to the freedoms of expression and association, and to petition the government for a redress of grievances; and (3) that it was unconstitutionally vague. Further, plaintiffs contended that the voter-driven initiative process by which Amendment Two was passed violated the Guarantee Clause of Article IV, Section 4, of the U.S. Constitution.64 Finally, plaintiffs argued that Amendment Two violated the Supremacy and Due Process Clauses of the U.S. Constitution and Article II, Section 6 of the Colorado Constitution.65

After an evidentiary hearing, the trial court issued a temporary restraining order and, on January 15, 1993, granted plaintiffs’ motion for a preliminary injunction.66 As a matter of law, the court agreed through the initiative process “shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed.” COLO. CONST. art. V, § 1.


63. The remaining plaintiffs, all governmental entities, raised a number of separate arguments against Amendment Two as well. The Boulder Valley School District RE-2 argued that Amendment Two violated local control over educational policies guaranteed by Article IX, § 15 of the Colorado Constitution. Two of the municipal governmental plaintiffs claimed that Amendment Two interfered with their home rule powers. All of the governmental plaintiffs asserted that the amendment, if enforced, would expose them to potential liability under the Supremacy Clause of the U.S. Constitution. Id.

64. The Clause provides: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence,” U.S. CONST. art. IV, § 4. Although the U.S. Supreme Court has long interpreted the opening provision, the “Guarantee Clause,” as not justiciable, recent litigation (including Evans) has revived the argument that the Clause should be interpreted to bar anti-gay initiatives such as Amendment Two. For an intriguing analysis of this thesis, see Note, Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court, 62 GEO. WASH. L. REV. 100 (1993).

65. Evans I (Sup. Ct. op.), 854 P.2d at 1272 n.2.

with plaintiffs' equal protection argument that there was a substantial likelihood that the evidence would show that Amendment Two burdened the fundamental rights of an identifiable group — namely, lesbians, gays and bisexuals — by giving state endorsement to private biases against the group. Accordingly, the court concluded, if the plaintiffs were to prove at trial that Amendment Two did indeed constitute such a burden, defendants would lose unless they could prove that Amendment Two was constitutionally warranted under a "strict scrutiny" standard of review — that is, that Amendment Two was the "necessary means" for carrying out a "compelling governmental interest." Finally, the court enjoined the implementation of Amendment Two (originally scheduled to go into effect on or before January 15, 1993) pending determination at trial of its constitutionality.

In assessing the constitutional theories that would provide the most successful litigation strategy, Evans plaintiffs and their counsel chose initially (at least at the preliminary injunction stage) to limit their equal protection argument to the claim that Amendment Two violated the fundamental rights of an identifiable group (lesbians, gays and bisexuals). The strategy was designed to require justification under the most rigorous level of judicial scrutiny, rather than to make the sexual orientation-specific argument that Amendment Two should be subjected to strict scrutiny because it singles out not just any hypothetical group for exclusion from access to the political process, but particularly lesbians, gays and bisexuals. This litigative choice is worth noting especially with regard to the "comparability vs. non-comparability" dimension of the Amendment Two debate as discussed above in part II. The approach reflects plaintiffs' pragmatic decision to avoid a "sexual orientation-conscious" argument in favor of a "sexual orientation-neutral" one. Plaintiffs theorized at the preliminary injunction phase that


67. The court cited the six-part test of Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982), as authority for its assessment of plaintiffs' showing on the motion for preliminary injunction. Rathke requires the moving party first to show, as a threshold requirement, "a clear showing that injunctive relief is necessary to protect existing . . . fundamental rights"; once this element has been established, the plaintiff must also demonstrate: (1) a reasonable probability of winning the case on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) the absence of a plain, speedy, and adequate remedy at law; (4) that the granting of the injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that granting the injunction will preserve the status quo pending a trial on the merits. Evans I (Dist. Ct. op.), 1993 WL 19678, at *3.

68. Under the "fundamental rights" strand of equal protection doctrine, government actions that burden a right deemed "fundamental" by the Court are subjected to "strict scrutiny" irrespective of the characteristics of the people who are burdened. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (right to "travel" or migrate interstate); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (right to vote).

69. See supra note 61.
Amendment Two should be deemed unconstitutional, not because of anything uniquely invidious about bias against gays, lesbians and bisexuals — or even comparably invidious to racial discrimination — but rather, because the singling out of any group (e.g., eyeglass-wearers, truck-drivers, blue-eyed people) in such an initiative would deny that group its right to participate in the political process. For a court to accept this argument of political exclusion, it could reject or ignore entirely the philosophical, political and constitutional dilemma of comparing the injustice of sexual-orientation classifications with that of racial classifications; instead, it could rule for plaintiffs based on the far less controversial premise that the evils of Amendment Two could be analyzed without particular reference to its anti-gay impetus.70

The most likely constitutional path for crafting a “comparability” argument at the Evans preliminary injunction stage would have been to assert that Amendment Two contained a “suspect classification” in its singling out of lesbians, gays and bisexuals for discriminatory treatment by the state.71 In fact, the “suspect classification” argument was proffered by the Evans plaintiffs later in the litigation (both at trial and on appeal). Given the dearth of judicial precedent supporting the theory that sexual-orientation classifications should be regarded as “suspect” under equal protection analysis,72 as well as the historical difficulty of convincing courts that suspect classification doctrine should be expanded to include categories other than race, national origin, and in

70. In fact, plaintiffs’ counsel quite strategically focused their primary energies on the “political participation” rationale, precisely because earlier cases had consistently denied heightened protection to lesbians, gays and bisexuals as a class. Plaintiffs’ counsel reasoned as follows: If earlier courts’ rejection of such protection had relied upon the rationale that lesbians, gays and bisexuals could use their clout in the political process to effectuate their goals, then surely a legislative attempt (such as Amendment Two) to cordon them off from the political process must be viewed as an unconstitutional frustration of potential popular will. Interview with Matthew Coles, co-counsel for plaintiffs, Berkeley, CA, (November 10, 1994).

