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The Supreme Court, Sexual Citizenship and the Idea of Progress

KENDALL THOMAS*

Is American Progressive Constitutionalism dead . . . yet? I propose to seek the beginnings of an answer to this question in the pages of a recent decision by the United States Supreme Court. I do feel obliged to say this, not because I am committed to a court-centered adjudicative conception of American constitutionalism; to the contrary. But rather, because the decision on which I want to focus seems to me to offer a rich resource for critical reflection on the idea of self-government whose connections to Progressive Constitutionalism give us our topic this afternoon.

During its 1995-96 term the U.S. Supreme Court plunged for the second time in ten years into the heavy current of contemporary American sexual politics. In *Romer v. Evans*¹ the Court relied on the Equal Protection Clause to invalidate an amendment, Amendment Two to the Colorado Constitution, that forbade the enactment, adoption, or enforcement of laws or policies prohibiting discrimination based on homosexual, lesbian or bisexual orientation, conduct practices, or relationships. Within days after the Court announced its judgment, the *Evans* opinion generated a flurry of criticism. In the popular press the critical response to the *Evans* decision spanned a broad ideological spectrum. At one end were those commentators who thought the decision indefensible at every level. David Frum argued that *Evans* was a lamentable instance of suspect jurisprudence. For James Kilpatrick the decision was nothing less than a blow to the democratic process. Paul Craig Roberts warned that the decision had left tarring and feathering the only recourse for people beset with tyrannical and lawless judges. Other commentators applauded the results in *Evans*, but voiced doubts about the soundness of the constitutional analysis on which the *Evans* Court based its decision. Writing in the *Washington Times*, Bruce Fine commended the Court's holding, but thought the majority had based its decision on the wrong reasons. Stewart Taylor found the opinion both immensely inspiring and intensely troubling. Although he praised the *Evans* Court for its overdue embrace of simple justice for gay people, Taylor could not countenance the crude, superficial and evasive legal reasoning of Justice Kennedy's opinion for the Court, which, he feared might not only damage the Court's moral authority, but set back the cause of gay rights.

In the months since the *Evans* decision, a number of constitutional scholars have added their voices to the chorus of critical assessment. Some of these accounts reject both the decision's reasoning and result. Other scholars have defended the Court's result, but only after supplying what Lynn A. Baker has called "the missing pages of evidence."

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1. 517 U.S. 620 (1996).

What unites these very different perspectives is a reliance on two core premises. The first is that the central issue in *Evans* has to do with individual rights. The second is the common location of this right with concomitant approval or condemnation in the text of the Fourteenth Amendment's Equal Protection Clause. These premises are not universally shared and there are some exceptions. Starting from this twofold conceptual consensus, however, most of the scholarly writing on *Evans* has thus far confined itself to defending or attacking, on this or that theory, the Court's conclusion made that Amendment Two was an unconstitutional invasion of rights guaranteed by the Equal Protection Clause. I shall confine myself here to a couple of representative examples. Daniel Farber and Susanna Sherry read *Evans* as a judicial vindication of the Pariah Principle, which holds that government cannot grant any group as unworthy to participate in civil society.² This principle, they write, is at the heart of the *Evans* Court's declaration that Amendment Two has the peculiar property of imposing a broad and undifferentiated disability on a single named group and is thus an exceptional and invalid deprivation of a constitutional guarantee of equality. Paul Farley, along with Timothy Tymkovich and John Dailey in a recent issue of the University of Colorado Law Review, condemns *Evans* as "one more example of ad hoc activist jurisprudence without constitutional mooring."³ The authors argued that the amendment readily satisfied the Court's pre-*Evans* standards of rational basis review under the Equal Protection Clause and its contortions, they argue can only be explained by the majority's desire to judicialize special legal protections for homosexuals.

