

4-15-1997

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Recommended Citation

Gary Alan Collis *Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 Pepp. L. Rev. Iss. 3 (1997)

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Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey

I. INTRODUCTION

Homosexuals are one of the most reviled minority groups in the United States.¹ They are victims of "hate" crimes more often than any other group.² With this reality as a backdrop, the United States Supreme Court first confronted the issue of homosexuality and its relation to the Equal Protection Clause of the United States Constitution³ in *Romer v. Evans*.⁴

On October 10, 1995, the United States Supreme Court heard oral arguments on the politically and socially sensitive issue of homosexual equality in the case of *Romer v. Evans*.⁵ The Court handed down its decision on May 20, 1996, and the opinion's implications are wide, yet not totally settled.⁶ The decision may affect government policy regarding political equality,⁷ same sex marriages,⁸ homosexuals in the mili-

1. Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 410-19 (1994).

Attacks against lesbians and gay men because of their homosexuality tend to be motivated by such extreme hatred that these incidents are unusually bloody or gruesome. According to one sociological study, "[a]n intense rage is present in nearly all homicide cases involving gay male victims. A striking feature . . . is their gruesome, often vicious nature. Seldom is the homosexual victim simply shot. He is more apt to be stabbed a dozen or more times, mutilated and strangled."

Id. at 410-11 (quoting Brian Miller & Laud Humphreys, *Lifestyles and Violence: Homosexual Victims of Assault and Murder*, 3 QUALITATIVE SOC. 169, 179 (1980)).

2. Brief for Respondents at 5 n.4, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039).

3. The Equal Protection Clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. 116 S. Ct. 1620 (1996); *cf.* *Bowers v. Hardwick*, 478 U.S. 186, 192-96 (1986) (addressing for the first time the issue whether consensual homosexual sodomy is a fundamental right protected by the Due Process Clause).

5. See Transcript of Oral Argument, *Romer*, 116 S. Ct. at 1620 (U.S. Oral Arg., Oct. 10, 1995) (No. 94-1039), available in 1995 WL 605822.

6. See Daniel A. Batterman, Comment, *Evans v. Romer: The Political Process, Levels of Generality, and Perceived Identifiability in Anti-Gay Rights Initiatives*, 29 NEW ENG. L. REV. 915, 920 (1995).

7. See, e.g., *Romer*, 116 S. Ct. at 1623.

tary,⁹ security clearance for government employees based upon sexual orientation,¹⁰ and immigration.¹¹ This Note analyzes the Supreme Court's decision in *Romer*. Part II discusses the Equal Protection Clause, judicial standards of review, and relevant landmark decisions which impact homosexuals' quest for constitutional protection.¹² Part III discusses the barriers the Supreme Court has developed against using the Due Process Clause as an effective method of challenging legislation disfavoring homosexuals.¹³ Part IV analyzes the history of Amendment 2¹⁴ and the Court's majority and dissenting opinion in *Romer*.¹⁵ Finally, Part V analyzes the possible impact of *Romer* on the future of gay rights.¹⁶

II. AN ANALYSIS OF THE EQUAL PROTECTION CLAUSE AND THE STANDARDS OF REVIEW

The Equal Protection Clause appears in the Fourteenth Amendment to the Constitution.¹⁷ Enacted after the Civil War, the Supreme Court originally gave the Equal Protection Clause a narrow interpretation and applied the Clause only to the states.¹⁸ Over time, the Court expanded its interpretation of the Clause and applied the Fourteenth Amendment

8. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that denial of marriage licenses to same-sex couples violates the Hawaii Constitution's prohibition of gender-based discrimination).

9. Compare *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479-80 (9th Cir. 1994) (holding that the government has no rational basis for discharging gay military personnel based upon statement of homosexuality alone), and *Cammermeyer v. Aspin*, 850 F. Supp. 910, 920 (W.D. Wash. 1994) (holding no rational basis for an acknowledgement of homosexual orientation as evidence of a desire or propensity to engage in homosexual conduct), with *Phillips v. Perry*, 883 F. Supp. 539, 545-46 (W.D. Wash. 1995) (holding that homosexual acts are not protected by an equal protection analysis).

10. See generally Anthony W. Swisher, *Nobody's Hero: On Equal Protection, Homosexuality, and National Security*, 62 GEO. WASH. L. REV. 827 (1994) (arguing statutes covering employees based upon stereotypes and prejudice lack support under a rational basis analysis and therefore should be stricken as unconstitutional).

11. See generally Brian F. Henes, Comment, *The Origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for Refugee Purposes*, 8 TEMP. INT'L & COMP. L.J. 377 (1994) (discussing attempts by homosexual aliens to attain asylum in the United States by claiming membership in a particular social group).

12. See *infra* notes 17-39 and accompanying text.

13. See *infra* notes 40-57 and accompanying text.

14. See *infra* notes 58-250 and accompanying text.

15. See *infra* notes 251-335.

16. See *infra* notes 336-73 and accompanying text.

17. U.S. CONST. amend. XIV, § 1. See *supra* note 3 for text of the Clause.

18. See *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872).

to the federal government through the Fifth Amendment's Due Process Clause.¹⁹

In asserting an Equal Protection claim against a statute or government regulation, a challenger must first show an invidious classification.²⁰ Next, the Court chooses between three standards of review to guide its decision on the case.²¹ The Court begins with the lowest standard of review which assumes that legislation is valid if it is rationally related to a legitimate state interest.²² There are only two scenarios in which a government regulation will be evaluated under a heightened standard: when it infringes on a fundamental right²³ or when it targets a suspect classification.²⁴ In order to survive the Court's inquiry under the more rigorous "strict scrutiny" test, the government must show that the law advances a compelling state interest and is narrowly tailored to meet that interest.²⁵ An intermediate standard is used occasionally,

19. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The text of the Fourteenth Amendment makes it applicable only to the states. U.S. CONST. Amend XIV. The Fifth Amendment reads in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

20. Thomas E. Baker, *Can Voters Exclude Homosexuals and Their Interests from the Legislative Process?*, 1 PREVIEW U.S. SUP. CT. CAS. 11, 13 (1995).

21. Seth Hilton, Comment, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?*, 28 U.C. DAVIS L. REV. 445, 450 (1995).

22. Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Constitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 98 (1995). The Supreme Court will declare legislation invalid using this "rational basis" test only on extremely rare occasions. *But see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding under rational basis test that a city may not deny a special use permit to the mentally retarded for operation of a group home). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

23. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (holding that marriage is a fundamental right that must be analyzed under a heightened standard). Most of these fundamental rights are found in the Constitution's Bill of Rights. *Baker, supra* note 20, at 14.

24. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that laws preventing marriage between black and white citizens violate the Equal Protection Clause because race is a suspect classification). "At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'" *Id.* at 11 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

25. Hilton, *supra* note 21, at 451. The Supreme Court has only allowed government activities to survive strict scrutiny when two fundamental rights collide or when the

usually when a quasi-suspect class²⁶ is involved.²⁷ To survive this intermediate level scrutiny, regulations of a quasi-suspect class must have a substantial relationship to an important government objective.²⁸

The Supreme Court has identified several factors for determining whether a particular class of people constitute a suspect class.²⁹ Class members must have an immutable characteristic, be politically powerless, and have suffered from a history of discrimination.³⁰ Homosexuality usually fails this test by failing to establish an immutable characteristic.³¹ When analyzing immutability, most have considered homosexuality strictly an issue of conduct that does not involve any irrepressible internal identification and understandings of self.³² In addition to the inability to clear the immutability hurdle, homosexuals have also experienced difficulty satisfying the politically powerless prong of the suspect class test.³³ As a result of these problems, the Supreme Court has refused to declare homosexuals a suspect class.³⁴ The Court has de-

country is at war. *See, e.g.,* *Burson v. Freeman*, 112 S. Ct. 1846 (1992) (holding that political campaigning may be restricted within 100 feet of a polling station); *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that Japanese Americans may be placed in internment camps during World War II). There is an indication that the wartime exception to strict scrutiny is no longer available. *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion). Justice O'Connor, writing for the majority in striking down an affirmative action plan, stated that "[t]he history of racial classification in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Id.* at 501 (citing *Korematsu*, 323 U.S. at 235-40).