71. Under the “suspect classification” strand of equal protection doctrine, “strict scrutiny” is applied to classifications based on several characteristics. See, e.g., Korematsu v. United States 323 U.S. 214, 216 (1944) (race); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin). Strict scrutiny is sometimes applied to alienage. See, e.g., Graham v. Richardson, 403 U.S. 365, 372 (1971); but see Ambach v. Norwich, 441 U.S. 68, 72-75 (1979) (describing “political function”/“mid-level scrutiny” exception to strict scrutiny for alienage classifications). Even the emergence of “suspect classification” theory has not served completely to delegitimize all such invidious categorizations; the Korematsu Court, for example, despite its ostensible application of “strict scrutiny,” nevertheless upheld Fred Korematsu’s conviction for violating a World War II military order excluding all persons of Japanese ancestry from designated West Coast areas. See Eugene Rostow, The Japanese American Cases — A Disaster, 54 Yale L.J. 489 (1945); Peter Irons, Justice at War 311-46 (1983).

some cases, alienage, plaintiffs’ strategy in this regard was certainly wise from a pragmatic perspective. Particularly at the preliminary injunction stage, the trial court would most likely have been disinclined to rule for plaintiffs on such a bold theoretical premise; for reasons discussed below, the court’s conditional acceptance of the likely success of a sexual-orientation “suspect classification” argument at a trial on the merits would have required judicial confrontation and dissection of the very same “non-comparability” issues regarding sexual orientation and race that provided the political impetus for Amendment Two itself. Accordingly, plaintiffs’ motion for preliminary injunction excluded the “suspect classification” argument, and the trial court’s ruling did as well.

Instead, the trial court in *Evans* held that Amendment Two burdened plaintiffs’ constitutional right “not to have the State endorse and give effect to private biases.” In so doing, the opinion simultaneously relies upon and distances itself from U.S. Supreme Court precedent involving race. For example, the court first notes with respect to its Fourteenth Amendment “fundamental rights” analysis that, although much of the controlling precedent concerns race, the germane issue is more generally “the history of discrimination.” The court then cites as controlling authority two cases involving racial bias: *Reitman v. Mulkey*, in which the U.S. Supreme Court invalidated a voter-passed amendment to the California Constitution on equal protection grounds; and *Palmore v. Sidoti*, in which the Court sustained an equal protection challenge to a race-based child custody decision.

In *Reitman*, the controversial initiative involved was Proposition 14, which pronounced that property owners had the right to discriminate, on any grounds, in the sale or rental of their real property. Race was not a specifically enumerated, so-called “permissible” ground for

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73. Note the trial court’s explicit (and rather awkward) recognition of plaintiffs’ conservative position on this issue in its ruling on the motion:

Plaintiffs produced evidence that the Amendment was only addressed to claims of discrimination by homosexuals, lesbians, and bisexuals. They did this by the testimony of witnesses who came before this Court and announced, self-declared, if you will, that they were homosexual. And then by saying that neither they or anyone that they knew who were also homosexual are seeking to establish any minority status or quota preference or protected status.


74. *Id.* at *9.

75. *Id.* at *11.

76. *Id.* at *6.

77. 387 U.S. 369 (1967).


79. 387 U.S. at 374.
discrimination in the language of the initiative. The most palpable immediate effect of Proposition 14, however, was to permit such bias by repealing extant state legal prohibitions on racial discrimination in housing and by precluding attempts to pass such legislation in the future.80 The Reitman Court held that Proposition 14 violated equal protection by effectively insulating "the right to discriminate, including the right to discriminate on racial grounds . . . from legislative, executive, or judicial regulation at any level of the state government."81 Moreover, the Reitman Court continued, Proposition 14 accorded state support and ratification to private biases such that racial discriminators could now invoke the mantle of constitutional authority — and not simply private choice — in support of their biased decision-making.

Similarly, in Palmore, the Court relied upon this rationale in invalidating a race-based award of custody to a white father over a white mother who had divorced him and subsequently married an African-American. Rendering its custody decision in favor of the father, the trial court had found that "despite the strides that have been made in bettering relations between the races in this country, it is inevitable that [the daughter] will, if allowed to remain in her present situation, with the mother and African-American step-parent, . . . suffer from the social stigmatization that is sure to come."82 The U. S. Supreme Court reversed and noted in a rationale quite similar to that of the Court in Reitman:

There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. [The] effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.83

Thus, in both Reitman and Palmore, as interpreted by the trial court at the Evans preliminary injunction stage, the unconstitutionality of the action in question hinged upon an attempt to use state mechanisms to give effect to private biases. The Evans court’s granting of

80. Id.
81. Id. at 377.
82. 466 U.S. at 433-34.
83. Id. at 434 (emphasis added).
plaintiffs' motion for preliminary injunction was also premised upon an interpretation of Amendment Two as giving effect to private biases. While the Reitman and Palmore decisions were used to construct the Evans holding, the court made clear that its analysis did not rest upon any notion of comparability between the Reitman and Palmore racial classifications and the sexual-orientation classifications of Amendment Two, beyond the similarity of their attempts to ratify private prejudices.

B. Evans v. Romer ("Evans I"): The Colorado Supreme Court Decision

On appeal for the first time to the Colorado Supreme Court, Evans v. Romer ("Evans I") focused on one issue: the validity of the "access to the political process"/fundamental rights argument accepted by the court below in granting plaintiffs' motion for preliminary injunction. At this stage, defendants/appellants again attempted to use a "non-comparability" argument in support of their position; they argued that the "access to the political process" claim should qualify for strict scrutiny under the Equal Protection Clause "'only when the political process has been restructured to place unusual burdens upon racial groups, or in the most expansive sense, [upon politically powerless groups].'" If thus construed, the "access to the political process" claim would be viable only for challenges to laws that singled out traditionally suspect classes — a threshold determination neither argued by plaintiffs nor accepted by the court below. Again, defendants/appellants aimed ultimately to rely upon the argument that the sexual-orientation classifications of Amendment Two were in no way comparable to the invalidated racial classifications of Reitman and Palmore, and, accordingly, to justify anti-gay initiatives as subject only to "rational basis" analysis under the Equal Protection Clause.

In Evans I, the court explicitly rejects defendants/appellants' "non-comparability" thesis and agrees with the trial court that the right of access to political participation is of fundamental importance, regardless of whether the claim is made by a racial minority group or

85. Evans I (Sup. Ct. op.), 854 P.2d at 1283.
86. In equal protection clause jurisprudence, "rational basis" scrutiny is used to assess the constitutionality of laws that neither infringe upon fundamental rights nor embody "suspect" or "quasi-suspect" classifications. According to the "rational basis" test, such laws will be upheld so long as they are rationally-related to a legitimate governmental interest. See, e.g., Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483 (1955); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
any group "comparable" to a racial minority. In an opinion considerably more detailed than the trial court's reasoning below, the court states:

The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time. . . . [T]he Equal Protection clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny.87

In so holding, the court analogizes defendants/appellants' rationales in defense of Amendment Two not only to the rationales repudiated in Reitman and Palmore, but also to a host of political exclusion cases concerning reapportionment,88 minority party rights,89 direct restrictions on the exercise of the franchise,90 and restrictions on the ability of identifiable groups to have legislation implemented through normal political processes.91 The court notes in particular that many of its cited political exclusion cases do not involve claims of group exclusion on the basis of race.92 Moreover, the court explains that Gordon v. Lance93 and Hunter v. Erickson94 make clear "the principle that a 'State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any groups smaller representation than another of comparable size,' . . . does not apply simply to racial minorities."95 Finally, the court concludes that Amendment Two represents just such a state-implemented disadvantage:

Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in Hunter, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," . . . Amendment 2 singles out that class of

87. Evans I (Sup. Ct. op.), 854 P.2d at 1276 (citations and footnotes omitted).
89. The court cites as among these cases, Williams v. Rhodes, 393 U.S. 23 (1968). Evans I (Sup. Ct. op.), 854 P.2d at 1276.
92. Evans I (Sup. Ct. op.), 854 P.2d at 1282-83.
93. 403 U.S. 1 (1971).
95. Evans I (Sup. Ct. op.), 854 P.2d at 1283 (quoting Hunter, 393 U.S. at 393).
persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden — no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "the concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." . . .

