

## ESSAY

# Levels of Scrutiny, the First Amendment, and Gay Rights

H.N. Hirsch\*

### I. CONSTITUTIONAL SCRUTINY AND SEXUAL ORIENTATION

At the conclusion of its 1995 term, the Supreme Court, in *Romer v. Evans*,<sup>1</sup> handed gay men and lesbians their most significant legal victory to date. Overturning a popularly adopted constitutional amendment in Colorado, an amendment that prohibited local communities from adopting laws to protect gays and lesbians, the Court used sweeping language to declare that the state action in this case failed to pass even a minimum test of rationality.<sup>2</sup> Gay rights groups hailed this decision as a breakthrough victory and a “landmark ruling.”<sup>3</sup>

In a blistering dissent, Justice Scalia pointed out—quite correctly—that the majority in *Evans* ignored a state interest that had been validated a mere ten years before—namely, the “modest attempt . . . to preserve traditional sexual mores. . . .”<sup>4</sup> In *Bowers v. Hardwick*,<sup>5</sup> five members of the Court had little trouble finding it wholly rational for a state to condemn and sanction homosexual conduct.<sup>6</sup> The five-person majority in *Hardwick* included Justice O’Connor, who nevertheless voted with the majority in *Evans*.<sup>7</sup>

*Evans* was decided only one term after a significant defeat for gay rights. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,<sup>8</sup> the Court unanimously declined to overturn the decision of a civic organization that had refused to allow the Irish-American Gay, Lesbian, and Bisexual Group of Boston to march in its annual St. Patrick’s day parade. Although the Supreme Judicial Court of Massachusetts held in

---

\* Professor of Political Science, University of California, San Diego. A.B. University of Michigan, 1974; Ph.D. Princeton University, 1978.

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

2. *See id.* at 1629.

3. *See, e.g.*, Suzanne B. Goldberg, *Single Most Important Positive Ruling in the History of the Gay Rights Movement*, Lambda Legal Defense and Education Fund, Press Release (visited May 20, 1996) <<http://www.lambdalegal.org/csi-bin/pages/documents/record?record=70>>.

4. *Evans*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

5. 478 U.S. 186 (1986).

6. *See id.* at 196.

7. *See id.* at 187; *Evans*, 116 S. Ct. at 1623.

8. 515 U.S. 557 (1995).

favor of the gay group on the basis of the state's public accommodations law,<sup>9</sup> the Supreme Court reversed, dealing the gay Irish group a stinging defeat.<sup>10</sup>

What can we make of these two cases, decided only one year apart? Are they evidence of a Court that is having trouble making up its mind about sexual orientation? Is the Court willing to accommodate gays and lesbians on some issues but not on others? What can we make of the seeming shift in the ten years between *Hardwick* and *Evans*? Finally, what is the best constitutional strategy available to gays and lesbians?

*Evans*, *Hurley*, and *Hardwick* illustrate a fundamental methodological truth of constitutional interpretation: decisions by the Supreme Court are inevitably embedded in subjective judgments about the nature of society.<sup>11</sup> It is simply not possible to decide cases like these based solely on the words of the Constitution. Any decision by the Court in these cases must rely on a construction of what can be called "social facts."<sup>12</sup> There may be better or worse constructions of social facts—constructions that comport more or less with "our" understanding of reality—but there cannot be finality, or inevitability, in these judgments.<sup>13</sup>

If we think about the law's treatment of another minority, we see that the Supreme Court reached a very clear moment at which it decided that state action against racial minorities was a function of prejudice, rather than any rational or legitimate state purpose; that moment, of course, was *Brown v. Board of Education*<sup>14</sup> in 1954. That moment had little to do with the text of the Fourteenth Amendment. Rather, it dealt with the slow and plodding pace of social and political consciousness, both on the Court and in society at large. Thus, in 1954, the Supreme Court of the United States began giving constitutional significance to a "new" social fact—the existence of widespread and unjustified prejudice against a minority group—and began interpreting the Fourteenth Amendment's equality in light of that now-crucial social fact.