26. *E.g.,* *Craig v. Boren*, 429 U.S. 190 (1976) (using intermediate level scrutiny in gender classification case).

27. *Hilton*, *supra* note 21, at 452.

28. *See* *Michael M. v. Superior Court*, 450 U.S. 464, 468-69 (1981) (plurality opinion).

29. *Duncan & Young*, *supra* note 22, at 98-100.

30. Pamela Coukos, *Civil Rights and Special Wrongs—The Amendment 2 Litigation*, 29 HARV. C.R.-C.L. L. REV. 531, 538 (1994).

31. Kenneth S. McLaughlin, Jr., Note, *Challenging the Constitutionality of President Clinton's Compromise: A Practical Alternative to the Military's "Don't Ask, Don't Tell" Policy*, 28 J. MARSHALL L. REV. 179, 191-92 n.84 (1994). In addition, some courts have observed that homosexuals are not politically powerless. *See, e.g.,* *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) (noting that "[i]n these times homosexuals are proving that they are not without growing political power").

32. *McLaughlin*, *supra* note 31, at 191 n.84.

33. *Id.* at n.85.

34. *Hilton*, *supra* note 21, at 469; *see* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (5-4 decision). Justice Brennan has come the closest to declaring that the Court should consider homosexuals a suspect class. *See* *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting).

[H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group

clared race,³⁵ gender,³⁶ alienage,³⁷ and illegitimacy³⁸ either suspect or quasi-suspect classifications which trigger the heightened form of judicial scrutiny.³⁹

III. THE ELIMINATION OF THE DUE PROCESS ARGUMENT

Twenty-four states and the District of Columbia make sodomy between consenting adults a crime.⁴⁰ This number is significantly fewer than in 1961, when every state banned sodomy.⁴¹ The acts which define sodomy and the punishment for commission of these acts vary between jurisdictions.⁴² These laws have "ancient roots,"⁴³ and religious and cultural notions of morality are the foundation upon which they stand.⁴⁴

In the 1982 case *Bowers v. Hardwick*,⁴⁵ police arrested Michael Hardwick in the bedroom of his home and charged him with engaging in homosexual sodomy in violation of Georgia's criminal sodomy stat-

are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality."

Id. at 1014 (Brennan, J., dissenting) (footnote omitted) (quoting *Plyer v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

35. *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

36. *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

37. *Bernal v. Fainter*, 467 U.S. 216, 219-20 (1984); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

38. *Lalli v. Lalli*, 439 U.S. 259, 274-76 (1978); *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1971).

39. *Hilton*, *supra* note 21, at 450-51.

40. *SEXUAL ORIENTATION AND THE LAW* 9 (Harvard Law Review ed., 1990) [hereinafter *SEXUAL ORIENTATION*].

41. *Bowers v. Hardwick*, 478 U.S. 186, 193 nn.5-6 (1986).

42. *Id.* at 198 n.1 (Powell, J., concurring); *SEXUAL ORIENTATION*, *supra* note 40, at 10.

43. *Bowers*, 478 U.S. at 192.

44. *See id.* at 196-97 (Burger, C.J., concurring) ("Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman Law."); Arthur A. Murphy et al., *Gays in the Military: What About Morality, Ethics, Character and Honor?*, 99 DICK. L. REV. 331, 334-36, 343 (1995).

45. *Bowers*, 478 U.S. 186.

ute.⁴⁶ Hardwick filed suit, stating that Georgia's law placed him in "imminent danger of arrest" and arguing that the sodomy law was unconstitutional under the Due Process Clause.⁴⁷ The Eleventh Circuit reversed the district court's decision to grant the government's motion to dismiss.⁴⁸ The reversing court held that Georgia's anti-sodomy law was unconstitutional on the basis of several Supreme Court decisions which had recognized an implied right of privacy under the Due Process Clause.⁴⁹

The case reached the Supreme Court, and in a five-to-four decision the Court reversed the Eleventh Circuit.⁵⁰ The Court held that the Due Process Clause protects rights not explicitly mentioned in the text of the Constitution if those rights are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed."⁵¹ The Court ruled that homosexual activity differed from the activity protected in other privacy cases because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other [had] been demonstrated."⁵² In response to the Court's holding, the dissent observed,

[t]he fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours,

46. *Id.* at 187-88.

47. *Id.* at 188-89. The Fourteenth Amendment's Due Process Clause provides: "[N]o State shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

48. *Bowers*, 478 U.S. at 189.

49. *Id.* The Supreme Court has held that a right of privacy protects "an intimate relation[ship]" within the context of the family. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (alteration in original). Thus, the Court has held marriage itself to be a fundamental right. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). This right to privacy also extends to procreation and certain family rights which are "fundamental." *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

50. *Bowers*, 478 U.S. at 186.

51. *Id.* at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). The Court also described these implied rights as those "deeply rooted in this Nation's history and tradition." *Id.* at 192 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

52. *Id.* at 191. The Court rejected the argument that there is an implied right to engage in homosexual activity because regulation of these private acts would offend justice. *Id.* at 192. The Court emphasized that many states have regulated this conduct for most of American history. *Id.* at 192-94. The Court also reasoned that because a majority of Americans approve of such regulations, it cannot be extremely offensive to notions of justice. *Id.* at 196 ("[R]espondent . . . insists that majority sentiments about morality of homosexuality should be declared inadequate. We do not agree . . ."). In his dissent, Justice Stevens countered the majority's argument by stating that simply because "the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Id.* at 216 (Stevens, J., dissenting).

that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.⁵³

Romer marks the first time the Court has addressed the constitutional rights of homosexuals since the *Bowers* decision.⁵⁴

Bowers effectively eliminated the ability of homosexuals to use the Due Process Clause to gain constitutional protection against unfavorable legislation.⁵⁵ In *Bowers*, the Court's opinion rested entirely upon the Due Process Clause, a reliance which distressed the dissenters.⁵⁶ As a result, the Equal Protection Clause is the last constitutional path upon which to travel in order to protect homosexuals.⁵⁷

IV. HOMOSEXUALS AND THE POLITICAL PROCESS: *EVANS V. ROMER*

A. *History of Amendment 2*

The latest challenge confronting those seeking greater legal protection for gays and lesbians is the citizen initiative to state constitutions which seeks to deny homosexuals governmental protection of any kind.⁵⁸ In at least ten states, voters have attempted to secure constitutional amendments of this type.⁵⁹ Although some of these efforts have failed,⁶⁰ the 1992 effort in Colorado succeeded.⁶¹ Colorado voters

53. *Id.* at 205 (Blackmun, J., dissenting).

54. Baker, *supra* note 20, at 11.

55. Duncan & Young, *supra* note 22, at 95.

56. See *Bowers*, 478 U.S. at 201-03 ("The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make for a persuasive one.") (Blackmun, J., dissenting).

57. See Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 STAN. L. REV. 269, 271 (1995) (arguing for a new approach to legal protection for gays under the Equal Protection Clause). Although unlikely, since six of the Justices ruling in *Bowers* have left the Court, a Due Process challenge may succeed in the future. Baker, *supra* note 20, at 11.