Now my purpose this afternoon is not to join the debate about gay, lesbian, and bisexual rights and the Equal Protection Clause provoked by the *Evans* decision, but to go at the case from another direction. While I do not doubt that scholars writing about *Evans* have picked up something important about the Amendment Two controversy, I believe they have misstated what it is. I begin with the premise that I have argued more fully elsewhere. That premise is this: [T]he starting point for American constitutional analysis is not the substantive question of individual or personal rights or group rights, but the structural question of political power. A political power model best comports with the recognition that American constitutionalism is first and focally about the arts of government or the techniques of power which Michel Foucault calls "governmentality." On this view, the primary function of constitutional adjudication is to identify and check the illegitimate exercise of political power because power

2. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMM. 257 (1996).

3. Timothy M. Tymkovich et al., *A Tale of Three Theories: Reason and Prejudice in the Battle over Amendment II*, 68 U. COL. L. REV. 287, 333 (1997).

is the medium in which politics lives and breaths and has its being. Accordingly, instead of asking what *Evans* teaches us about the equality rights of lesbian and gay citizens, I shall try to persuade you then that, at base, the decision is not about rights at all. I propose instead to read *Evans* as a judicial seminar about the requirements of republican law making. To put the point in the terms of this panel, I want to argue that the core of the controversy in *Evans* is most productively understood as a contest between competing conceptions of republican self-government. By self-government, however, I mean to denote something very different from democracy.

Now, to put the question this way requires more than a shift in accent and emphasis in the way we talk about the *Evans* decision. It demands that we bring an altogether different orientation to the case which focuses on elements of *Evans* that are anterior to and thus elude the analytic of rights. Although I can't elaborate these distinctions fully, it may help you while I am talking to compare and contrast the two approaches by way of the following propositions. Where rights-based constitutionalism focuses on the subject or the individual actor, the political power model addresses itself to questions with institutional structure and agency. Where rights-based constitutionalism accords priority to matters of substantive right, the political power model concerns itself with the substance of procedure.

My project proceeds as follows: I want to begin with a few observations about the *Evans* majority opinion, reading it largely against the grain, with a focus on Justice Kennedy's unsuccessful attempt to avoid the political implications of the Amendment to the controversy. I want to trace that failure not only to the instability of the terms in which Justice Kennedy conducts his analysis, but in the language of Amendment Two itself. I then want to develop, very briefly, a republican political argument against Amendment Two. And, unhappily, I will not be able to give you the critical account of the explicitly political defense of the amendment, which Justice Scalia offers in his *Evans* dissent. That will have to wait another day. Along the way, however, I do hope to argue that the strongest constitutional case against Amendment Two can be found in the terms of the Guarantee Clause. And, I want to explain why *Evans* presents a justiciable political question. Now it is going to strike some folks in the audience that I am making, certainly for me, an uncharacteristically formalist argument. I am going to be talking about originalism and textualism; things that I usually trash with great glee. But, this is a thought experiment on my part because I want to finish by raising some questions about the uses and effects of formalist argument as a strategy for progressive constitutionalism and that will bring us back to some of the conversations we've had this morning.

In the opinion, Justice Kennedy, writing for the Court, concludes the opening section with a few remarks about the constitutional grounds on which Amendment Two was struck down by the Supreme Court of Colorado. In its holding, he writes, the lower court held that Amendment

Two was subject to strictest scrutiny under the Fourteenth Amendment because it infringed the fundamental rights of gays and lesbians to participate in the political process. While Justice Kennedy found it worthwhile to note that the Colorado court had justified its holding by reference to the Supreme Court's own case law regarding voting rights, and the discriminatory restructuring of governmental decision-making, he took pains to make clear that he and his colleagues were resting their affirmance of the supreme court judgment on very different grounds. In short, although it agreed that Amendment Two ran afoul of the Equal Protection Clause, the *Evans* majority expressly declined to follow the logic of the lower court. Accordingly, according to the majority, *Evans* could not and should not be read to endorse the notion that the rights implicated by Amendment Two were fundamental, that they involved political participation of a degree and kind comparable to those at issue on the court cited cases. Or, that the standard of review by which the constitutionality of the Amendment should be assessed was the exacting standard of strictest scrutiny.