Whether *Evans* represents a similar moment with regard to sexual orientation remains to be seen; there are indications in the opinion that

---

9. See *id.* at 564-65. Massachusetts' public accommodations law explicitly includes sexual orientation as a protected class. MASS. GEN. LAWS ANN. ch. 272 § 98 (West 1992). The statute protects "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." *Id.*

10. See *Hurley*, 515 U.S. at 581.

11. See H.N. HIRSCH, A THEORY OF LIBERTY: THE CONSTITUTION AND MINORITIES 88-89 (John Brigham & Christine B. Harrington eds., Routledge 1992).

12. See *id.* at 113.

13. For an elaboration of my argument about social facts and constitutional interpretation, see *id.* at 2.

14. 347 U.S. 483 (1954).

celebrations by gays and lesbians may be a bit premature. Caution is appropriate in our evaluation of *Evans* because the majority uses the loosest level of scrutiny, the rational relation test, to invalidate the Colorado law in question.<sup>15</sup> The Court uses this standard in spite of the fact that the Colorado Supreme Court, on the basis of unassailable Supreme Court precedent, found that Amendment 2 impinged on the fundamental right of political participation and thus triggered the use of strict scrutiny.<sup>16</sup>

To be sure, there is much in Justice Kennedy's opinion in *Evans* for gays and lesbians to admire and celebrate, including stirring rhetoric. Kennedy begins by invoking Justice Harlan's hundred-year-old dissent in *Plessy v. Ferguson*<sup>17</sup> and the theme of constitutional neutrality. Kennedy writes:

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." . . . Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.<sup>18</sup>

Kennedy goes on to speak forthrightly of "the injuries caused by discrimination" and to characterize state and local laws protecting gays and lesbians in public accommodations as part of an "emerging tradition of statutory protection."<sup>19</sup> Following that tradition, enumeration of the classes of people to be protected "is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."<sup>20</sup> Perhaps most importantly from the point of view of gays and lesbians, Kennedy effectively demolishes the idea that the anti-discrimination ordinances adopted by Colorado municipalities, and overturned by Amendment 2, were examples of "special rights" for homosexuals.<sup>21</sup> Kennedy specifically states:

[there is] nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against

---

15. See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

16. See *id.* at 1624.

17. 163 U.S. 537, 539 (Harlan, J., dissenting) (1896).

18. *Evans*, 116 S. Ct. at 1623.

19. *Id.* at 1625.

20. *Id.*

21. See *id.* at 1627. The idea that anti-discrimination laws provide homosexuals with "special rights" was invoked by the New Right in its assault on gays and was explicitly invoked by Colorado. See *id.* at 1624.

exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.<sup>22</sup>

Kennedy then finds that Amendment 2 fails even the rational relation test.<sup>23</sup> He states, its “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects.”<sup>24</sup> Amendment 2 is not “narrow enough in scope” or based on a “sufficient factual context” to be considered constitutionally rational.<sup>25</sup> Kennedy describes Amendment 2 as “at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protections from the law is unprecedented in our jurisprudence.”<sup>26</sup> Kennedy states with stirring rhetoric: “Amendment 2 . . . in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”<sup>27</sup>

Kennedy quickly disposes of Colorado’s proffered justifications for the law: the protection of Coloradans’ freedom of association, “and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality,” as well as the state’s interest “in conserving resources to fight discrimination against other groups.”<sup>28</sup> The breadth of the Amendment, Kennedy says, “is so far removed from these particular justifications that we find it impossible to credit them.”<sup>29</sup>

It is in this quick disposal of the state’s justifications for the Amendment that we find the inevitable subjectivity of constitutional decision-making most clearly at work.<sup>30</sup> How far removed *are* the state’s means and ends in this law? Given the extraordinary latitude the Court has given states in most other cases under the rational relation test, is it really so easy to say that Colorado is being *irrational*? Normally, “irrational” means that the Court cannot conceive of an even hypothetical justification for the law.<sup>31</sup> In many of the cases Kennedy cites, the Court

---

22. *Id.* at 1627.