58. Batterman, *supra* note 6, at 916-20.

59. See Baker, *supra* note 20, at 12.

60. Christopher B. Daly, *Maine: Diverse Coalition Defeats Anti-Gay Rights Measure*, WASH. POST, Nov. 9, 1995, at A28 (discussing the defeat of a proposed amendment to the Maine Constitution which would have denied the government the ability to protect gays and lesbians from discrimination). Daly observed that "[t]he text of the referendum question never mentioned homosexuality or gay rights. Instead, it attempted to limit categories entitled to protection under the Maine Human Rights Act to race, sex, physical or mental disability, religion, age, ancestry, national origin,

passed what became known as Amendment 2 on November 3, 1992, by a vote of 53.4% to 46.6%.⁶² Amendment 2 stated:

[N]either 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.⁶³

Amendment 2 would have effectively eliminated protection for gay and lesbian citizens which existed in the Colorado cities of Aspen, Boulder, and Denver.⁶⁴

The campaign for passage of Amendment 2 centered on the key issue of whether laws against discrimination on the basis of sexual orientation provide "special rights" or "equal rights" for homosexuals.⁶⁵ Explaining what is meant by special rights is a difficult task. One easily understood explanation maintains that the rights involved are "special" because they grant rights to homosexuals which heterosexuals do not enjoy.⁶⁶ Looking at the laws in *Romer* on their face make it apparent that this explanation is not valid.⁶⁷ The laws adopted by various Colorado cities grant freedom from discrimination on the basis of sexual orientation rather than on the basis of homosexual orientation.⁶⁸ A second potential explanation of special rights is that homosexuals will use the laws primarily for protection, even though the laws are facially neutral.⁶⁹ While homosexuals may be more likely than heterosexuals to seek protection under such laws, homosexuals also are more likely to be victims of discrimination.⁷⁰ Although homosexuals are regularly discriminated against and forced to seek protection under antidiscrimination laws, the laws do not grant homosexuals any special rights denied to other groups.⁷¹ The difficulty in supporting the argument that protection for homosexuals equals special rights may be evidence that the term was developed more

family status and marital status." *Id.*

61. See Batterman, *supra* note 6, at 918.

62. *Id.*

63. See Baker, *supra* note 20, at 12.

64. See Batterman, *supra* note 6, at 918-19.

65. Samuel A. Marcossou, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 138-39 (1995).

66. *Id.* at 140.

67. *Id.* at 140-41.

68. *Id.*

69. *Id.* at 142-43.

70. *Id.*

71. *Id.* at 143.

for its political appeal and effect than based upon sound legal reasoning.⁷²

In Colorado, the groups arguing that laws and ordinances banning discrimination created special rights were victorious at the ballot box.⁷³ It took only nine days, however, for opponents of Amendment 2 to file a legal challenge asking a district court to grant a preliminary injunction and declare the amendment unconstitutional.⁷⁴ The plaintiffs argued that Amendment 2 violated their rights under the Equal Protection Clause of the Fourteenth Amendment and under other provisions of both the Colorado and United States Constitutions.⁷⁵ The defendants in the suit, including the Governor and Attorney General of Colorado, argued that Amendment 2 did not violate any constitutional provisions and that it only ordained a "statewide policy of governmental neutrality with respect to sexual orientation."⁷⁶ On January 15, 1993, the district court granted plaintiffs' request and issued a preliminary injunction against the enforcement of the amendment pending a determination of its constitutionality.⁷⁷ The Supreme Court of Colorado affirmed this injunction on July 19, 1993.⁷⁸

After the passage of Amendment 2, a national boycott of Colorado was undertaken which, coupled with a decline in tourism, may have cost the state \$120 million in lost revenue.⁷⁹ Yet Amendment 2 had other, more substantial costs.⁸⁰ Hate crimes increased by as much as 800% following

72. *Id.* at 147 n.24. The group Colorado for Family Values (CFV), which worked closely on the campaign with the Reverend Pat Robertson's National Legal Foundation, prepared the text of Amendment 2. Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 846-47 (1995). CFV's stated mission is essentially to protect people from "the forced affirmation of the homosexual lifestyle." *Id.* at 847. In its campaign for the Amendment, CFV argued that homosexuals were undermining families, molesting children, and overcrowding hospitals as a result of sexually transmitted diseases. *Id.* at 848.

73. Grauerholz, *supra* note 72, at 844. Voters passed Amendment 2 by a margin of 813,966 to 710,151. *Id.*

74. *Id.* at 845. A group of homosexual Coloradans and one heterosexual man suffering from AIDS filed the legal challenge on November 12, 1992. *Id.*

75. *Id.*

76. *Id.* at 845-46 (citing *Evans v. Romer*, 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct. Jan. 15, 1993), *aff'd on other grounds*, 854 P.2d 1270 (Colo. 1993)).

77. *Id.* at 846.

78. *Evans*, 854 P.2d at 1270.

79. Grauerholz, *supra* note 72, at 851.

80. See Batterman, *supra* note 6, at 941-43.

its passage, which is consistent with the effect of anti-gay rights campaigning in other states.⁸¹ During a similar debate in Oregon, a lesbian and gay newspaper in Portland received a note which read: "After 9 passes we will kill you all."⁸² In addition to an increase in physical violence, the passage of Amendment 2 led to movements in all fifty states to enact anti-gay rights legislation.⁸³ Gay rights organizations, however, mobilized by promoting education drives and other activities designed to combat the stereotypes and myths about homosexuals advanced by anti-gay rights activists.⁸⁴ Opponents of measures such as Amendment 2, with the support of groups such as the National Education Association, the Colorado Bar Association, and the American Psychological Association, worked to counter beliefs that homosexuality is a chosen behavior and that homosexuals are more likely to be child molesters than heterosexuals.⁸⁵ Ultimately, the decision of the Colorado Supreme Court served to quiet many of these arguments.⁸⁶

B. *The Supreme Court of Colorado's Majority Opinion*

The Colorado Supreme Court advanced a controversial position when it declared that the Constitution of the United States guarantees, through the Equal Protection Clause, "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 As the dissent correctly outlined, the Supreme Court has often refused to "expand the list of fundamental constitutional rights."⁸⁸ The *Evans* court included the right to equal participation in the political process on this list by taking a broad, generalized view of earlier Court decisions.⁸⁹ The hostility which some Supreme Court Justices, including Justice Scalia, have expressed for broad interpretation of previous decisions exemplifies the controversial nature of this decision.⁹⁰ Justice Scalia has maintained that when choosing how broadly or narrowly to view a decision, the Court "refer[s] to the most *specific*

81. *Id.* at 942 n.187-89.

82. *Id.* at 939 n.189 (quoting Heather Rhoads, *Cruel Crusade: The Holy War Against Lesbians and Gays*, PROGRESSIVE, Mar. 1993, at 21).

83. Grauerholz, *supra* note 72, at 851 (citing Michael Booth & Steven Wilmson, *The Great Divide: Basic Values at Heart of Debate*, DENVER POST, Sept. 19, 1993, at 10).

84. *Id.* at 851-52.

85. *Id.* at 849-51.

86. *See Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

87. *Id.* at 1276.

88. *Id.* at 1291 (Erickson, J., dissenting).

89. *See Batterman*, *supra* note 6, at 945-46.

90. *Id.* at 952-53.

level at which a relevant *tradition* protecting, or denying protection to, the asserted right can be identified."⁹¹ In the case of Amendment 2, the *Evans* court took a more expansive view of the Court's earlier cases dealing with access to the political process.⁹² The court dispensed with the idea that the Equal Protection Clause applies only to suspect classes of persons and then began a long discussion of four types of cases: (1) right to vote, (2) reapportionment, (3) access to the ballot, and finally (4) cases which limit an identifiable group's ability to influence legislation because of ballot initiatives.⁹³

1. Right to Vote Cases

"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."⁹⁴ The *Evans* court began weaving its support for a fundamental right to participate in the political process guaranteed by the Equal Protection Clause by visiting Supreme Court decisions addressing the right of citizens to vote.⁹⁵ The court cited cases such as *Dunn v. Blumstein*,⁹⁶ *Harper v. Virginia Board of Elections*,⁹⁷ and *Kramer v. Union Free School District*⁹⁸ to support its

91. *Id.* at 952 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (emphasis added)).

92. *Id.* at 953-55. Instead of looking at Supreme Court precedent in terms of the narrow subject matter of each case, the *Evans* court tied several decisions together and determined that no group should be denied the right to fully participate in the world of representative democracy and public policy. *Id.* at 947-48.

93. *Evans*, 854 P.2d at 1275-86. Specifically, the court stated that "gay men, lesbians, and bisexuals have not been found to constitute a suspect class, . . . and that plaintiffs do not claim that they constitute such a class do[es] not render the Equal Protection Clause inapplicable to them." *Id.* at 1275 (internal citations omitted).

94. *Id.* at 1276.