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." . . . Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . [a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.66

Because defendants/appellants had not articulated any "compelling governmental interests" to withstand strict scrutiny at the preliminary injunction stage, the Evans I court affirmed the trial court's ruling and, accordingly, provided that the strict scrutiny standard should govern at trial.97

Thus, through the pre-trial phases of Amendment Two, plaintiffs' success depended in large part on avoiding entirely the "comparability" question as a basis for legal decision-making. So long as plaintiffs portrayed the central constitutional shortcomings of Amendment Two as essentially irrelevant to — or at least severable from — its anti-gay underpinnings, they could avoid a jurisprudential confrontation of the controversial question that they had so clearly lost in the political arena: namely, is anti-gay bias comparable to racial bias for legal purposes? Are comparisons between sexual-orientation classifications and racial classifications useful in reaching this determination, or is analogical thinking in this regard yet another example of "obscuring the importance of race"?

96. Evans I (Sup. Ct. op.), 854 P.2d at 1285 (citations and footnote omitted).
97. Evans I (Sup. Ct. op.), 854 P.2d at 1286.
"CIVIL RIGHTS AGENDA"

C. Evans II - The Trial of Amendment Two

1. "Non-Comparability" and Defendants' "Compelling State Interests"

In November 1993, Judge Jeffrey Bayless presided over the trial of Amendment Two in Evans II, after the Colorado Supreme Court's affirmance of his decision to grant plaintiffs' motion for preliminary injunction in the Evans I litigation. In accordance with the state Supreme Court's articulation of the requisite "strict scrutiny" standard to be applied to the abrogation of plaintiffs' fundamental right "to participate equally in the political process," defendants faced the burden at trial of showing that Amendment Two was a narrowly tailored or necessary means for promoting a compelling state interest. Defendants advanced — and the court heard testimony regarding — not one but six state interests that they argued were sufficiently "compelling" to warrant upholding Amendment Two:

1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of our children.99

The trial court ultimately rejected as non-compelling all of the above-asserted interests, except for familial and religious privacy; it further concluded that, even given the compelling significance of religious and familial freedoms, Amendment Two was not sufficiently narrowly tailored to protect those interests in the least restrictive manner possible.100

Although, as noted above in sections III.A. and III.B., the viability of plaintiffs' argument for strict scrutiny of Amendment Two was premised upon avoidance of a theory of comparability between racial classifications and sexual-orientation classifications, defendants' alleged "compelling state interests" resurrected at trial many aspects of the "non-comparability" dogma so successfully advanced in the electoral campaign leading to Amendment Two's passage. Implicit in the six "justifications" enumerated above was defendants' insistence that the
boundaries of gay, lesbian and bisexual rights, unlike the rights of racial minorities, are contingent upon the will, moral beliefs and intangible tastes of the non-gay majority; that sexual-orientation discrimination (again, unlike racial bias) is warranted to protect majoritarian values and allay majoritarian fears; and that anti-gay legislation need not meet the highest level of scrutiny and suspicion accorded to race-based legislation.\(^\text{101}\)

Again, as Amendment Two proponents had accomplished so subtly in the political arena, the Evans II defendants marshalled evidence at trial to support a construct of sexual-orientation discrimination as radically different from (and therefore less reprehensible than) racial discrimination; in doing so, defendants sought to foster the impression that their interests lie not so much in targeting gays, lesbians and bisexuals for mistreatment, but rather in protecting both the heterosexual majority and "real" suspect classes (e.g., African-Americans) from the dilutive effects of an expanded, multi-faceted "civil rights agenda." This litigative strategy, while ultimately ineffective in terms of results in the case at hand, nevertheless sharply affected the nature and direction of trial testimony, as well as the reasoning of the trial court's opinion on the merits. Thus, while the trial court judge rejected defendants' arguments that there was a "compelling" need to sustain Amendment Two, at a number of points he seemed implicitly to sanction defendants' discursive framework of "non-comparability" by failing to question its ideological underpinnings and legal consequences. It is this dimension of the trial court disposition of Amendment Two — the subtext of "non-comparability" — that I wish to explore below.

Consider, as an initial example, the trial court's treatment of defendants' first alleged "compelling interest" — that Amendment Two was necessary as a deterrent to "factionalism." Defendants argued at trial:

Amendment 2 does not purport to serve any interests outside of Colorado's borders; rather, it simply seeks to ensure that the deeply divisive issue of homosexuality does not fragment Colorado's body politic. Amendment 2 eliminates city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. As a matter of law, therefore, Amendment 2 serves a compelling state interest by ending political fragmentation and promoting statewide uniformity on this issue.\(^\text{102}\)

\(^{101}\) One of the most startling illustrations of these assumptions was the above-quoted testimony at trial of Professor Harvey C. Mansfield of Harvard University, supra note 59 and accompanying text: "Disapproval of gays is not like racial or gender discrimination; there is nothing wrong with being black or being a woman, but it is perfectly reasonable to think there is something wrong with being gay." (emphasis added).

\(^{102}\) Evans II (Dist. Ct. op.), 1993 WL 518586, at *2 (quoting Defendants' Trial Brief, pp.
In labeling the question of gay, lesbian and bisexual rights as merely a "deeply divisive," "political" issue — a topic on which the cosmetic balm of "statewide uniformity" is presumptively preferred over the ragged fray of "fragmentation" — defendants implicitly located sexual-orientation discrimination outside the normative bounds of validly proscribable behavior. Anti-gay bias is transformed into a matter of "political" preference rather than legal principle — an issue of personal predilection rather than "civil rights." Defendants would have been hard pressed to argue that, by comparison, statewide statutory protections for the rights of racial minorities could be abolished, because the "statewide uniformity" of no rights would be preferable to the "political fragmentation" of disagreement over "divisive" issues of race; however, defendants clearly had no problem in advancing the view that the rights of sexual minorities are expendable — and unproblematically so — as the cause of "factionalism." Thus, defendants' first "compelling interest" invited the court to adopt a construct of "factionalism" that would effectively eclipse a normative evaluation of the invidiousness of sexual-orientation discrimination.