23. *See id.*

24. *Id.*

25. *See id.*

26. *Id.* at 1627-28.

27. *Id.* at 1628-29.

28. *Id.* at 1629.

29. *Id.*

30. *See HIRSCH, supra* note 11, at 88-89.

31. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

bent over backwards to find and credit a “legitimate state interest.”<sup>32</sup> Measured against these holdings, Colorado’s attempt to protect the “freedom of association” of landlords and employers—many of whom, no doubt, have very real personal and deeply-felt religious objections to homosexuality—and its attempt to husband undoubtedly scarce resources for the fight against other forms of discrimination do not inevitably fail to measure up. The judgment being made here is a subjective one and has little to do with the words of the Fourteenth Amendment.

The subjective judgment of the majority in *Evans* works to the advantage of the minority in question in this particular case and produces an important victory for gays and lesbians. But, we must ask, what if Colorado’s law had been less sweeping and all-inclusive? What if a state passes a narrowly tailored law to achieve a single objective, a law that could be interpreted as based on a “sufficient factual context”? For example, what would the *Evans* majority make of a law forbidding gays and lesbians from teaching in public schools? Or a law prohibiting the discussion of gay sex as part of sex education or AIDS-prevention efforts? Could a state not justify such laws as rationally related to the achievement of “legitimate” government goals—the promotion of only “healthy” sexuality and “appropriate” role models, as defined by a majority of the state’s population?

It is perhaps a matter of sheer luck for gays and lesbians that Colorado chose as sweeping and all-encompassing a strategy as it did in Amendment 2. More importantly, it was vital to the outcome of the case that Colorado did not attempt to wrap its actions in the language of morality, for this allows the majority of the Court to ignore the question that so disturbs Justice Scalia in his dissent—the still-standing, very much alive precedent of *Bowers v. Hardwick*, a case merely ten years old at the time.<sup>33</sup> As Justice Scalia says, with seemingly unassailable logic, “if it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”<sup>34</sup>

---

32. See *New Orleans v. Dukes*, 47 U.S. 297 (1976) (upholding law favoring certain vendors over others based on tourism benefits); *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (holding health concerns justified a law favoring optometrists over opticians); *Railway Express v. New York*, 336 U.S. 106 (1949) (upholding regulation exempting certain vehicle owners from advertising vehicle ban); *Kotch v. Board of River Port Pilot Comm’rs*, 330 U.S. 552 (1947) (upholding a scheme which disfavored persons unrelated to current riverboat pilots because of possible safety and efficiency benefits resulting from a closely-knit pilotage system).

33. See *Evans*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

34. *Id.* at 1631 (Scalia, J., dissenting).

The gay rights groups that litigated *Evans* did not ask the Court to overturn *Hardwick*,<sup>35</sup> instead, they attempted to finesse that case by arguing that Amendment 2 applied to all individuals of homosexual orientation, including individuals who did not commit any homosexual acts.<sup>36</sup> They distinguished *Hardwick* on the ground that it concerned state law criminalizing the act of sodomy.<sup>37</sup> However, Scalia effectively answers this argument by saying “if it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual ‘orientation’ is an acceptable stand-in for homosexual conduct.”<sup>38</sup>

The *Evans* majority simply ignores *Hardwick*, and it is not difficult to understand why. The holding in *Hardwick* would almost certainly sustain Amendment 2 under the rational relation test. The Court’s reasoning in *Evans* is difficult to square with its reasoning in *Hardwick*. In the earlier case, Justice White found “no connection” at all between the rights of homosexuals and the rights of privacy already protected by the Court<sup>39</sup> and explicitly stated that the state’s interest in fostering the morality favored by a majority of its citizens is a rational and legitimate basis for anti-gay laws.<sup>40</sup> White stated, “The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”<sup>41</sup>