95. *Id.* The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments each expand and protect the citizens' freedom to vote, evincing the importance of the right to vote found in the Constitution itself. *See* U.S. CONST. amend. XV, § 1 (banning race-based restrictions on the right to vote); U.S. CONST. amend. XIX (banning restrictions based on gender); U.S. CONST. amend. XXIV, § 1 (prohibiting poll taxes); U.S. CONST. amend. XXVI, § 1 (granting voting rights to persons 18 years old and older).

96. 405 U.S. 330, 360 (1972) (striking down voter residency requirements).

97. 383 U.S. 663, 670 (1966) (making poll taxes illegal).

98. 395 U.S. 621, 633 (1969) (banning property ownership and parental status as voting requirements).

position that the right to political participation is fundamental.⁹⁹ The Court in *Dunn* specifically stated, "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."¹⁰⁰ In each of these cases, the Supreme Court applied the strict scrutiny test and concluded that the laws were unconstitutional.¹⁰¹

2. Reapportionment Cases

The *Evans* court next added Supreme Court cases concerning apportionment of representation to its discussion of equal participation in the political process.¹⁰² The court first considered *Reynolds v. Sims*.¹⁰³ In *Reynolds*, the Court held that the Alabama legislature must allow each citizen's vote to have an equal impact upon an election by apportioning seats in the Alabama legislature according to population.¹⁰⁴ The Court said that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. . . . Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."¹⁰⁵ The *Evans* court adopted this idea and stated:

[T]he Court's opinion in *Reynolds*, as well as in the other reapportionment cases, reflects the judgment that dilution in the effectiveness of certain voters' exercise of the franchise violates the guarantee of equal protection of the laws not simply because citizens are guaranteed the right to vote, but because that right must be preserved in a meaningful, effective manner.¹⁰⁶

The apportionment line of cases established the "one man, one vote" principle and expanded the Court's perspective on the importance of fairness and equality in the political process.¹⁰⁷

3. Access to the Ballot Cases

The *Evans* court next turned its attention to the Supreme Court's decisions regarding candidate and party eligibility.¹⁰⁸ The court discussed

99. *Evans*, 854 P.2d at 1276-77.

100. *Dunn*, 405 U.S. at 336.

101. Grauerholz, *supra* note 72, at 865.

102. *Evans*, 854 P.2d at 1277.

103. 377 U.S. 533 (1964).

104. *Id.* at 568.

105. *Id.* at 560 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964)).

106. *Evans*, 854 P.2d at 1278.

107. See Grauerholz, *supra* note 72, at 868.

108. *Evans*, 854 P.2d at 1278.

Williams v. Rhodes,¹⁰⁹ which overturned an Ohio law that greatly restricted access to the presidential ballot, and *Illinois State Board of Elections v. Socialist Workers Party*,¹¹⁰ in which the Court invalidated an Illinois law disfavoring minority parties in local elections.¹¹¹ The court noted that the Supreme Court applied strict scrutiny to these cases because the laws "placed significant burdens on the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."¹¹²

Although these three types of cases were important to the *Evans* court's determination that the Supreme Court has implicitly endorsed a fundamental right to equal participation in the political process, the court found the final category the most instructive.¹¹³

4. Ballot Initiatives Disadvantaging a Particular Group

The *Evans* court correctly identified a group of cases more closely paralleling the case at bar than the cases previously discussed.¹¹⁴ Beginning with *Hunter v. Erickson*,¹¹⁵ the court detailed Supreme Court decisions which strongly suggested the unconstitutionality of ballot initiatives limiting a particular group's political participation.¹¹⁶ In *Hunter*, Ohio voters passed an amendment to the Akron City Charter requiring the voters to enact any fair housing ordinances while permitting the city council to enact all other ordinances.¹¹⁷ The plaintiffs claimed that the amendment discriminated against them because of their race and made it more difficult for them to secure favorable legislation.¹¹⁸ The Supreme Court held that the amendment violated the Equal Protection rights of African-Americans because it subjected them to a disadvantage in the political arena.¹¹⁹ "[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation

109. 393 U.S. 23 (1968).

110. 440 U.S. 173 (1979).

111. *Evans*, 854 P.2d at 1278.

112. *Id.* (quoting *Williams*, 393 U.S. at 31).

113. *Id.* at 1278-79.

114. *See id.* at 1278-84.

115. 393 U.S. 385 (1969).

116. *Evans*, 854 P.2d at 1279.

117. *Hunter*, 393 U.S. at 386.

118. *Id.* at 386-89.

119. *See id.* at 393.

than another of comparable size.¹²⁰ Although the plaintiff in the case was black, the *Evans* court stated that the “opinion speaks to concerns which are broader than the repugnancy of racial discrimination alone.”¹²¹ In support of this contention, the court pointed out that if *Hunter* was concerned with only racial discrimination, the Court could have dispensed with it on the grounds that it adversely impacted a suspect class and avoided a detailed discussion on the “importance of political participation.”¹²² As additional support for its contention that the *Hunter* Court intended its decision to be generally applicable and not confined to race cases, the court noted that the Supreme Court did not cite to any race cases to support its decision.¹²³

Next, the court looked at *Washington v. Seattle School District No. 1*.¹²⁴ In *Seattle School District*, the Supreme Court struck down a voter initiative which would have forbidden local school districts from requiring student busing for purposes of integration.¹²⁵ The Court relied upon its decision in *Hunter* and fully adopted the principle of neutrality that Justice Harlan discussed in his concurring opinion in *Hunter*.¹²⁶ The Court held that the initiative was unconstitutional because it was not based upon “neutral principles.”¹²⁷ The Court explained that only neutral regulations would be free from Equal Protection attack, stating that “[b]ecause such [neutral] laws make it more difficult for every group in the community to enact comparable laws, they ‘provid[e] a just framework within which the diverse political groups in our society may fairly compete.’”¹²⁸ Based on the Supreme Court’s adoption of the rule of neutral principles, the *Evans* court concluded that these cases were not limited to a racial context; rather, a court should apply the neutral principle whenever an identifiable group is not given equal opportunity to participate in the political process.¹²⁹ “Thus, while *Hunter* and [*Seattle School District* were] indeed cases which involved racial minorities, the principle articulated in those cases clearly [was] not one that [could] logically be limited to the ‘race’ context alone.”¹³⁰

120. *Id.*

121. *Evans*, 854 P.2d at 1279.

122. *Id.* at 1283.

123. *Id.* at 1279-80.

124. 458 U.S. 457, 459-67 (1982).

125. *Id.* at 459-67.

126. *Id.* at 469-70; see *Hunter v. Erickson*, 393 U.S. 385, 394 (1969) (Harlan, J., concurring).

127. *Seattle Sch. Dist.*, 458 U.S. at 469-70.

128. *Id.* at 470 (emphasis in original) (quoting *Hunter*, 393 U.S. at 393).

129. *Evans v. Romer*, 854 P.2d 1270, 1281 (Colo. 1993).

130. *Id.*

As further support for the proposition that these cases were not based on race, the *Evans* court analyzed *Gordon v. Lance*.¹³¹ In *Gordon*, the Supreme Court upheld a section of the West Virginia Constitution which required a voter referendum approved by sixty percent of the voters in order for the State or one of its subdivisions to incur bonded indebtedness.¹³² The Court stated, "We conclude that so long as such provisions do not discriminate against or authorize discrimination against *any identifiable class* they do not violate the Equal Protection Clause."¹³³ The Court could not identify any "independently identifiable group or category" which was discriminated against by this section of the West Virginia Constitution and thus found that it did not violate the Equal Protection Clause.¹³⁴ The *Evans* court reasoned that because the Court in *Gordon*, which did not involve race, cited to *Hunter*, which did involve racial minorities, the identifiable groups to which the Supreme Court referred was not limited to race.¹³⁵ The *Evans* court pointed out that the reason for upholding the West Virginia provision while striking down the two previous provisions was that in *Gordon*, there was no identifiable group while in *Hunter* and *Seattle School District*, such a group existed.¹³⁶

The court used these four types of cases, with particular emphasis on the final category, to conclude that the Supreme Court had recognized a fundamental right to equal participation in the political process and thus, courts must subject any law which limits participation of an identifiable group to strict scrutiny.¹³⁷ The *Evans* court stated:

[T]he Court consistently recognized the paramount importance of political participation in our system of government, and articulated the fundamental principle which guided its decision in those cases: The Equal Protection Clause guarantees the fundamental right to participate equally in the political process and thus, any attempt to infringe on that right must be subject to strict scrutiny and can be held constitutionally valid only if supported by a compelling state interest.¹³⁸

131. 403 U.S. 1 (1971).

