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THE FIRST AMENDMENT'S PETITION CLAUSE AS AN ALTERNATIVE BASIS FOR CHALLENGING VOTER INITIATIVES THAT BURDEN THE ENACTMENT OF ANTI-DISCRIMINATION PROTECTION FOR GAYS, LESBIANS, AND BISEXUALS

KEVIN FRANCIS O'NEILL[1]

In the battle for gay, lesbian, and bisexual rights, most of the fighting has centered on two sources of constitutional protection: substantive due process and equal protection. Unfortunately, courts have been reluctant to find in either of those constitutional guarantees a broad source of protection for gays, lesbians, and bisexuals.[2] The purpose of my remarks today is to suggest that the First Amendment—specifically, the Petition Clause of the First Amendment[3]—provides an alternative basis for vindicating gay, lesbian, and bisexual rights in certain cases. At least in the context of voter initiatives that seek to abolish anti-discrimination protection for sexual orientation, the Petition Clause is a promising alternative to equal protection and substantive due process.

The principal reason for invoking the Petition Clause is that the Supreme Court is much more receptive these days to First Amendment claims than it is to equal protection and substantive due process claims. As for equal protection, the Court does *not* regard sexual orientation as a suspect classification—so it analyzes claims by gays, lesbians, and bisexuals under its least protective standard: "rational basis" review.[4] Substantive due process is even less promising. We have only to remember the disaster of *Bowers v. Hardwick*,[5] where the Court contemptuously rejected any privacy right in consensual same-gender sex.[6] More recently, in the right-to-die

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[2]*See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (substantive due process) (emphatically rejecting the notion that the fundamental right to privacy identified in the Court's substantive due process precedents extends to same-gender sex); Romer v. Evans, 517 U.S. 620, 631 (1996) (equal protection) (subjecting equal protection claims by gays, lesbians, and bisexuals to the Court's most deferential standard: "rational basis" review).

[3]The Petition Clause is contained in the First Amendment to the U.S. Constitution, which provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (1791).

[4]Romer v. Evans, 517 U.S. 620, 631 (1996).

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

[6]*Id.* at 190-91.

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cases,[7] the Court displayed an open reluctance to recognize any new categories of fundamental rights.[8] In First Amendment cases, by contrast, the Court is much more receptive to innovative arguments and political minorities.[9]

When it comes to anti-gay voter initiatives, the need for an alternative to equal protection and substantive due process is especially compelling. This is made plain by the conflicting outcomes of two recent cases—*Romer v. Evans*[10] and *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*[11]—which both involved voter initiatives that abolished anti-discrimination protection for gays, lesbians, and bisexuals. Except for their scope (*Romer* involved a state-wide referendum, while *Cincinnati* featured a local election), the initiatives in these two cases were virtually identical. And yet they produced opposite results. Applying "rational basis" review,[12] the Supreme Court struck down the *Romer* initiative.[13] Employing the same deferential standard,[14] and straining to distinguish the *Romer* facts,[15] the Sixth Circuit upheld the *Cincinnati* initiative.[16] But the Sixth Circuit did not so much distinguish *Romer* as read into the *Cincinnati* initiative a benign effect (one that the

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[7]In *Washington v. Glucksberg*, 521 U.S. 702 (1997) and in *Vacco v. Quill*, 521 U.S. 793 (1997), the Supreme Court rejected, respectively, a substantive due process and an equal protection challenge to state statutes criminalizing assisted suicide.

[8]*Glucksberg*, 521 U.S. at 720-21 (emphatically confining substantive due process to "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'") (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

[9]*See, e.g.,* Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999) (stressing the First Amendment value of uninhibited communication with voters, the Court strikes down Colorado's restrictions on the procedure for getting initiatives on the ballot) (among the restrictions invalidated were requirements that people circulating petitions be registered Colorado voters and wear badges identifying themselves by name); City of Chicago v. Morales, 527 U.S. 41 (1999) (invoking the First Amendment vagueness doctrine to strike down an anti-loitering ordinance aimed at preventing gang members from controlling neighborhood streets); Reno v. ACLU, 521 U.S. 844 (1997) (striking down the Communications Decency Act, a federal statute that criminalized the on-line display of "indecent" materials to minors) (holding that the Internet, unlike broadcast media, enjoys the same unqualified protection afforded the print media); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997) (striking down an injunction that imposed a "floating buffer zone," requiring pro-life protesters to stay 15 feet from those entering or leaving an abortion clinic); McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) (striking down a ban on anonymous leafletting); City of Ladue v. Gilleo, 512 U.S. 43 (1994) (striking down local ordinance whose enforcement barred a homeowner from displaying on her property a sign that opposed U.S. intervention in the Persian Gulf).