It is tantalizing to speculate on the attitudes of the *Evans* Court toward *Hardwick*. Four justices voting in the majority in *Evans* were not on the Court at the time of *Hardwick*: Souter, Ginsburg, Breyer, and Kennedy. Together with Justice Stevens, who dissented in *Hardwick*, it is conceivable that these five represent a majority ready to overturn, or at least reconsider, *Hardwick*, a decision that was greeted with nearly universal, and appropriate, condemnation.<sup>42</sup> The Court’s invalidation of Amendment 2 on the basis of the rational relation test might then be a

---

35. *See id.*

36. *See id.*

37. *See id.*

38. *Id.* at 1632 (Scalia, J., dissenting).

39. *See Hardwick*, 478 U.S. at 191.

40. *See id.* at 196.

41. *Id.*

42. *See* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (3d ed. 1992); Earl Maltz, *The Court, the Academy, and the Constitution: A Comment on Bowers v. Hardwick and Its Critics*,” 1989 BYU L. REV. 59, 60 (1989). For my analysis of *Hardwick*, see HIRSCH, *supra* note 11, at 134-46.

first, somewhat tentative step in that direction; this would help explain the rather expansive nature of some of Kennedy's rhetoric.

The avoidance of strict scrutiny in *Evans* does need explaining; if nothing else, Amendment 2 impinges on the fundamental right of political participation. Several precedents dealing with racial discrimination make it clear that the decision of a popular majority to shift the level of government at which decisions are made in order to thwart anti-discrimination laws is unconstitutional. For example, *Hunter v. Erickson*,<sup>43</sup> decided by a sharply divided Court in 1969, invalidated a newly adopted section of the Akron, Ohio, city charter that provided that the city council could not implement ordinances regulating the sale and lease of real property "on the basis of race, color, religion, national origin or ancestry" unless the action was approved by a majority of the city's voters in a general or special election.<sup>44</sup> In a concurrence, Justice Harlan pointed out that the law in question had "a clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest."<sup>45</sup> In *Washington v. Seattle School District No. 1*,<sup>46</sup> decided in 1982, sixty-six percent of Washington state voters approved an initiative mandating that no school board could assign pupils to any school other than the school closest to or next nearest their home.<sup>47</sup> The initiative came in response to a busing order by the local Seattle school district.<sup>48</sup> The Court relied on *Erickson* to hold that the initiative had the effect of modifying "the community's political mechanisms" in order to "place effective decision-making authority over a racial issue at a different level of government."<sup>49</sup> The Court continued explaining why the initiative "did not fall within" the purview of the state's voters:

When the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome . . . prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." . . . In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a

---

43. 393 U.S. 385 (1969).

44. *Id.* at 387.

45. *Id.* at 395 (Harlan, J., concurring).

46. 458 U.S. 457 (1982).

47. *See id.* at 461-62.

48. *See id.*

49. *Id.* at 474.

position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>50</sup>

Here, the Court is dealing with what it regards as a fundamental constitutional principle: that majorities cannot rig the political process against minorities by shifting the forum in which decisions are made.

It is interesting to note that the then newly-appointed Justice O'Connor joined three other justices (Powell, Burger, and Rehnquist) in dissenting in *Washington v. Seattle*;<sup>51</sup> this could explain why the Court in *Evans* was reluctant to cite these cases as precedent and thereby invoke strict scrutiny.<sup>52</sup> O'Connor voted with the majority in *Evans*, and, although a bare majority could have decided *Evans* in the same way without her, Justice Kennedy may have written his *Evans* opinion in such a way as to hold on to her vote. It also may be that the *Evans* majority believed that the fact that *Evans* implicated political participation by gays and lesbians rather than political participation by racial minorities made a crucial difference, although this would be an alarming and rather bizarre argument; if political participation is a fundamental right, surely it is a fundamental right belonging to everyone.