The central infirmity of Amendment Two was in a sense, and paradoxically, less subtle and more shocking. The problem of Amendment Two on Justice Kennedy's account was the problem of *Plessy*,⁴ to which he adverts in the very first paragraph of his opinion. "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 of neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid the provision of Colorado's Constitution."⁵ Amendment Two, in other words, ordains and establishes an illegitimate regime of sexual apartheid. The chief constitutional defect of Amendment Two, Kennedy writes later, is that "[it] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A state cannot so deem a class of persons a stranger to its laws."⁶

In another passage of the opinion, Justice Kennedy introduces an additional image to underscore his point that this is not a case about the political but the legal consequences of Amendment Two. And that it is not the political but the legal consequences of Amendment Two that render it unconstitutional. Amendment Two, he writes, relegates gay men and lesbians to the margins of civil society promoting their "exclusion from an almost limitless number of transactions and endeavors that constitute

4. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

5. *Evans*, 517 U.S. at 623 (citations omitted) (quoting *Plessy*, 163 U.S. 537, 559 (dissenting opinion)).

6. *Id.* at 635.

ordinary civic life in a free society.”⁷

For our purposes what bears remarking about the text of the *Evans* opinion is Kennedy’s inability to sustain the strict separation of law and politics of civil life and political society that presumably distinguishes analysis of Amendment Two from that of the Supreme Court of Colorado. Let me explain what I mean. Although Justice Kennedy begins his opinion by stressing that the Court’s decision rests on grounds that are different from the political participation theory staked out by the lower court, it eventually becomes apparent that the *Evans* court cannot altogether escape the political dimensions of Amendment Two.

In this connection, one of the more decisive moments in the text comes towards the end of the opinion. Justice Kennedy has just noted disapprovingly, the sheer breadth of the categorical character of the amendment, which identifies persons by a single trait and then denies them protection across the board. “It is not,” he writes, “within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”⁸ A few lines later he casts the point in slightly different terms. “Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general, it shall be more difficult for one group of citizens than for all others to seek aid from government,” a wonderfully capacious phrase, “is itself a denial of equal protection of the laws in the most literal sense.”⁹

Now, one cannot help but note an ambiguity here, which may be traced to the fact that among the parts of government that Amendment Two closes off are the mechanisms of the legislative process. We cannot accept a view that Amendment Two’s prohibition on specific legal protection does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps on the state’s view by trying to pass helpful laws of general applicability. Taken together these passages suggest that despite their precise semantic differences Justice Kennedy’s opinion and that of the Colorado court may fairly be read as variations on a common theme. One might call it the principle of open government. For Justice Kennedy this principle of open government is one of the most basic terms of the

7. *Evans*, 517 U.S. at 631.

8. *Id.* at 633.

9. *Id.*

social compact, which imposes an affirmative obligation on this state to provide equal and impartial political access to government and each of its parts. In suggesting that this obligation is inherent in the very idea of law, the *Evans* majority opinion may be read to posit something like a conceptual connection between purporting to be a government and keeping the political process through which laws are made open to citizens. Moreover, and this is a crucial rule, it need only take a small step from this point to a related proposition.

The Court seems finally to embrace a conception of access to government, which is unintelligible unless it also entails at least an implicit recognition of an interest in political participation. Whether this claim or interest can be described as a right or not is beside the point since the state is still obliged to accord citizens equal concern, respect, recognition, and protection. Why is Justice Kennedy unable to avoid the engagement with the very political questions whose significance he seems so determined to deny? I would suggest that the elements of an answer to this question must be sought in the terms of Amendment Two itself. It is crucially important in this connection to know precisely what Amendment Two did and did not say and what it did and did not do. The Amendment was not merely an ordinary statutory repeal of existing statutes, ordinances, or executive orders prohibiting discrimination against gay men, lesbians or bisexuals. Nor was Amendment Two merely a statutory prohibition against the future adoption of ordinances forbidding discrimination against gay men, lesbians or bisexuals. Amendment Two was an amendment to the Colorado State Constitution. These features of Amendment Two without more are not what rendered it constitutionally infirm.