Notwithstanding the subtextual ideological referents of defendants' argument, the trial court's opinion responded in a formalistic, literal fashion. Cursorily rejecting defendants' cited cases, the trial court concluded:

As defined by defendants, "factionalism" means "political fragmentation" over a controversial political issue. Defendants therefore define a difference of opinion on a controversial political question as factionalism. . . . The "factionalism" which defendants here argue about [is] found to be a great strength of the American political process in the cases cited.

Defendants' own authorities encourage the "competition of ideas" with "uninhibited, robust and wide-open" political debate. Defendants seek to deter those very things as being "factionalism." The history and policy of this country has been to encourage that which defendants seek to deter. Defendants' first claimed compelling state interest is not a compelling state interest. The opposite of defendants' first claimed compelling interest is most probably compelling.104

While the trial court's dissection of this claimed "compelling inter-
"est" is a credible and logical response to the issue as framed in defendants' terms, the court missed the opportunity to unravel defendants' superficially neutral framework to reveal and analyze the inherent anti-gay biases beneath. If the trial court conceded, as it seemed to, defendants' premise that gay, lesbian and bisexual rights are merely a "controversial political question," then it also implicitly endorsed the notion that such rights are extraneous to (and perhaps incompatible with) a true "civil rights agenda." I would argue that defendants' "factionalism" argument rested not only upon the view that the cause of gay, lesbian and bisexual rights is bitterly divisive and therefore outside the purview of legal protection, but also upon the manipulative rhetorical message that gay, lesbian and bisexual rights are "non-comparable" and therefore inferior to the rights of racial minorities and women. To counter such a message, the trial court might well have questioned the underpinnings of — rather than simply maneuvered within — defendants' framework by assessing the applicability of the "factionalism" argument to other, potentially "comparable" forms of group-based discrimination. For example, the trial court might have rejected the "factionalism" argument not simply on the grounds that "uninhibited, robust, and wide-open" debate about homosexuality exemplifies the kind of disagreement that is a "great strength of the American political process," but by stating unequivocally that the eradication of sexual-orientation discrimination — like the elimination of racial bias — is an equality principle so important that it cannot be bargained away in the legislative/initiative process, because a majority of voters happen to consider it too "divisive" and "political."

A more salient illustration of defendants' strategy to obstruct possible comparisons between racial bias and anti-gay bias may be found in defendants' third asserted "compelling interest": "preserving the ability of the State to remedy discrimination against suspect classes." Although, for reasons more fully discussed in section II,


106. I do not disagree that "uninhibited, robust, and wide-open" debate about sexual orientation, race, and myriad other issues is a "great strength of the American political process"; rather, my argument is that such a response is in many ways beside the point because it leaves begging the question of the trial court's valuation of antidiscrimination protections for gays, lesbians and bisexuals as a constitutional norm.

107. Such a rationale could properly invoke the reasoning of Reitman and Palmore, discussed supra in footnotes 77-83 and accompanying text, for the proposition that claims of political "divisiveness" and "factionalism" cannot be used to mask and justify the indulgence of private biases. Both the Reitman and Palmore decisions garnered particular moral force from their specific repudiations of racial bias; similarly, the Evans II trial court could have used defendants' "factionalism" argument as an opportunity to repudiate sexual-orientation bias.

Amendment Two proponents seemed highly (and perhaps preposterously) unlikely protectors of the rights of "traditional" suspect classes, defendants devoted considerable effort at trial to advance the following arguments: (1) "there are insufficient fiscal resources available to the state to add another group to the rolls of those protected by existing civil rights laws or ordinances"; (2) "the addition of gays to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories"; and (3) "enforcement of civil rights protections for gays could result in a dilution of governmental resources allocated to protect those traditional civil rights." In this manner, defendants raised the issue of "non-comparability" between gay, lesbian and bisexual rights and "real" or "traditional" (i.e., race-based) civil rights by suggesting (often through testimony offered by witnesses who were racial minorities) that gay rights advocates would both tarnish the image of "historic civil rights categories" and deplete actual monetary resources as well.

Again, the trial court responded to defendants' "compelling interest" not by debunking the manipulative nature of its underlying message, but by rejecting defendants' testimony in a literal fashion. Rather than straightforwardly addressing defendants' premise that "traditional" or "historic" civil rights categories represent a closed universe (whether for legal, moral, or fiscal reasons) from which gays, lesbians and bisexuals are presumptively excluded, the court again reasoned primarily within the parameters of defendants' framework by underscoring plaintiffs' testimony that the addition of sexual orientation to antidiscrimination laws would not cause enormous administrative inconvenience and fiscal burdens. The court cited, for example, the testimony of officials from Denver and from the State of Wisconsin regarding those entities' sexual orientation-inclusive antidiscrimination provisions. The Denver officials asserted that the addition of sexual orientation had not detracted from the enforcement of Denver's city ordinance; a representative from the Civil Rights Bureau of the State of Wisconsin, the first state to enact statutory prohibitions against sexual-orientation bias, testified that sexual-orientation complaints and cases did not occupy a significant percentage of the Civil Rights Bureau's caseload. Although the court did express "a very real question as to


110. As noted in the trial court opinion, defendants' proffered witnesses included former members of the Colorado City Rights Division and Colorado Civil Rights Commission, and Professor Joseph Broadus of the George Mason University School of Law. Id.

111. Id. at *5-6 (complete transcript of testimony on file with author).
whether fiscal concerns may rise to the level of a compelling interest, it anchored this caveat in its “fundamental right of participation in the political process” theory, rather than on the premise that sexual-orientation discrimination — no less than racial discrimination — cannot be rationalized away as too expensive or administratively problematic to eliminate.

The remaining “compelling interests” cited by defendants at trial similarly evinced the rhetoric of “non-comparability” as a strategy for devaluing gay, lesbian and bisexual rights as a credible civil rights issue; despite its rejection of essentially all but one of these cited “interests” on the merits, the trial court in many respects ratified defendants’ “non-comparability” arguments by failing to question their assumptions. With respect to defendants’ claim that Amendment Two was necessary to preserve the integrity of the State’s political functions from “militant gay aggression,” a “homosexual agenda,” and coercion to accept sexual orientation as a “protected status,” the court simply responded that defendants had presented insufficient evidence for such an assertion: “[T]he evidence does not persuade the court that absent Amendment Two, homosexuals and bisexuals are going to be found to be a suspect or quasi-suspect class and afforded protections based on those classifications.” The court might reasonably have explored defendants’ argument further by asking questions such as: What is “militant gay aggression” and how does it threaten the integrity of state political processes? What is a “homosexual agenda” and how does it threaten a “traditional” civil rights agenda? Why is the notion of “protected status” acceptable for the categories of race and gender but not sexual orientation? Finally, and most important — do racial bias and anti-gay bias share characteristics which should render them comparably invidious under the law?