132. *Id.* at 2.

133. *Id.* at 7 (emphasis added).

134. *Id.* at 5.

135. *Evans*, 854 P.2d at 1282.

136. *Id.*

137. *Id.*

138. *Id.* at 1279 (footnote omitted).

C. *The Dissent of Colorado Supreme Court Justice Erickson*

Justice Erickson was the only dissenter in *Evans*.¹³⁹ He analyzed the rationale of the district court's original preliminary injunction¹⁴⁰ and the rationale of the majority and determined that no right to equal participation in the political process existed.¹⁴¹ The dissent rejected the notion that voter rights and ballot access cases stand for any principle beyond those expressly stated by the Court.¹⁴²

After a brief discussion of the voter cases, the dissent turned its attention to cases which have discussed changing the political structure of a state to the disadvantage of a particular group of persons.¹⁴³ The dissent reasoned that *Hunter* and *Seattle School District*, both cited by the majority,¹⁴⁴ were nothing more than traditional racial classification cases.¹⁴⁵ The dissent quoted extensively from portions of *Hunter* in which the Supreme Court emphasized the importance of plaintiff's membership in a racial minority group.¹⁴⁶ According to the dissent, *Seattle School District* was also a simple racial case.¹⁴⁷ The dissent dismissed *Gordon v. Lance*,¹⁴⁸ a case upholding a contended regulation, as distinguishable from *Hunter* in which "the group challenging the constitutional measure could not establish membership in a discrete and insular minority that the Supreme Court recognized as a suspect classification."¹⁴⁹

The major support for the dissent's contention that the Supreme Court did not intend to establish a generalized right to equal participation in the political process came from *James v. Valtierra*.¹⁵⁰ In *James*, the Supreme Court upheld a voter-initiated amendment to the California Consti-

139. *Id.* at 1286 (Erickson, J., dissenting).

140. *Romer v. Evans*, 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct. Jan. 15, 1993), *aff'd on other grounds*, 854 P.2d at 1270. The district court based its decision to preliminarily enjoin enforcement of Amendment 2 on a fundamental right to not have the government give effect to private biases. *Id.*

141. *Evans*, 854 P.2d at 1302 (Erickson, J., dissenting).

142. *Id.* at 1294 (Erickson, J., dissenting) ("[T]here is no . . . common thread uniting the decisions cited by the majority.")

143. *Id.* at 1296-97 (Erickson, J., dissenting).

144. *Id.* at 1279-81.

145. *Id.* at 1297-1300 (Erickson, J., dissenting).

146. *Id.* at 1297 (Erickson, J., dissenting).

147. *Id.* at 1300 (Erickson, J., dissenting).

148. 403 U.S. 1 (1971).

149. *Evans*, 854 P.2d at 1299 (Erickson, J., dissenting). The dissent did not explain the *Gordon* Court's curious language that it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing." See *Gordon*, 403 U.S. at 5. If the Court had intended to contrast *Gordon* with *Hunter* on a racial basis alone, it could have pointed out that the bond indebtedness amendment did not impact a suspect classification of persons. See *id.*

150. 402 U.S. 137 (1971).

tution which would have forbidden municipalities from building or acquiring public housing projects without a voter-approved referendum.¹⁵¹ The Court said that "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group."¹⁵² The *Evans* dissent argued that if the Court had intended to protect "any identifiable group," as the majority argued, it would have struck down the California amendment because it disadvantages poor citizens who benefit from low-income housing.¹⁵³

For these reasons, the dissent concluded that "[t]o date . . . the Supreme Court has never explicitly stated that a fundamental right to participate equally in the political process exists."¹⁵⁴ In rejecting the arguments of Amendment 2 opponents, the dissent stated that "rather than expressing a willingness to extrapolate new fundamental rights based on selective language from prior Supreme Court decisions, we should exercise caution in identifying and embracing previously unrecognized fundamental rights."¹⁵⁵

D. Events Following *Evans v. Romer*

After the Colorado Supreme Court affirmed the lower court's granting of the injunction and dictated a strict scrutiny standard of review, the case returned to the lower court for a determination of whether Colorado had a compelling state interest and if Amendment 2 was narrowly tailored to achieve that interest.¹⁵⁶ The State argued that it had six compelling reasons to justify Amendment 2.¹⁵⁷ These included: (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)

151. *Id.* at 140-41.

152. *Id.* at 142.

153. *Evans*, 854 P.2d at 1297-98 (Erickson, J., dissenting).

154. *Id.* at 1301 (Erickson, J., dissenting).

155. *Id.* (Erickson, J., dissenting).

156. *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753, 754 (Colo. Dist. Ct. Dec. 14, 1993), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996).

157. *See id.* at 755-62.

promoting the physical and psychological well-being of children.¹⁵⁸ The lower court concluded that only the promotion of religious and familial privacy were compelling state interests and that Amendment 2, as it related to those objectives, was not sufficiently narrow to pass constitutional requirements.¹⁵⁹ The plaintiffs again appealed this decision to the Colorado Supreme Court and the court delivered an opinion on October 11, 1994.¹⁶⁰ The Colorado Supreme Court affirmed the lower court's decision that the State had not met its burden of showing it had a compelling state interest or that the Amendment was narrowly tailored to the State's interest, and thus, Amendment 2 could not stand.¹⁶¹

E. To the Supreme Court of the United States

On February 21, 1995, the United States Supreme Court granted Petitioners' writ of certiorari.¹⁶² The Court heard oral arguments on October 10, 1995.¹⁶³

1. Brief for Petitioners

Petitioners¹⁶⁴ began their argument by labeling the decision of the Colorado Supreme Court as one which "embodies a revolutionary change in the structure of state and local political authority" and "does profound violence to settled understandings of the authority of, and respect for, popular government at the state level."¹⁶⁵ This concern over federal interference in the internal political decision-making process of the State

158. *Id.* at 755.

159. *Id.* at 759.

160. *See Evans*, 882 P.2d at 1335.

161. *Id.* at 1350. Although religious and familial privacy were compelling government interests, the court concluded that Amendment 2 was not narrowly tailored to achieve these goals. *Id.* at 1344 ("[F]ully recognizing that parents have a 'privacy' right to instruct their children that homosexuality is immoral, we find that nothing in the laws or policies which Amendment 2 is intended to prohibit interferes with that right.").

162. *Romer v. Evans*, 115 S. Ct. 1092 (1995).

163. Transcript of Oral Argument, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039), available in 1995 WL 605822, at *1 (Oct. 10, 1995).

164. Many amicus briefs were filed in support of the Petitioners, including Joint Brief of the States of Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and Virginia; Joint Brief of the Christian Legal Society, Catholic League for Religious and Civil Rights, Christian Life Commission of the Southern Baptist Convention, Focus on the Family, Lutheran Church-Missouri Synod, National Association of Evangelicals; and Family Research Council; Joint Brief of the Oregon Citizens Alliance, No Special Rights Committee, and Stop Special Rights-PAC; and Amicus Brief of the Pacific Legal Foundation. Baker, *supra* note 20, at 17-18.