Commenting on *Hunter* and the *Seattle* case, Laurence Tribe notes that “[t]ransfers of power involving direct democracy have been a popular ploy for electoral majorities which sensed that their governments were becoming too aggressive in combating racial segregation.”<sup>53</sup> That Amendment 2 in Colorado—and similar moves in other states—represents a similar ploy on the part of anti-gay forces is hard to ignore, although one’s judgment about this matter is a subjective judgment about political reality. To put it another way, deciding *Evans* requires the construction of a social fact; to decide the case, one must ask how we might understand the political reality of Amendment 2.

## II. GAY RIGHTS IN LIGHT OF THE FIRST AMENDMENT

The gay litigants’ implausible construction of other social facts caused their defeat in the *Hurley* case, just one term prior to *Romer v. Evans*. In *Hurley*, the Irish-American Gay, Lesbian, and Bisexual Group of Boston was attempting to force its presence in the annual St. Patrick’s day parade, organized by the South Boston Allied War Veterans’

---

50. *Id.* at 486 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

51. *Washington*, 458 U.S. 457 (1982).

52. *See Romer v. Evans*, 116 S. Ct. 1620, 1623-29 (1996).

53. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-17, at 1485 (2d ed. 1988).



Council.<sup>54</sup> The Council claimed that the First Amendment protected its right to refuse participation to groups carrying messages it did not endorse.<sup>55</sup> It asserted that the exclusion of “groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values.”<sup>56</sup> The gay group argued the parade was a form of “public accommodation” and therefore subject to the state’s public accommodation law, which lists sexual orientation as one of its protected categories.<sup>57</sup> They argued that the Council was merely a “conduit” for the speech of the participants in the parade, “rather than itself a speaker.”<sup>58</sup>

The Supreme Judicial Court of Massachusetts agreed with the gay group and ordered the Veterans’ Council to accept the group’s participation.<sup>59</sup> The Supreme Judicial Court affirmed the trial court’s ruling, which had stated that the Council’s exclusion of the gay group was “paradoxical,” since “a proper celebration of St. Patrick’s and Evacuation Day requires diversity and inclusiveness.”<sup>60</sup>

The Supreme Court reversed the Massachusetts court.<sup>61</sup> Writing for a unanimous Court, Justice Souter claimed the state court’s application of the public accommodation statute to these facts was “peculiar” and had the effect of requiring petitioners to alter the expressive content of their parade.<sup>62</sup> Souter construed the main issue of the case to be “whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey.”<sup>63</sup>

On the basis of strong precedent, the Court held that parades are indeed a form of expression deserving First Amendment protection and spoke of “the inherent expressiveness of marching to make a point. . . .”<sup>64</sup> Although the “message” of the Veterans’ Council in an annual St. Patrick’s Day parade may be somewhat amorphous, “a narrow, succinctly articulable message is not a condition of constitutional protection.”<sup>65</sup> Each unit in a parade “is understood to contribute something to a

---

54. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 561 (1995).

55. See *id.* at 563.

56. *Id.* (citations omitted).

57. See *id.* at 561.

58. *Id.* at 575 (citations omitted).

59. See *id.* at 564-65.

60. *Id.* at 562 (quoting *Irish-American Gay, Lesbian and Bisexual Group v. City of Boston*, 1993 WL 818674, No. 921518, at \*13 (Mass. Super. Ct. Dec. 15, 1993)).

61. See *Hurley*, 515 U.S. at 581.

62. See *id.* at 572-73.

63. *Id.* at 559.

64. *Id.* at 568.