112. Id. at *7.
113. Id. at *4.
114. Id. at *5.
115. Defendants’ fifth and sixth asserted “compelling interests” — which were also rejected by the trial court — could be subjected to similar criticism and analysis. The fifth “interest” — the prevention of government from subsidizing the political objectives of a special interest group — is rejected simply as “unclear” in its logic and unsupported by “any credible evidence or any cogent argument,” Evans II (Dist. Ct. op.), 1993 WL 518586, at *8. The court, however, comments briefly and cryptically that defendants’ “strongest argument” on this claim was:

For example, if a landlord is forced to rent an apartment to a homosexual couple, the landlord is being forced to accept, at least implicitly, a particular ideology. (Defendants’ Trial Brief, p. 69).

Id. The court’s cursory assessment of this argument as “strong,” with no further analysis or explanation, is a perplexing bit of dictum on a complex and critical issue in housing discrimination law. The court might have explored the question considerably more fruitfully if it had compared the validity of defendants’ argument with similar defenses raised in housing discrimination cases in the racial context.
On a final note, it is worth examining the manner in which the court accepted as sufficiently compelling defendants' articulated interest in "the prevention of governmental interference with personal, familial and religious privacy." Although defendants' evidence at trial in support of this claimed interest specifically invoked anti-gay biases, again the court used the neutral standard of the "right to participate in the political process" as a countervailing claim. It might have been valuable to analogize defendants' claim of religious freedom in this context with Bob Jones University's claim of religious freedom as a justification for racial discrimination in *Bob Jones University v. U.S.* In that case, the U. S. Supreme Court held that private schools that utilize racially discriminatory policies (even policies asserted to be "necessary" as a matter of religious doctrine) could not qualify as exempt under the tax code. Instead, the court's disposition of the argument, although instrumentally favorable to plaintiffs' equality claims, nevertheless begged the question of whether anti-gay bias and other forms of group bias (particularly racial bias) are evils comparably repugnant under the equal protection clause.

2. Questions of "Non-Comparability" and Plaintiffs' Claim of Suspect or Quasi-Suspect Status

Despite the Colorado Supreme Court's acceptance in *Evans I* of plaintiffs' "fundamental rights" argument as grounds for strict scrutiny of Amendment Two, plaintiffs decided to argue at the *Evans II* trial alternative grounds for heightened scrutiny — namely, that classifications based on sexual-orientation (such as Amendment Two) should be considered "suspect," or at least "quasi-suspect," and therefore presumptively invalid. As a final alternative, plaintiffs argued at trial that Amendment Two should not withstand even "rational basis" review, the least rigorous standard of scrutiny. In support of these claims,
plaintiffs offered considerable testimony at trial regarding the pertinence of traditional indicia of "suspect"-ness to experiences of sexual-orientation discrimination; in addition, plaintiffs sought to persuade the court that the pervasiveness, arbitrariness and irrationality of anti-gay prejudice is comparable to the bias experienced by groups historically regarded as "suspect" — particularly racial minorities. The presentation of such testimony offered the court an opportunity to assess and address directly and in depth the history and nature of sexual-orientation discrimination as a barrier to equality under the 14th Amendment. Such a discussion might fruitfully have included not only a survey of lower court precedent on the doctrinal question of whether or not sexual-orientation classifications should be regarded as "suspect" or "quasi-suspect," but a more nuanced analysis drawing upon relevant recent writings in equal protection theory.119

Instead, perhaps because plaintiffs' "fundamental rights" theory had been the original and central basis for constitutional challenge in both *Evans I* and *Evans II*, the trial court accorded little attention to their later argument for a finding of "suspect" or "quasi-suspect" status. In evaluating the "suspect" classification argument, the trial court applied factors drawn from *San Antonio School District v. Rodriguez*:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.2

The court also cited standards enunciated in *High Tech Gays v. Defense Industrial Security Clearance Office*.21 In *High Tech Gays*, the Court of Appeals for the Ninth Circuit had rejected the district court's finding that sexual-orientation classifications warranted "quasi-suspect" status under the equal protection clause:

To be a "suspect" or "quasi-suspect" class, homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right.22

Based on these criteria, the *Evans II* court briefly evaluated the


120. 411 U.S. 1, 28 (1973).

121. 895 F.2d 563 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990).

122. *Id.* at 573 (citations omitted).
testimony of a number of plaintiffs' witnesses, including scientists, psychiatrists, historians, legal scholars, and social scientists specializing in research on sexual orientation. Although the court concluded that plaintiffs had adequately demonstrated that gays, lesbians and bisexuals had suffered a history of discrimination, the court made no determination on the issue of "immutability" and rejected plaintiffs' claim of "political powerlessness." The court observed:

[F]ailure to prevail on an issue in an election such as Amendment Two is not a demonstration of political powerlessness. Indeed, in the case of the vote on Amendment Two, the evidence supports a finding of the political power of gays and bisexuals. According to the figures presented to the court, more than 46% of Coloradans voting voted against Amendment Two. Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness. The President of the United States has taken an active and leading role in support of gays, and an increasing number of states and localities have adopted gay rights protective statutes and ordinances such as the three city ordinances in the present case. Because the gay position has been defeated in certain elections, such as Amendment Two, does not mean gays are particularly politically vulnerable or powerless. It merely shows that they lost that election. No adequate showing has been made of the political vulnerability or powerlessness of gays.

The court concluded that a finding of political powerlessness hinged not upon the size or lack of clout of the group itself, but on its ability to garner support with other communities; it noted that gays, lesbians and bisexuals, "though small in number are skilled at building coalitions which is a key to political power." At best, such a conclusion regarding "political powerlessness" is problematic, for at least two reasons. First, the court's assessment of gays', lesbians' and bisexuals' "coalition-building" influence as a key to political power begs the question of the independent validity or invalidity of a rights-restrictive law such as Amendment Two; if it is true — as the court implicitly assumes — that a correctly functioning, majoritarian-driven initiative process will eventually reflect the rights-restorative goals of sexual minorities and their allies (a dubious proposition, at best), then the brunt of responsibility falls upon gays, lesbians and bisexuals to "do the job"

123. The court declined to rule on the question of immutability on the grounds that "[t]he ultimate decision on 'nature vs. 'nurture' is a decision for another forum, not this court, and the court makes no determination on this issue." Evans II (Dist. Ct. op.), 1993 WL 518586, at *11. For a provocative argument that "immutability" has only sporadically figured in the determination of "suspect classifications" and should not be a basis upon which gays, lesbians and bisexuals seek such status, see Halley, Argument from Immutability, supra note 119, at 567-68.