[10]517 U.S. 620 (1996).

[11]128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

[12]517 U.S. at 631.

[13]*Id*. at 635-36.

[14]128 F.3d at 293.

[15]*Id*. at 294-97.

[16]*Id*. at 301.

Supreme Court dissenters had no trouble finding in *Romer*[17] as well): namely, Cincinnatians were merely "eliminat[ing] 'special class status' and 'preferential treatment' for gays as gays."[18]

What is to stop other municipalities from following *Cincinnati's* lead? What is to stop other homophobes from rallying around *Cincinnati's* "special rights" accusation? What is to stop other judges, hostile to *Romer's* result, from echoing *Cincinnati's* analysis? Since, after all, *Romer* requires the application of "rational basis" review[19]—a standard that invites a rubber-stamped approval of the challenged action—what is to prevent *Romer's* result from becoming the exception rather than the rule? There is only one answer to these questions: Resort to a constitutional provision *other than* the Equal Protection Clause. Enter the Petition Clause.

The First Amendment provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[20]

By its terms, the Petition Clause is implicated by voter initiatives that strip a political minority of anti-discrimination protection and place special obstacles in the path of that minority should it ever seek to restore the protection it has lost.

This was exactly the effect of the *Cincinnati* initiative—and, as part of the litigation team at the district court level in that case, I drafted a Petition Clause argument that found its way into our brief. In granting us an injunction that blocked the initiative from taking effect, the district judge embraced my argument, holding that the First Amendment afforded a distinct basis for striking the initiative down.[21] On appeal, the plaintiffs relied exclusively on the Equal Protection Clause. Thus, the Petition Clause argument proved successful the only time it was employed.

That argument proceeded as follows: The *Cincinnati* initiative makes it impossible to enact anti-discrimination legislation for gays, lesbians, and bisexuals through normal lobbying of city council and normal majority vote. One must amend the city charter to restore such protection.[22] Under the Ohio Constitution,[23] there are only two ways to amend a municipal charter: (1) obtain a two-thirds vote by city council; or (2) present city council with a petition signed by ten percent of the

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[17] 517 U.S. at 638 (Scalia, J., dissenting) ("The amendment prohibits special treatment of homosexuals, and nothing more."). Justice Kennedy, writing for the Romer majority, flatly rejected this assertion. *Id.* at 631.

[18] 128 F.3d at 297.

[19] 517 U.S. at 631.

[20] U.S. CONST. amend. I (1791).

[21] Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 444-47 (S.D. Ohio 1994), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *cert. granted, judgment vacated*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289 (6th Cir. 1997) (rejecting equal protection challenge to the Cincinnati initiative, distinguishing *Romer v. Evans*, 517 U.S. 620 (1996)), *cert. denied*, 525 U.S. 943 (1998).

[22] 860 F. Supp. at 445.

[23] OHIO CONST., art. XVIII, § 9.

electorate. Thus, to restore the anti-discrimination protections they have lost, gays, lesbians, and bisexuals are confronted by special burdens faced by no other political minority. They must leap through one of two hoops of flame: Go and get a super majority in city council, or hit the streets and gather signatures from ten percent of the electorate. Compounding these burdens are two additional problems. First, the *Cincinnati* initiative appears by its terms to prohibit the first option (seeking a super majority in city council).[24] Second, gays, lesbians, and bisexuals who take to the street to collect the requisite signatures are all the while stripped of anti-discrimination protection in housing and employment—exposing them to retaliation and thus chilling their speech.[25]