65. *Id.* at 569.

common theme.”<sup>66</sup> A parade is unlike a shopping center<sup>67</sup> or a cable television station<sup>68</sup> because there are no disclaimers in a parade, in which the organizers can dissociate themselves from the message of a particular marching unit. Such disclaimers “would be quite curious in a moving parade.”<sup>69</sup> Taking to the streets to express a message—even an amorphous message—is core First Amendment activity.<sup>70</sup> For the state to interfere in such activity is the “antithesis” of free speech.<sup>71</sup>

It was foolhardy, and counterproductive, for the gay litigants in this case to deny that the Veterans’ Council had First Amendment rights or that their parade carried a message. Every year, in dozens of cities across the country, gay and lesbian groups hold their own parades in celebration of gay pride—parades from which anti-gay groups are excluded.<sup>72</sup> In San Diego a few years ago, a contingent of homophobic citizens, led by a former mayor-turned-talk-show-host who called themselves “Normal People,” attempted to obtain a court order allowing them to march in the local gay pride parade.<sup>73</sup> The gay organizers of the parade, quite naturally, argued in court to exclude them and won.<sup>74</sup> It is a rather simple social fact that a parade does carry an overall message and a similarly simple social fact that disclaimers could not possibly work in a moving parade. In *Hurley*, Justice Souter quotes a scholarly treatise claiming that “parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration.”<sup>75</sup> On the most basic level, a St. Patrick’s Day celebration is deeply immersed in Catholicism, and the Catholic church continues to define homosexuality as unnatural and homosexual activity as sinful.<sup>76</sup> It is undoubtedly and understandably the

---

66. *Id.* at 576. The Court distinguished *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding shopping mall owner may disavow message of leafleters by posting signs near them) from this case, which involved a moving parade.

67. *See Hurley*, 515 U.S. at 575-76, in which the Court distinguished *Turner Broadcasting v. F.C.C.*, 512 U.S. 622 (1994), in which the Court held that a cable station, which has historically been considered a mere conduit of broadcast signals, suffers little risk that viewers would assume the views of broadcast stations are the same views as the cable station, from this case, in which parade members are all considered to contribute to a common theme.

68. *See Hurley*, 515 U.S. at 575-77.

69. *Id.* at 577.

70. *See id.* at 579.

71. *See id.*

72. *See* JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 237-38 (1983); MARTIN DUBERMAN, *STONEWALL* 270-80 (1993).

73. *See* K.L. Billingsley, *Judge Bars Opposition from Gay Rights Parade*, WASH. TIMES, July 16, 1994, at A3.

74. *See id.*

75. *Hurley*, 515 U.S. at 569 (quoting S. DAVIS, *PARADES AND POWER: STREET THEATER IN NINETEENTH-CENTURY PHILADELPHIA* 6 (1986)).

76. *See* 7 NEW CATHOLIC ENCYCLOPEDIA 118 (1967).

desire of gay Irish groups to counter this underlying message that leads them to seek entry into these parades in the first place. But their stance represents an idea about sexuality that conflicts with the ideas that traditional Irish groups seek to promulgate. To ignore this is to ignore basic social reality. Thus in *Hurley*, as in *Evans*, it is the manner in which the Court construes social facts—about parades, about prejudice, about politics—in light of the Constitution’s basic commitments—to free speech, to equality—that decides the cases in question.

### III. FIRST AMENDMENT PROTECTION OF GAY RIGHTS

If *Hardwick* should remain the law of the land, how can gays and lesbians assert their claims? What is the best argument available to support the rights of gays and lesbians to equal treatment at the hands of the state?

A tentative but growing consensus among gay scholars suggests that the most fruitful basis on which to press constitutional claims may well lie not in the concept of privacy but rather in the First Amendment. Being gay or lesbian in a homophobic society—a society encrusted with what has been called heteronormativity<sup>77</sup>—involves far more than merely the commission of certain sexual acts with a member of one’s own gender; it involves a way of life, an “ethos,”<sup>78</sup> an identity. Correspondingly, the legal right most at stake for gays and lesbians is not necessarily the right of adults to commit particular sexual acts in private—although, of course, such a right is vitally important and has enormous symbolic significance—but rather the right to articulate an identity different from the norm. In a very real sense, this can be construed as a First Amendment right.