125. Id.
of enforcing rights to which they are presumably entitled in the first instance. Second, so long as sexual minorities (or, in fact, any minority group) constitute such a small percentage of the overall voting population, they will most likely have to endure a long series of losses in the political arena before their much-touted skills at coalition-building come to fruition. In rejoinder to Judge Bayless's "compliment" regarding the statistically disproportionate power of gays, lesbians and bisexuals in the Amendment Two campaign, one might respond that a loss of rights by a margin of only four percentage points is a loss nonetheless.126

Finally, and particularly pertinent with regard to questions of comparability, one might note that the "coalition-building" rationale articulated by the trial court has not served in other cases of "political powerlessness" for purposes of qualifying for "suspect classification" status. In contrast to the Evans II trial court's unrealistic assumptions regarding the political power of gays, lesbians and bisexuals as sufficient to withstand majoritarian evisceration, courts generally assume that the "political powerlessness" of systematically disadvantaged groups, such as African-Americans and Latinos, is a pervasive historical phenomenon rather than an ad hoc assessment of electoral vulnerability in a particular campaign.127 By analyzing the analogical possibili-

126. Indeed, the Evans II trial court fails to recognize that there is a salient difference between a concept of "political powerlessness" encompasses groups that systematically subordinated in the political process regardless of the outcome of a particular election, and a concept of "political powerlessness" that hinges upon how badly a discrete group happens to be outvoted in a particular election relative to its size in the overall population. Even if one were to embrace the Evans II trial court's use of the latter, narrower standard of "political powerlessness" as "population/percentage points politics," one could argue that lesbians, gays and bisexuals, even as the (barely) losing side in the Amendment Two battle, were surely still the "politically powerless" side. As the former Justice Powell noted:

[In] one sense, any group that loses a legislative battle can be regarded as both "discrete" and "insular." It is discrete because it supported or opposed legislation not supported or opposed by the majority. It is insular because it was unable to form coalitions with other groups that would have enabled it to achieve its desired ends through the political process.

Lewis Powell, Carolene Products Revisited, 82 COLUM. L. REV. 1087, 1087 (1982). Judge Bayless's opinion was premised upon the conclusion that lesbians, gays and bisexuals must be politically powerful if "only 4%" of the population could garner the support of an additional 42% in the Amendment Two vote. A more plausible reading of "political powerlessness" lies, I think, in the reasons why a particular group over time has been disadvantaged in or systematically excluded from the political process.

127. See generally Milner S. Ball, Judicial Protection of Powerless Minorities, 59 IOWA L. REV. 1059 (1974); Robert Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE L.J. 1287 (1982). Bruce Ackerman has been especially critical of a crass, interest-group driven view of "political powerlessness":

We must repudiate [the] reduction of the American Constitution to a simple system of pluralistic bargaining if we are to reassert the legitimacy of the court's critical function. Although the bargaining model captures an important aspect of American politics, it
ties in this regard, the *Evans II* trial court might not have rejected the "political powerlessness" argument as summarily as it did.\textsuperscript{128} As such, the trial court opinion appeared driven more by an unspoken assumption of "non-comparability" between sexual orientation and other "suspect" and "quasi-suspect" categories than by a willingness to explore thoughtfully potential similarities among sexual orientation, race and gender.\textsuperscript{129}

\section*{IV}

\textbf{COMPARISONS AND COALITIONS: MOVING WITHIN AND BEYOND THE RHETORIC OF ANALOGY}

We compare the issues about which we have the greatest certainty with those that baffle us more. The decision to liken one instance to another, or to distinguish them, turns on a judgment of what differences and similarities are most significant to the moral beliefs at stake.

— Roberto Unger\textsuperscript{130}

We live in a competitive and comparative society, so it seems natural that writers of one group would use the experiences of another to illustrate a point. But whether writers are Hispanic, female, Jewish, disabled, or gay, they are bound by an ability to use the black experience as a bottom line. Why? Is it carelessness, thoughtfulness, or intellectual laziness? Has the black experience been so vivid that it stands out in everyone's mind? From where I sit as an African American, I am often angered and resentful of the comparisons made, mainly because they place

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\textsuperscript{does not do justice to the most fundamental episodes of our constitutional history. We make a mistake, for example, to view the enactment of the Bill of Rights and the Civil War Amendments as if they were outcomes of ordinary pluralist bargaining. Instead, these constitutional achievements represent the highest legal expression of a different kind of politics — one characterized by mass mobilization and struggle that [yielded] fundamental principles transcending the normal processes of interest group accommodation. \\
\textsuperscript{128} For further elaboration on the dimensions of a "political powerlessness" thesis for gays, lesbians and bisexuals, see generally Testimony of Professor Kenneth S. Sherrill, *Evans II* (Dist. Ct. op.), 1993 WL 518586, at *11 (full transcript on file with the author).
\textsuperscript{129} The court also rejected plaintiffs' alternative arguments for "quasi-suspect" status and for invalidation of Amendment Two under the "rational basis" test. With regard to the viability of sexual-orientation classifications as "quasi-suspect," the court held that plaintiffs had not defined with sufficient specificity the requirements for such status and their applicability to gays, lesbians and bisexuals as a group. The court also declined plaintiffs' request for rejection of Amendment Two under the "rational basis" test, on the ground that rational basis was inapplicable to Amendment Two, given that the Colorado Supreme Court in *Evans I* had pronounced the appropriate level of review to be strict scrutiny. *Evans II* (Dist. Ct. op.), 1993 WL 518586, at *12.
\textsuperscript{130} \textit{Roberto M. Unger, Knowledge and Politics} 258 (1975).
\end{flushright}
blacks in discussions where we don't belong, and often make unwar-
ranted implicit assumptions about black progress.
— Julianne Malveaux

My goal in offering the above assessment of the Evans I and Evans II litigation, as well as the political battle for Amendment Two's passage that preceded it, is neither to re-script "suspect classification" theory nor to argue for a conflation of the categories into which historically disadvantaged minorities of many and diverse kinds have been shunted. As Malveaux and others have noted, simplistic and ahistorical comparisons can be more insulting than illuminating, and sometimes serve as little more than a "rhetorical prop" for those who "have no use for Black people except to refer to them as the worst case at a pity party." Moreover, as the history of the Amendment Two litigation amply reveals, comparisons also reflect what Unger might call the "bafflement" (or, one might less kindly term it, ignorance) of those who tend to substitute facile analogies for true understanding of and empathy with a complex and vastly different (and therefore perhaps frightening) experience. Rather, I offer the example of Amendment Two and the Evans I/Evans II litigation to argue that African-Americans and other groups in the so-called "traditional" civil rights agenda may need to reclaim the power of analogy even as we seek to critique and distance ourselves from its excesses. Even as we seek to prevent others from "stealing the center," i.e., the antiracist commitment, of the civil rights agenda, we would benefit greatly from sharing that center with others persistently relegated to the periphery — and those others include the victims not only of racism/white supremacy, but also of sexism, classism and homophobia. Such a multi-pronged approach to formulating a new "civil rights agenda" would involve the hard work of confronting racism in gay, lesbian and bisexual communities, as well as homophobia in racially diverse communities — in other words, a concerted commitment to speaking out about the perhaps ineliminable differences that may permanently relegate us to different and unique "categories" in social relations, in politics, and in legal theory.