It is here that we must shift our attention from the substance to the *form* of the provision or rather to the *content* of its form. Like much of the subsequent commentary on the case, the *Evans* opinion places great weight on the injury Amendment Two inflicts on lesbians, bisexuals, and gay men. Less emphasis has been given to the damage it inflicts on republican norms regarding what Frank Michelman called today the "law of lawmaking"; what I prefer to call the "rules of republican rule making." Consider, in this regard, the Amendment's mode of address. Before it specifies a class of persons against whom it shall operate, Amendment Two begins with a command to the institutions of representative government. I'll read the Amendment in full now.

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 persons or class of persons to have or claim any minority status, quota of

preferences or protected status or claim of discrimination.¹⁰

As its language suggests, before it even addresses the legal status of lesbian, gay and bisexual Coloradans, Amendment Two undertakes a constitutional reordering of the very forms of republican lawmaking. Stated another way, Amendment Two achieves an across-the-board exclusion of gay, lesbian, and bisexual Coloradans from the spheres of civil and political society by way of a similarly comprehensive restriction on the practices of republican government.

To appreciate the comprehensiveness of this latter restriction we must direct our attention at this point to a concept that is the cornerstone of republican political structure. I am thinking here, of course, of the concept of representation, whose claim on the American political imagination is older than the nation itself. In his magisterial study on the creation of the American republic, Gordon Wood has persuasively demonstrated the almost obsessive concern of the Framers to ensure that political representation would operate as “the pivot”—the metaphor is Madison’s—“on which the whole American system moved.”¹¹ Although the 1980s revival of civic republicanism served to refocus our attention on the importance of representation as a basic construct in our national government, it bears remarking that political representation is also an equally central component in the government of the states. So central in fact that it was one of the few affirmative obligations to which the original Constitution bound the federal government, vis-à-vis its relationship with the state or before Article IV, section four provides that “the United States shall guarantee to every State in this Union a Republican Form of Government.”¹²

In the modern period, we have come to view the Guarantee Clause as a dead letter in American constitutional law, which cannot form the basis of a justiciable claim. This, however, has not always been the case. In a 1994 article, to which I am deeply indebted, Erwin Chemerinsky quotes a passage from John Harlan’s dissent in *Plessy*, which found the Louisiana system of state-mandated segregation railway travel unconstitutional on, among others, Guarantee Clause grounds.¹³ Harlan denied the power of state managers, these are his words:

“by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of inferiority a large body of American

10. *Evans*, 517 U.S. at 624 (quoting the text of the Colo. Const., art. III, § 30b).

11. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 597 (1969).

12. U.S. CONST. art IV, § 4.

13. See Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

citizens, now constituting a part of the political community called the 'People of the United States,' for whom, and by whom through representatives, our community is administered. Such a system is inconsistent with the guaranty given by the constitution to each state of republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme laws of the land anything in the constitution or laws of any state to the contrary notwithstanding."¹⁴

Chemerinsky demonstrates that it was not until the twentieth century that the Court began to treat Guarantee Clause claims as non-justiciable political questions. What is interesting for our purposes is the fact that the waning of Guarantee Clause jurisprudence was roughly contemporaneous with the rise of the referendum, the ballot initiative and other tools of plebiscitary politics of which Amendment Two was an instance. Interestingly, too, a citizen initiated legislation and constitutional amendment were a product of the turn of the century progressive movement. These tools were devised to bypass the mechanisms of representative government and give expression to the direct democratic will to power. Since the beginning of this century, then, these two antagonistic visions of political power have been on a collision course.

I hope by now to have said enough to prepare the ground for specification of just what it is about Amendment Two that warranted its invalidation on constitutional grounds. As I see it, the chief constitutional problem in the *Evans* case may be found in the fact that Amendment Two was an attempt to change the rules of the game of representative politics without going through the process of representative politics. Amendment Two fails to pass constitutional muster, not so much because it abridges the right to participate in the political process. Our political process is not participatory in any direct sense.