165. Brief for Petitioners at 10, *Romer* (No. 94-1039).

of Colorado constituted the primary argument for overturning the lower court ruling.¹⁶⁶ Petitioners pointed to *Luther v. Borden*¹⁶⁷ and *San Antonio Independent School District v. Rodriguez*,¹⁶⁸ among other cases, as support for their position that a state may organize its internal political functions as it chooses.¹⁶⁹ Indeed, Petitioners pointed to authority which indicates that even when a suspect or quasi-suspect class is affected by the self-governing process within a state, strict scrutiny is not necessarily triggered.¹⁷⁰ Petitioners urged the Court not to interfere with Colorado's internal decision making process and noted that the Court has traditionally given states "extraordinarily wide latitude" to structure themselves politically.¹⁷¹

Next, Petitioners argued that Amendment 2 did not involve a suspect or quasi-suspect class.¹⁷² Respondents did not preserve the issue for Supreme Court review, and both the district court and the Colorado Supreme Court acknowledged that homosexuals were not considered a suspect class for constitutional purposes.¹⁷³ Therefore, strict scrutiny would apply to the Equal Protection claim only if *Romer* involved a "federally-guaranteed fundamental right."¹⁷⁴

Petitioners asserted that "[t]he 'right' of every independently identifiable group to fully participate in all phases of the political process identified by the Colorado Supreme Court has no basis in the text of the Constitution."¹⁷⁵ Petitioners buttressed this position by arguing that the cases relied upon by the majority in *Evans*, such as *Hunter v. Erickson*¹⁷⁶ and *Washington v. Seattle School District*,¹⁷⁷ did not create a fundamental right but instead protected a suspect class.¹⁷⁸ In addition to at-

166. *Id.* at 14-16.

167. 48 U.S. (7 How.) 1 (1849).

168. 411 U.S. 1 (1973).

169. Brief for Petitioners at 14-15, *Romer* (No. 94-1039).

170. *Id.* at 15 n.6.

171. *Id.* at 15-16 (quoting *Holt Civil Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978)).

172. *Id.* at 16-18.

173. *Id.* at 16-17.

174. *Id.* at 18.

175. *Id.* at 19.

176. 393 U.S. 385 (1969).

177. 458 U.S. 457 (1982).

178. Brief for Petitioners at 20-24, *Romer* (No. 94-1039). This is the precise position taken by the dissent in the lower court opinion, illuminating the difficulty in interpreting two Supreme Court decisions which do not carefully delineate the line between suspect classifications and fundamental rights. See *Evans v. Romer*, 854 P.2d

tacking the lower court's reading of these two cases as having "turn[ed] the opinion in *Hunter* on its head,"¹⁷⁹ petitioners cited to *James v. Valtierra*.¹⁸⁰ Petitioners pointed out that *James* concerned an amendment to the California Constitution which would have required voter approval of municipal purchases or acquisitions of low-income housing.¹⁸¹ The Court upheld the amendment and indicated its decision did not conflict with *Hunter* because unlike *Hunter*, *James* did not involve racial issues.¹⁸² Petitioners used this line of reasoning as proof that the opinions relied upon by the *Evans* court were suspect class cases and could not be read to create a new fundamental right.¹⁸³ Finally, Petitioners claimed that the majority "rewrote" *James* using "mystifying" logic¹⁸⁴ and insisted that "the *Hunter* rule comes into play only to protect racial minorities—or at its most expansive, members of a suspect class."¹⁸⁵

Petitioners next addressed the other types of cases upon which the *Evans* court relied.¹⁸⁶ After discussing the right to vote and ballot access cases, Petitioners asserted that these cases do not stand for anything beyond the issue presented to the Court.¹⁸⁷ Furthermore, "[r]ather than burdening any person's rights to vote or associate, Amendment 2 simply raises a certain issue to a constitutional level."¹⁸⁸ Petitioners concluded by asserting that voter and ballot access cases not only failed to support the *Evans* court's conclusion, but instead stand for the proposition that "[s]tates are completely free to structure their governmental decision making authority without judicial interference."¹⁸⁹

1270, 1286-1302 (Colo. 1993) (Erickson, J., dissenting).

179. Brief for Petitioners at 20, *Romer* (No. 94-1039).

180. 402 U.S. 137 (1971).

181. Brief for Petitioners at 21, *Romer* (No. 94-1039).

182. *James*, 402 U.S. at 141.

183. Brief for Petitioners at 22, *Romer* (No. 94-1039).

184. *Id.*

185. *Id.* at 24.

186. *Id.* at 25 (noting that the *Evans* court also relied on *Reynolds v. Simms*, 377 U.S. 533 (1964), and *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969)).

187. *Id.* at 25-28. Petitioners failed to point out that the *Evans* court acknowledged that these cases, when taken by themselves, do not establish the fundamental right to participate in the political process. See *Evans v. Romer*, 854 P.2d 1270, 1276 (Colo. 1993) ("*When considered together*, these cases demonstrate that the Equal Protection Clause guarantees the fundamental right to participate equally in the political process.") (emphasis added).

188. Brief for Petitioners at 27, *Romer* (No. 94-1039). This statement begs the question because the court is addressing the constitutionality of raising this issue to the state constitutional level under the assumed fundamental right to participate equally in the political process. See generally *Evans*, 854 P.2d at 1270.

189. Brief for Petitioners at 28, *Romer* (No. 94-1039). The Petitioners also qualified this statement by adding "absent a clearly applicable constitutional impediment." *Id.*

Petitioners maintained that the *Evans* court fundamentally erred by locating the right to participate equally in the political process in case law, rather than determining whether such a right is "deeply rooted in this Nation's history and tradition."¹⁹⁰ Petitioners asserted that courts cannot find this right in the Equal Protection Clause itself; instead, the right must be found through a historical Due Process analysis or in the text of the Constitution.¹⁹¹ Having established the framework for identifying fundamental rights, Petitioners asserted that "[t]he 'right' to demand preferential treatment from any level of state or local government is neither 'deeply rooted in this Nation's history and tradition,' nor 'implicit in the concept of ordered liberty.'"¹⁹² Petitioners next discussed a series of cases in which the Supreme Court deferred to a state's ability to structure itself politically.¹⁹³ In addition to arguing that the Court should defer to the state on these issues, Petitioners maintained that allowing every "independently identifiable group" to challenge unfavorable constitutional provisions would subject a whole range of provisions to challenge.¹⁹⁴ According to Petitioners, this problem is complicated by the limitless number of groups which are independently identifiable and the Colorado Supreme Court's failure to limit its decision only to the legal challenge of constitutional provisions.¹⁹⁵

The *Evans* court concluded that such an impediment existed, making all the cases it considered relevant under Petitioners' standard. *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993).

190. Brief for Petitioners at 28-29, *Romer* (No. 94-1039) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977))) (internal quotation marks omitted in original).

191. *Id.* at 28.

192. *Id.* at 30 (quotations omitted in original). Many who engage in political battles for civil rights argue that petitioning elected representatives for protections against discrimination is indeed deeply rooted in our nation's history and tradition. Marcossou, *supra* note 65, at 144-54; see also *Evans*, 854 P.2d at 1291 (Erickson, J., dissenting).

193. Brief for Petitioners at 30-33, *Romer* (No. 94-1039).

194. *Id.* at 34-38. Petitioners argued that "[a]ny conceivable group, from a boy scout troop to a group of tax protestors, fits the definition." *Id.* at 35.

195. *Id.* at 35. Despite Petitioners' contention that the *Evans* court did not limit its decision to constitutional provisions, the decision makes it clear that a group could not argue that they were "fenced out" of the political process when democratically elected representatives were empowered to take notice of their voices prior to the enactment of a statute or ordinance and were empowered to repeal such statutes or ordinances after implementation. See *Evans*, 854 P.2d at 1284.

Finally, Petitioners focused on whether Amendment 2 would pass the rational basis test.¹⁹⁶ Petitioners asserted three state interests which they contended were rationally related to Amendment 2: (1) the integrity of civil rights laws, (2) enhancing individual freedoms, and (3) avoiding factionalism in the law.¹⁹⁷ First, Petitioners maintained that given Colorado's financial constraints, it was rational to assume that adding gays and lesbians to the class of suspect citizens would deplete resources and limit the State's ability to combat discrimination against other protected groups.¹⁹⁸ Second, Petitioners asserted that Amendment 2 might interfere with religious, familial, personal, and associational freedoms.¹⁹⁹ Petitioners pointed out that churches might be required to hire homosexuals in violation of their faith, persons may be required to rent rooms to homosexuals in violation of personal privacy, and Amendment 2 "could undermine the efforts of some parents to teach traditional moral values."²⁰⁰ Finally, Petitioners argued that "[i]t is advantageous to the State to have uniform civil rights laws, both to promote efficient enforcement, and to maximize individual liberty, including the preservation of traditional social norms."²⁰¹ They maintained that having many different municipal ordinances "seriously fragment[ed] Colorado's body politic."²⁰²

196. Brief for Petitioners at 39, *Romer* (No. 94-1039).

197. *Id.* at 41-48.