132. Id. at 130.
133. Grillo & Wildman, supra note 20, at 402.
134. While acknowledging that the African-American community has continuing problems with sexism and homophobia, and the gay community has problems with racism and sexism, Judge Henderson still urges that the groups "move beyond mere tolerance to solidarity. We must find common ground and recognize the commonalities of our experiences." Henderson, supra note 37, at 26. Borrowing from the words of Harvey Milk, Henderson calls upon African-American heterosexuals to "come out" for gay rights, just as white civil rights activists "came out" for African-Americans during the 1960s. Id. at 27.
this approach would also entail acknowledging the power of analogy, empathy and coalition, for purposes of combating the many mainstream efforts to dismantle any broad-based “civil rights agenda” and to distance minority groups from one another.

At this point, let me return briefly to the “analogy” problem, or “same as” dilemma, as so perceptively articulated by Grillo and Wildman in the essay quoted in the introduction to this article. They note (and one might insert, for purposes of this discussion, the respective terms “heterosexism” or “sexual orientation” for their use of the terms “sexism” or “gender”):

Comparing sexism to racism perpetuates patterns of racial domination by marginalizing and obscuring the different roles that race plays in the lives of people of color and of whites. The comparison minimizes the impact of racism, rendering it an insignificant phenomenon — one of a laundry list of -isms or oppressions that society must suffer. This marginalization and obfuscation is evident in three recognizable patterns: (1) the taking back of center-stage from people of color, even in discussions of racism, so that white issues remain or become central in the dialogue; (2) the fostering of essentialism, so that women and people of color are implicitly viewed as belonging to mutually exclusive categories, rendering women of color invisible; and (3) the appropriation of pain or the denial of its existence that results when whites who have compared other oppressions to race discrimination believe that they understand the experience of racism. Grillo and Wildman, see in discussions of comparability the dangers of false empathy, false analogy, and ultimately false consciousness. They conclude: “Analogies offer protection for the traditional center.”

In the context of the Amendment Two discussion and any attendant political or legal consideration of the comparability of sexual-orientation discrimination with race/sex discrimination, the concern would be that issues of heterosexual dominance could silently “steal the center” of the debate. Consistent with this observation, many objections have been raised that gays, lesbians and bisexuals “steal” attention, symbolism, strategies, jobs, hiring goals and priorities, avenues for redress, and

135. I am aware that this suggested conceptual substitution of the category of sexual orientation for the category of gender might itself be criticized as an example of the fallacious and essentialist excesses of “comparability.” Still, I find it to be a useful method for inverting (and subverting) traditional assumptions about the “non-comparability” of race, gender and sexual orientation. For a discussion of the value of race-conscious “inversion,” see Margaret M. Russell, Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice, 43 HASTINGS L.J. 749, 762-63 (1992) (discussing Patricia Williams’s use of “race-switching” techniques to illustrate unspoken racial biases in public perceptions of the Bernhard Goetz case).

137. Id. at 403.
even references from African-American politics and culture.\textsuperscript{138} From a progressive antiracist and feminist perspective, these are indeed serious concerns. Feminist and critical race theorists have observed generally — though not in the context of sexual orientation — that questions of categorization and comparability are fraught with the potential for distortion and misuse. Kimberlé Crenshaw, for example, notes:

According to the dominant view, a discriminator treats all people within a race or sex category similarly. Any significant experiential or statistical variation within this group suggests . . . that the group is not being discriminated against. . . . Race and sex, moreover, become significant only when they operate to explicitly disadvantage the victims; because the privileging of whiteness or maleness is implicit, it is not perceived at all.\textsuperscript{139} According to this view, the conflation of categorical differences involved in “lumping together” what are, in many ways, very different (albeit overlapping) experiences of subordination may itself give the discriminator a tool for deflecting the significance of any one type of discrimination. For example, the “model minority” stereotypes of middle-class, second- or third- generation Asian-Americans may be held up by the discriminator to “disprove” the argument that Asian immigrants are victims of racism; the hiring of a heterosexual African-American female may be used to deflect criticisms of discrimination against the gay (or straight) African-American male; the promotion of a white female may be used to deflect accusations that the lesbian Latina has been unfairly treated; and so on.

Finally, as feminist and critical race writers have noted, the “comparability” question raises the problem of essentialism and false universalities. The anti-essentialist critique is based on the view that “Oppression-With-A-Capital-‘O’” and “Discrimination-With-A-Capital-‘D’” are terms of contested meaning, and that a healthy dose of self-criticism is necessary in trying to make any generalizations about any group’s experiences. In this regard, consider the advice of Angela Harris, who argues against not only false universalities, but also against the

\textsuperscript{138} See generally Malveaux, supra note 131; Julianne Malveaux, Blacks and Gays — It’s Not the Same, in Sex, Lies, and Stereotypes: Perspectives of a Mad Economist 132 (1994); Other examples of the kind of cultural appropriation to which I refer are titles such as: Why Martin Luther King, Jr. Is a Gay Rights Hero, see supra note 8 and accompanying text, and Fear of a Queer Planet: Queer Politics and Social Theory (Michael Warner ed., 1993). (the latter title is an allusion to the rap album by Public Enemy entitled Fear of a Black Planet (Columbia Records 1990)).

reification involved in the very process of categorization. Harris urges that we make our categories "explicitly tentative, relational, and unstable," and "that to do so is all the more important in a discipline like law, where abstraction and 'frozen' categories are the norm."140

I raise these critiques in discussing the "comparability" question in the race/sexual-orientation debate for several reasons. First, I think they are wise and well-taken points about the pitfalls of essentialism and false analogies. Within progressive coalitions — especially across boundaries of race, gender and sexual orientation — we would do well to strive to avoid the dangers that these criticisms identify. But I raise these points also to emphasize the substantive ethical and political differences between a progressive "non-comparability" critique and what I see evolving as a destructive and very different strand of "non-comparability" argument in public policy and legal debate. This second strand of the "non-comparability" argument — so prevalent in the anti-gay rights movement — is part of a "wedge" agenda of the extreme political right in this country. The goal of the extreme right in this regard is to use all arguments against comparability in furtherance of the diminution and trivialization of not only gay/lesbian/bisexual rights, but all broadly-based notions of civil rights. Under the guise of concern for the protection of the rights of racial minorities, anti-gay rights activists such as Lou Sheldon and the Traditional Values Coalition, seek to divide diverse communities of racial and sexual minorities and convince them that they share nothing in common. Building on the animosity generated by accusations that gays, lesbians and bisexuals are "stealing the center" of the civil rights debate away from "legitimate" minorities, anti-gay rights activists have created an opening for prejudice and intolerance to flourish.