Republican or representative politics embodies at least three norms. These norms can be called the norm of mediation, a norm of deliberation, and a norm of accountability. Of course, they do not exhaust the conceptual field of thinking on this matter, but they are the ones I want to talk about. By mediation I mean to denote the artificial or aesthetic character of political deliberation. There is a differentiation of citizens, which marks the fact that political action takes place in the public sphere. One might say that politics takes place on a stage and in drag in republican government. Our point of reference here, at least in part, is not. But, I will move on. The second norm is deliberation, which entails the discourse ethic of debate, discussion, and reason giving. Ours, as Cass Sunstein has said, is

14. *Id.* at 861 (quoting from Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 563 (1896)).

a republic of reasons and accountability.¹⁵ That is the third one, which works on at least two levels. Representatives have to make and formally report their decided positions on matters of substantive policy and they must answer for that record to their constituents in periodic elections. Taken together conforming with these three political norms is what makes republican government republican. It's what makes the form or way of political life in a republic, republican. To be sure, this process requirement can be conceptually distinguished from the claim made by the Colorado Supreme Court about the right to participate in the political process. The distinction is between the structural requirement and individual rights.

The riddle of *Romer v. Evans* lies in the failure of a court and many commentators to recognize that Amendment II raises questions first and foremost about the structure of politics, and, only secondarily and derivatively about the subject of politics. Who can change the rules of representative politics and how? What are the rights of gay men, bisexuals, and lesbian citizens? At least in the U.S. system, the domain of the political entails a distinctive set of norms about the substance of the procedure for following the conception—you might say—the concept of the form by which the rules of the game of representative politics can be changed. If the distinctive feature of American politics is its republican representative character, one might go so far as to say that the referendum or rather the ballot issue by which Amendment Two was added to the constitution, is not a supplement to, but a subversion of, politics. From this perspective, representation as has been recently put, is democracy.

My constitutional hook for this is, as I've suggested, the Guarantee Clause and the small point here is that at least with respect to this narrow category of norm—rules about the rules of representative politics—the Court ought to, can and ought to, use the Guarantee Clause to enforce the guarantee of republican government. It is a species of, if you will, representation enforcement, and the endorsement of a certain kind of political ethics, the makings of a distance or gap between the represented and their representatives that is the hallmark of republican government. Insofar as that right belongs to or can be attributed to a subject, that subject is the subjectless structure of representative government itself. So you could say that Article IV is a kind of postmodernist construct, since the guarantee runs to the states and not to the people.

Now, my final question. The symposium brochure poses a question I'd like to address by way of a final word about the implications of a formalist argument such as I have made for progressive constitutional politics. That question you will recall is this: what novel theories of progressive constitutionalism can be formulated for deployment in the twenty-first century? I'd like to reply to that question by way of a final word about the

15. CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

implications of the formalist argument for progressive constitutional politics.

You may have noticed that the case that I have made has formalist features. Is it conservative? Well I want to say no. I think not. And I do so because I want to make a plea for a contextualist theory of progressive constitutionalism. I want in short to insist that progressive constitutional method recognizes that the particular strategy of constitutional argument cannot be understood or assessed without reference, and I am paraphrasing Fredric Jameson here, to the practical context in which alone its results can be measured. To put the point another way, progressive constitutionalism is most productively grasped as above all a strategy which holds that the political aims and effects of constitutional discourses can never be determined independently of their function in a given historical situation. It's another way of making a point about contingency that Mark Tushnet made in his presentation.

Roberto Unger has noted the ways in which those committed to progressive political and legal ideals, like their liberal and conservative adversaries, have tended to view the idea of representative democracy as though it were equal to and exhausted by the peculiar combination of eighteenth century liberal constitutionalism and nineteenth century party politics that history has bequeathed them. This prejudice, the term is ominous, has prevented them from forging an alternative conception of representative democracy which sees the system of political representation as a barrier to progressive constitutional practice. I want to suggest that the notion that representative democracy and progressivism are hostile to one another at all points can be sustained only if one ignores the situated character of progressive constitutionalism. There is no necessary correspondence between formalism and conservatism or between anti-formalism and left politics. Thus within this conception of progressive constitutionalism, my argument is not conservative, and I am willing to talk a bit more with you about why I think that is so for reasons that I have not yet stated. The point here, and for progressive American constitutionalism, is that the context is all.