198. *Id.* at 41-43. Petitioners implied that homosexuals do not need protection because homosexuals and bisexuals have higher than average levels of wealth and education. *Id.* at 43 n.30. Petitioners did not mention the testimony of two experts, Denver Mayor Wellington Webb and Anti-discrimination Compliance Officer Brenda Tolliver-Locke, who indicated that enforcing Denver's anti-gay discrimination ordinance does not detract from enforcing antidiscrimination laws against other groups. *Evans v. Romer*, 63 Fair. Empl. Prac. Cas. (BNA) 753, 757 (Colo. Dist. Ct. Dec. 14, 1993), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). Petitioners also did not mention the testimony of Leanna Ware from the Civil Rights Bureau of the State of Wisconsin who said that the percentage of claims filed by homosexuals is very small and no adverse impact upon enforcement of other laws has resulted. *Id.*

199. Brief for Petitioners at 43-48, *Romer* (No. 94-1039).

200. *Id.* at 43-46.

201. *Id.* at 47-48. Petitioners did not address the following comments of the trial judge: "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." *Evans*, 63 Fair. Empl. Prac. Cas. (BNA) at 756.

202. Brief for Petitioners at 47, *Romer* (No. 94-1039).

2. Brief for Respondents

The Respondents²⁰³ brief mirrored the position of the lower court

203. Many amicus briefs were filed in support of the Respondents including: Joint Brief of United Methodists for Gay, Lesbian and Bisexual Concerns, Axious USA, Inc., The Brethren/Mennonite Council for Lesbian and Gay Concerns, Dignity/USA, Evangelicals Concerned, Inc., Integrity, Inc., Lutherans Concerned/North America, Presbyterians for Lesbian/Gay Concerns, United Church Coalition for Lesbian/Gay Concerns, and the World Congress of Gay and Lesbian Jewish Organizations; Joint Brief of the American Association on Mental Retardation, American Orthopsychiatric Association, the ARC, National Association of Protection and Advocacy Systems, National Association for Rights Protection and Advocacy, American Network of Community Options and Resources, The American Bar Association; and The American Federation of State, County, and Municipal Employees AFL-CIO; Joint Brief of the American Friends Service Committee, American Jewish Committee, Anti-Defamation League, Federation of Reconstructionist Congregations and Havurot, Interfaith Impact for Justice and Peace, The Most Reverend Edmond L. Browning, Presiding Bishop of the Episcopal Church, Reconstructionist Rabbinical Association, Unitarian Universalist Association, United Church of Christ Office for Church in Society, and United Synagogue of Conservative Judaism; Joint Brief of The American Psychological Association, American Psychiatric Association, National Association of Social Workers, Inc., and the Colorado Psychological Association; Joint Brief of the Anti-Defamation League, Asian American Legal Defense and Education Fund, Japanese American Citizens League, NAACP Legal Defense and Education Fund, Inc., National Council of La Raza, and the People For The American Way and Puerto Rican Legal Defense and Education Fund; Joint Brief of the Colorado Bar Association et al., and the Gay and Lesbian Lawyers of Philadelphia; Joint Brief of the Human Rights Campaign Fund, National Gay and Lesbian Task Force, National Lesbian and Gay Law Association, National Center for Lesbian Rights, Gay and Lesbian Advocates & Defenders, Gay and Lesbian Medical Association, Union of American Hebrew Congregations, National Asian Pacific American Legal Consortium, National Organization for Women, NOW Legal Defense and Education Fund, Connecticut Women's Education and Legal Fund, Inc., Gay and Lesbian Law Association of Florida, Oregon Gay and Lesbian Law Association, Bay Area Lawyers for Individual Freedom, Lawyers for Human Rights—the Lesbian and Gay Bar Association of Los Angeles, Orange County Lawyers for Equality Gay and Lesbian, and the Tom Homann Bar Association of San Diego; Joint Brief of the NAACP Legal Defense and Educational Fund, Inc., the Mexican American Legal Defense and Education Fund, and the Women's Legal Defense Fund; Joint Brief of the National Education Association, the Colorado Education Association, the American Federation of Teachers, AFL-CIO, American Association of University Professors, Association for Supervision of Curriculum Development, Council of the Great City Schools, and the National Association for Chicana and Chicano Studies; Joint Brief of the States of Oregon, Iowa, Maryland, Massachusetts, Minnesota, Nevada, Washington, and the District of Columbia; Joint Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan. Baker, *supra* note 20, at 17-18. Noticeably absent from this list was the expected brief of the United States Department of Justice. Ann Devroy, *Clinton Backs Ban on Sexual Orientation Bias at Work*, WASH. POST, Oct.

majority in *Evans*.²⁰⁴ After setting forth the history of Amendment 2²⁰⁵ and its treatment by the Colorado Supreme Court,²⁰⁶ Respondents summarized their argument by stating that Amendment 2 violated the rights of homosexuals to participate equally in the political process, but did not pass either the strict scrutiny or the rational basis test.²⁰⁷

Respondents also challenged Petitioners' assertion that *Romer* involved a federalism issue and that states should be free to structure their internal political process as they choose.²⁰⁸ Respondents contended that the Supreme Court may intervene when these structures "burden a federally protected right."²⁰⁹

Next, Respondents argued that the right to participate equally in the political process is fundamental and applies to everyone, not simply to suspect classifications.²¹⁰ In support of this position, Respondents cited the cases used by the *Evans* majority.²¹¹ Countering Petitioners' position that no fundamental right to equal participation in the political process exists for nonsuspect groups, Respondents replied that "[t]he State's reasoning not only distorts what the Court said in those cases [cited by the *Evans* majority], but also is illogical."²¹² While conceding that the cited cases involved racial classifications, Respondents argued that the outcomes of the cases did not turn solely upon race.²¹³

Respondents then attempted to explain what the Court intended when Justice Harlan used the "neutral principle" approach to political restructuring in *Hunter v. Erickson*.²¹⁴ Petitioners had argued that if the neutral principle approach applies to all independently identifiable groups, not just to suspect classes, then the Court would invalidate many state constitutional provisions.²¹⁵ Respondents countered the argument by reasoning that constitutional provisions that only affect independently identifiable groups based upon a neutral principle that may not affect

20, 1995, at A7. This omission was especially unusual in light of the Justice Department's tradition of filing briefs in major civil rights cases and President Clinton's stand on homosexual issues generally. *Id.*

204. See generally Brief for Respondents, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039).

205. *Id.* at 7-8.

206. *Id.* at 1-3.

207. *Id.* at 12-15.

208. *Id.* at 24.

209. *Id.*

210. *Id.* at 25.

211. *Id.* at 25-28; see *supra* notes 92-137 and accompanying text.

212. Brief for Respondents at 27, *Romer* (No. 94-1039).

213. *Id.* at 28.

214. *Id.* at 30-31 (quoting *Hunter v. Erickson*, 393 U.S. 385, 394-95 (1969) (Harlan, J., concurring)).

215. *Id.* at 31.

other groups would not violate the Equal Protection Clause; but, those that specifically target such groups with the intention of diminishing their political power would violate the Equal Protection Clause.²¹⁶ Respondents also disputed Petitioners' argument that almost all constitutional provisions discriminate against a particular identifiable group, and therefore, Respondents' definition would require all constitutional measures to be subject to strict scrutiny.²¹⁷ Respondents argued that the group must be identified "independent" of their common position in opposition to or support for a particular measure.²¹⁸ They maintained:

The State's parade of horrors is populated by groups that it can only describe by views on or a desire to engage in activities that some state constitutions ban government from regulating. . . . [T]he relevant question is whether the state constitutional provision itself identifies some group with some personal trait that is independent of the issue that the provision addresses, and gives to this group different access to the political process as to that issue. While none of the State's examples so identify and burden any group, this is precisely what Amendment 2 does.²¹⁹

Finally, Respondents argued that Amendment 2 could not survive even under the rational basis test.²²⁰ Respondents attacked each of Colorado's asserted interests and charged, *inter alia*, that the real purpose behind Amendment 2 is "to harm a politically unpopular group."²²¹

3. Petitioners' Reply Brief

Petitioners' Reply Brief began by reaffirming Petitioners' belief that the entire issue was one of federalism and that the Court may not dictate the internal decision-making process of individual states.²²² They reasoned: "All that is at issue here is whether Coloradans can divest their elected representatives of authority to deal with a particular issue . . . and instead insist that [a] question of public policy be resolved solely by the people on a statewide basis."²²³ Petitioners asserted that Respondents were asking the Court to overturn its decision in *James v. Valtierra*²²⁴

216. *Id.* at 29-31.