In light of these developments, the string of anti-gay victories thus far (even given the affirmance of Amendment Two's invalidation by the Colorado Supreme Court) convinces me that progressives need to revisit questions of "non-comparability" with the knowledge that their answers have vastly different implications, depending on the legal and political contexts in which they are raised. Despite the imperfections of analogical thinking, we need to work harder to build on the connections among all kinds of group subordination to create an expansive and inclusive civil rights agenda. Such an effort would incorporate awareness of the hazards of false categorization and false comparisons into an overall goal of broad-based coalition.

Those who wish to fight against the invidiousness of both racial

bias and sexual-orientation discrimination should not have to “rank” or choose between them; in my view, they need not even view their convictions as “two” separate struggles. Perhaps the most perceptive observations on this point have emerged from communities of gays, lesbians and bisexuals of color — those who stand at the intersection of both kinds of discrimination. Notes one leader in the African-American gay, lesbian and bisexual community:

[T]he conservative groups today striving to pit [us] against gays are composed of the same people who opposed civil rights efforts thirty years ago. It is imperative that blacks remember that these groups didn’t want us to integrate their schools or live in their neighborhoods, . . . . The rhetoric that the Christian right uses against gays today is no different from the racist tactics they used against blacks in the 1960’s. We must remember our history.

This last point, I think, is quite a valuable one — and one which in a moral, historical and political sense speaks to the power of analogies even as we dissect their shortcomings. It is critically important to avoid false universalities and the dangers of essentialism. But we should also beware of the false invocation of an “analogy problem” fostering “differences” which, I would argue, are either not there or are quite irrelevant to the larger moral, legal and political concerns at hand. Attention to such larger concerns often reveals a tragic breakdown of the coalitional potential of analogy, comparability and empathy. In one sense, it is certainly true that Martin Luther King was (and is) an African-American civil rights hero, not a gay rights hero; that proscriptions against interracial marriage struck down in Loving v. Virginia are not “the same” as proscriptions against same-sex marriage; and that the homophobia of Bowers v. Hardwick is not “the same” as the racism

142. Judge Henderson quotes the late author James Baldwin: “It is an inexorable law that one cannot oppress another; for in thy victim’s face you see a reflection of your own.” Henderson, supra note 37, at 26. In response, Henderson comments: Baldwin’s words speak to both the Black community and the gay community, and they, unfortunately, ring as true today as the day when they were written. Baldwin tells us we must not oppress one another, for in that act we see our own oppression. . . . Baldwin was, I believe, uniquely qualified to make such an observation — sitting at the nexus of the Black and the gay communities — at the intersection, as it were, of two particularly virulent strains of oppression.
143. White, supra note 8; see also Henderson, supra note 37, at 26.
144. See Abernathy, supra note 24, at 198.
145. For a creative argument drawing such an analogy, see James Trosino, Note, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B. U. L. REV. 93 (1993); see also Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (comparing prohibitions on same-sex marriage to anti-miscegenation laws).
of *Plessy v. Ferguson*. On the other hand, in particular contexts it is not only appropriate but strategically effective, I think, to stress similarities between racial bias and anti-gay bias, and to consider the extent to which both forms of prejudice collaborate in a larger context of minority subordination.

An excellent example of the persuasive use of analogy may be found in the *Evans II* litigation itself, when Professor Jerome Culp compared the conservative arguments of Amendment Two proponents to the similarly recalcitrant views that had inspired Martin Luther King's "Letter From a Birmingham Jail":

People said to Dr. King that you should wait, that oppression either wasn't too difficult or it would go away, and what Dr. King said in response is that it's always easy for the non-oppressed to deal with oppression. It's always easy for the non-oppressed to ignore oppression, and that it's not possible for a civil rights movement to ignore that oppression and to not deal with it. It seems to me that gays, lesbians and bisexuals are very much in the spirit of that letter, and in the spirit of Dr. King's effort to extend civil rights.

Professor Culp's testimony, it seems to me, is both respectful of the history of Dr. King's letter and accurate as to its implications for other subordinated groups. As the African-American gay activist quoted above stresses: "It is important to remember our history" — and "our history" is in fact many histories, both male and female, heterosexual and homosexual.

**V**

**Conclusion**

Through an analysis of both the public debate surrounding the passage of Colorado's Amendment Two and the subsequent constitutional challenge to that law's implementation, this Article has attempted to explore the issue of lesbian, gay and bisexual rights as part of a mainstream "civil rights agenda" for the decades to come. After evaluating the advantages and disadvantages of a "comparability" approach from an anti-subordination perspective, I conclude that normative comparisons between racial bias and anti-gay bias can be enor-
mously helpful not only in constitutional litigation, but also in building coalitions among African-American and lesbian/gay/bisexual communities, so long as such comparisons do not conflate the uniqueness of racism and the uniqueness of homophobia.

The task of building bridges across group boundaries, while difficult and rarely accomplished, is hardly a new idea — but it is a revolutionary one. A generation ago, African-Americans and Jews in the civil rights movement debated similar concerns, and wondered whether there was room in the "traditional" civil rights agenda for a shared, cross-cultural project. In one of a pair of essays, both entitled What Happens To Them Happens to Me, Dr. King argued passionately for an inclusive vision of the civil rights movement:

Injustice anywhere is a threat to justice everywhere. Injustice to any people is a threat to justice to all people. . . . For what happens to them, happens to me — and to you; and we must be concerned. . . .

You have read Washington Irving’s story “Rip Van Winkle.” What we remember most about this dramatic little story is that Rip Van Winkle slept twenty years. The most arresting thing is not that Rip slept twenty years, but that he slept through a revolution. While he was peacefully snoring up in a mountain, a great revolution was taking place in the world, the American Revolution, a revolution that in a sense would completely change the face of this earth; and yet, Rip knew nothing about it. His tragedy was that he slept through a revolution.

One of the great responsibilities of history is that all too many people find themselves in a great period of social change and yet fail to develop the new attitudes, the new mental framework, that the new situation demands. There is nothing more tragic than to sleep through a revolution.148