By singling out one political minority, abolishing its anti-discrimination protection, and then saddling it with heightened electoral burdens should it ever seek to restore those protections, the *Cincinnati* initiative left gays, lesbians, and bisexuals at a special disadvantage in lobbying their government for desired legislation. This, held the district court, was a violation of the Petition Clause.[26]

What, finally, do we know about the Petition Clause? Though it has generated scant attention from lawyers and judges, the right to petition has an ancient lineage—traceable all the way back to Magna Carta (1215)[27] —and was firmly rooted in the American colonies by the time of the Revolution.[28] Indeed, 50 years before the First Amendment's adoption, the colonial assemblies were already treating the right to petition as deserving of the greatest protection.[29] The few scholars who have looked at this history assert that the right to petition originated and developed separately from the other expressive freedoms (speech, press, and assembly);[30] that it was treated as superior to those other freedoms;[31] and that it was subject to much fewer restrictions than those other freedoms.[32] In 1680—when constructive treason,[33] licensing,[34] and seditious libel[35] effected ferocious restrictions on speech and press—the English Parliament adopted resolutions singling out the

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[24]*Equality Foundation*, 860 F. Supp. at 447.

[25]*Id*. at 446, 447.

[26]*Id*. at 444-47.

[27]Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 22 (1993); Norman B. Smith, *"Shall Make No Law Abridging. . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1155 (1986).

[28]Spanbauer, *supra* note 27, at 28; Smith, *supra* note 27, at 1170-75.

[29]Spanbauer, *supra* note 27, at 20.

[30]Spanbauer, *supra* note 27, at 17; Smith, *supra* note 27, at 1168-69.

[31]Spanbauer, *supra* note 27, at 17; Smith, *supra* note 27, at 1167-69.

[32]Spanbauer, *supra* note 27, at 17; Smith, *supra* note 27, at 1153-54.

[33]LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 9 (1985); FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 265-68 (1952).

[34]LEVY, *supra* note 33, at 6, 12; SIEBERT, *supra* note 33, at 260-63.

[35]LEVY, *supra* note 33, at 11; SIEBERT, *supra* note 33, at 271.

right to petition as an ancient privilege and expelling certain members for attempting to thwart its exercise by the citizenry.[36] Thus, the Petition Clause embodies a right whose lineage appears longer and stronger than that of the great freedoms of speech and press.

Seemingly unaware of this lineage, the Supreme Court has described the Petition Clause as "cut from the same cloth" as the other First Amendment freedoms.[37] Though this may be historically inaccurate, it nevertheless bodes well for Petition Clause claimants, who can expect a heightened scrutiny comparable to that reserved for other First Amendment claims. Indeed, the Court has expressly held that "'statutes . . . limit[ing] the power of the people to initiate legislation are to be closely scrutinized and narrowly construed.'"[38]

Let me conclude my remarks simply by recalling my original purpose in making them. My objective here was merely to plant a seed: to identify an alternative basis for vindicating the rights of gays, lesbians, and bisexuals—especially when combatting homophobic voter initiatives like those in *Romer* and *Cincinnati*. It's my hope that—confronted by the new wave of voter initiatives that will likely follow in *Cincinnati*'s wake—the Petition Clause will serve as a useful tool in fighting efforts to cripple the ability of gays, lesbians, and bisexuals to enact or restore anti-discrimination protection.

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[36]Smith, *supra* note 27, at 1160 (citing 4 Parl. Hist. Eng. 1174 (1700)). These resolutions stated that "it is and ever hath been the undoubted right of the subjects of England to petition the King for the calling and sitting of Parliament and the redressing of grievances," and, further, that "to traduce such petitioning as a violation of duty, and to represent it to his majesty as tumultuous and seditious is to betray the liberty of the subject, and contribute to the design of subverting the ancient legal constitution of this kingdom, and introducing arbitrary power." *Id*.

[37]McDonald v. Smith, 472 U.S. 479, 482 (1985).

[38]Meyer v. Grant, 486 U.S. 414, 420 (1988) (quoting Urevich v. Woodard, 667 P.2d 760, 763 (Colo. 1983)).

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