The link between the First Amendment and gay rights has been argued most effectively by Nan Hunter.<sup>79</sup> In *Identity, Speech and Equality*, Hunter argues that the right of free expression and the right to equal treatment are inextricably linked for lesbians and gay men, even more so than for other minorities.<sup>80</sup> Most lesbians and gay men can “pass” as straight, and thus “coming out”—defining oneself as different from the sexual norm—is central to the gay or lesbian experience. Hunter explains, “[t]o be openly gay, when the closet is an option, is to function

---

77. See MICHAEL WARNER, FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY xxi-xxv (1993).

78. See MARK BLASIUS, GAY AND LESBIAN POLITICS: SEXUALITY AND THE EMERGENCE OF A NEW ETHIC ch. 5 (1994).

79. See Nan Hunter, *Identity, Speech and Equality*, 79 VA. L. REV. 1695 (1993).

80. See *id.* at 1716-18.

as an advocate as well as a symbol.”<sup>81</sup> The lesbian and gay movement, Hunter argues, has created a different kind of speech and a new kind of demand about speech—the demand that “speech about sexuality be treated as core political speech.”<sup>82</sup> This development, Hunter points out, requires a radical shift in traditional First Amendment doctrine, as well as in political thought; “it signals the conceptualization of sexuality—and specifically homosexuality—as a political idea.”<sup>83</sup> Whereas sexual speech has traditionally been exiled to the periphery of First Amendment protection,<sup>84</sup> the link between free expression and equality in the gay experience demands a serious rethinking of that exile. For lesbians and gay men especially, identity “encompasses explanation and representation of the self.”<sup>85</sup> Being publicly gay “necessarily includes *a* message that one has not merely come out, but that one intends to *be* out—to act on and live out that identity.”<sup>86</sup> A gay or lesbian identity necessarily “merge[s] not only status and conduct, but also viewpoint, into one whole.”<sup>87</sup>

The centrality of expression to gay and lesbian existence, Hunter argues, “explains the logic behind what has become the primary strategy of antigay forces”—censorship, “the attempted penalization of those who ‘profess’ homosexuality.”<sup>88</sup> This helps explain, among other things, the ferocity with which anti-gay legislators attempt to remove state funding from artists whose work “promotes” homosexuality; these homophobic legislators quite rightly understand that gay and lesbian existence depends in large part on the availability of cultural images out of which a minority identity can be constructed. It also explains attempts to ban lesbians and gay men from teaching in public schools, attempts to deny funding to

---

81. *Id.* at 1696.

82. *Id.*

83. *Id.*

84. *See, e.g.,* *Miller v. California*, 413 U.S. 15 (1973) (holding that a conviction for mailing unsolicited sexually explicit material in violation of a California obscenity statute was constitutional only if the statute specifically defined the conduct, and the offense was limited to works that, taken as a whole, appeal to the purulent interest in sex, portray sexual conduct in a patently offensive way, and do not have serious artistic, political, or scientific value); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (holding that a book was not obscene according to a test similar to *Miller*, but requiring that the material be utterly without redeeming social value, rather than without serious artistic, political, or scientific value); *Roth v. United States*, 354 U.S. 476 (1957) (holding obscenity is not protected by the First Amendment, and a statute punishing the use of the mails to distribute obscene materials was constitutional because an average person, applying contemporary community standards would believe the dominant theme of the material as a whole appealed to purulent interests).

85. Hunter, *supra* note 78, at 1696.

86. *Id.*

87. *Id.*

88. *Id.*

lesbian and gay organizations at colleges and universities, and attempts to impose a “don’t ask, don’t tell” policy on gays in the military. In each of these scenarios, homophobic agents of the state are attempting to ban homosexuality as an idea—an idea that leads to the adoption of personal identities. At stake in each of these cases, Hunter rightly says, is “the role sexuality will have in the realm of public discourse.”<sup>89</sup>

My own experience as a gay man amply supports this view of the importance of images and ideas to the development of a gay self. As a high school student in a typical midwestern American suburb from 1966 to 1970, I became aware of terrifying sexual feelings and searched desperately, and in vain, for some cultural affirmation, some faint signal from somewhere that being homosexual was, in any context, culturally acceptable. I searched through the bookshelves of my well-read parents, full of works on psychology and sociology and politics, and found that they all defined homosexuality as pathological. I searched through the images of popular culture on television and in movies, where gay characters, if they appeared at all, were an object of pity and ridicule and almost always criminal and suicidal. I searched through the curriculum of my progressive high school and the teachings of my religion and found absolutely nothing even remotely affirming or nurturing. Not surprisingly, and at considerable cost to my self-esteem and my well-being, I remained firmly in the closet, convinced that my homoerotic feelings were something that would change in sufficient time. In the fall of 1970, I entered the University of Michigan in Ann Arbor—then a hotbed of the New Left and the counter-culture—and remained there until 1974. Not much was different—and, indeed, we now see clearly that the New Left, so strong in Ann Arbor at the time, was deeply homophobic.<sup>90</sup>

In the fall of 1974, I entered graduate school in Princeton, New Jersey, spending my free time in New York City. Suddenly, the world was different. In New York’s gay community, at the height of its post-Stonewall, pre-AIDS euphoria, I finally discovered the cultural space that I needed. I found gay newspapers, gay organizations, gay meeting places. I discovered a world that, miraculously, did not hide and apologize for itself. I discovered openly gay people who were at the same time successful in the world. I discovered, perhaps most importantly, a set of ideas belonging to a group of people who refused to acquiesce in society’s definition of them as pathological.

---

89. *Id.*

90. See BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* 73, 77 (1987); see also the discussion in MARTIN DUBERMAN, *STONEWALL* ch. 4-5 (1993).

I have often thought of my transition from the midwest to the east in 1974 as something like Dorothy's trip to Oz. Suddenly the world was in color, not black and white, and there were strange and wonderful sights everywhere. What changed for me in 1974 was not my ability to commit sexual acts in private places—my home state of Illinois was the first state in the Union, in 1961, to decriminalize sodomy—but rather my cultural, intellectual, and emotional life. That life was now sustained and nurtured by newspapers, books, organizations, and meeting places—all entities protected by the First Amendment. It was public space and culture—discourse—that changed for me, and for thousands of gay men and lesbians, not the ability to have sexual relations in private. Danger to our world, for the most part, did not come from laws outlawing sexual acts. Instead, the danger came from censorship and cultural repression. In cultural and political space protected by the First Amendment, I discovered a way of life and a community, rather than how to subvert the sodomy laws; men and women had been doing that for decades, if not centuries, and I had been doing it for years. As Mark Barnes argues,

explicit sexual images and the freedom to create and use them has been essential to the emergence of gay and lesbian cultures and identities over the past four decades. Explicit sexual images have allowed gay men and women to develop new eroticisms, to dismantle the view of homosexuality as pathological, to define a new culture apart from the dominant heterosexual ideal, and to establish new sets of norms and expectations. Censorship of sexual images . . . therefore threatens the vitality and even the survival of gay culture.<sup>91</sup>

The men and women in the Stonewall bar on the night of June 27, 1969, were not committing sodomy.<sup>92</sup> They were engaged, not in sexual acts, but in the cultural act of socializing and nurturing gay space.<sup>93</sup> Nearly thirty years later, it is not the right to march in other people's parades, but to create and march in our own, that gay men and lesbians should seek to protect. And the danger posed by movements such as Amendment 2 in Colorado is not that they will make it difficult for us to engage in sexual relations, but rather that our enemies will continue to find ways to silence and erase us and will make the state complicit in that process.

---

91. Mark Barnes, *Towards Ghostly Death: The Censorship of AIDS Education*, 89 COLUM. L. REV. 698, 720-21 (1989).

92. *See id.*

93. *See id.*