217. *Id.* at 31-32.

218. *Id.* at 32.

219. *Id.*

220. *Id.* at 35-49.

221. *Id.* at 36.

222. Reply Brief for Petitioners at 1, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039).

223. *Id.*

224. 402 U.S. 137 (1971) (holding that it is not unconstitutional to require a popular vote before allowing municipalities to acquire any public housing).

by relying primarily upon unfounded claims that Amendment 2 could deprive homosexuals of services as basic as police protection.²²⁵

Petitioners asserted that the *Hunter* case, referred to by Respondents, stands only for the premise that states may not structure political decision-making processes to disadvantage racial minorities, not that the structures may not disadvantage all identifiable groups.²²⁶ Petitioners argued that Respondents were ignoring the role that race played in *Hunter* and chastised Respondents for “do[ing] nothing to explain why *James v. Valtierra* . . . does not control this case.”²²⁷ They maintained that “contrary to Respondents’ position, it is no answer to declare that the privilege of strict scrutiny is ‘limited’ to those groups that are ‘independently identifiable.’ Certainly, the poor are as readily identifiable a group as homosexuals and bisexuals.”²²⁸

Next, Petitioners asserted that the Amendment did not shut homosexuals out of the political process because homosexuals could still vote and even repeal Amendment 2.²²⁹ They maintained that direct election is the best type of democracy and that with elections “there is no need to assure that the voter’s views will be adequately represented through their representatives in the legislature.”²³⁰

Petitioners took issue with some of the assertions made by Respondents concerning the potential consequences of Amendment 2.²³¹ Petitioners asserted that Amendment 2 had never been interpreted and that Respondents should not rely upon “extreme hypotheticals” to invalidate an otherwise constitutional provision.²³² Petitioners reiterated that extending the fundamental right to participate equally in the political process to all identifiable groups was unreasonable and complained that Respondents’ arguments were merely a “backdoor means to acquire suspect class treatment.”²³³

225. Reply Brief for Petitioners at 1, 7, *Romer* (No. 94-1039).

226. *Id.* at 2-3.

227. *Id.* at 3.

228. *Id.* (footnote omitted). The Petitioners were unable to identify a group impacted by the facially neutral housing amendment discussed in *James* which could be grouped together without regard to their common position on the amendment. See Brief for Respondents at 31, *Romer* (No. 94-1039).

229. Reply Brief for Petitioners at 4, *Romer* (No. 94-1039).

230. *Id.* Petitioners demonstrated that the referendum system is not as extraordinary as Respondents contended and that in a seven-year time period numerous states proposed 1001 amendments to their constitutions, and voters adopted over seventy percent. *Id.* at 4 n.7.

231. *Id.* at 6-7.

232. *Id.* at 7.

233. *Id.* at 11-12.

Petitioners concluded by arguing that Amendment 2 passed the rational basis test.²³⁴ Petitioners pointed out that the trial court had found some of the State's reasons for Amendment 2 to be not only rational but compelling, and maintained that Coloradans did not vote for Amendment 2 simply to perpetuate hate against homosexuals.²³⁵ Petitioners argued that Amendment 2 was simply a rational way for Coloradans to declare that the State should not use limited resources to protect homosexuals from discrimination.²³⁶ After supporting this position with statistics indicating that bias against homosexuals is not powerful in Colorado, Petitioners repeated their positions on each of the asserted rational bases of Amendment 2.²³⁷

4. The Decision

The Supreme Court decision in *Romer v. Evans* brought both cries of joy²³⁸ and expressions of anger.²³⁹ The Court's decision to uphold the ultimate decision of the Colorado Supreme Court²⁴⁰ brought immediate reaction from politicians across the political spectrum both nationally²⁴¹

234. *Id.* at 14.

235. *Id.* at 14-20.

236. *Id.* at 15.

237. *Id.* at 15-20.

238. Suzanne Goldberg, an associate of the Lambda Legal Defense and Education Fund, a gay and lesbian legal organization, stated, "This decision will change the course of civil rights for years to come." Tony Mauro, *Decision May Shift Course of Civil Rights Law*, USA TODAY, May 21, 1996, at 1A. Matt Coles, director of the American Civil Liberties Union's Lesbian and Gay Rights Project, stated that *Romer* "puts government on notice that laws based on hostility to gays and lesbians—or any other group—will not be tolerated." David G. Savage, *Supreme Court Strikes Down Law Targeting Gays*, L.A. TIMES, May 21, 1996, at A1.

239. The President of the Family Research Council, Gary L. Bauer, stated that the Court's decision "should send chills down the back of anyone who cares whether the people of this nation any longer have the power of self-rule." Linda Greenhouse, *Gay Rights Laws Can't Be Banned, High Court Rules*, N.Y. TIMES, May 21, 1996, at A20.

240. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996).

241. President Clinton's spokesperson, Mike McCurry, stated: "The President believes today's decision was appropriate. The Colorado law denied a group of citizens the right to participate effectively in the political process in Colorado, and the President believes that's bad public policy." Joan Biskupic, *Court Strikes Down Colorado's Anti-Gay Amendment*, WASH. POST, May 21, 1996, at A1. Senator John Kerry from Massachusetts said, "I hope that this final word will help to quash anti-gay initiatives in some states and the anti-gay political pandering of some conservatives . . . this results in violence against gay men and lesbians and is anti-American hate-mongering of the worst order." *Id.* Representative Charles Canady expressed the following opposing

and within the state of Colorado.²⁴² Commentators described the Court's decision as a "landmark victory for gay rights"²⁴³ and one "written with a generous tenor toward the legal rights of homosexuals."²⁴⁴ On the other hand, the negative emotion that the decision triggered among others led to calls for the impeachment of the six Justices who voted to uphold the lower court decision²⁴⁵ and even calls for revolution.²⁴⁶

While the complete impact of the Court's decision has yet to be determined, *Romer* will likely effect other cases pending before federal courts.²⁴⁷ For example, in *Nabozny v. Podlesny*,²⁴⁸ the Seventh Circuit Court of Appeals ruled that a young man who suffered from harassment in school on the basis of his homosexual orientation had stated a valid Equal Protection claim against the school district.²⁴⁹ In addition, lower

viewpoint, stating, "Not only has the Court seriously undermined common notions of democratic self-governance; it has done so in a manner that demeans and insults adherents of the traditional Western understanding regarding homosexuality." Press Release of Representative Charles Canady, Congressional Press Releases, Federal Document Clearing House, May 20, 1996, available in 1996 WL 8787216.

242. Colorado Governor Roy Romer expressed his pleasure at the Court's decision (Romer was named in the lawsuit in his official capacity despite his opposition to Amendment 2) and stated that he would "do everything [he could] to get Colorado to accept [the decision]." Greenhouse, *supra* note 239, at A20.

243. Savage, *supra* note 238, at A1.

244. Biskupic, *supra* note 241, at A1.

245. Dr. James Dobson, publisher of the newsletter and radio talk program *Focus on the Family*, quoted conservative leader Paul Weyrich's statement, "Impeachment is our only hope of bringing a court which is out of control under control." Charles Levendosky, *Religious Right Targets Justices for Impeachment Over Amendment 2*, DENVER POST, Oct. 16, 1996, at B7. The President of the National Legal Foundation, Steven Fitschen, stated, "[T]he 'Romer Six', the six Supreme Court [J]ustices who declared Amendment 2 unconstitutional, must be impeached." *Id.*

246. The Boston Herald editorial page stated:

The federal judiciary has become the most destructive institution in the land, pulverizing ethics with a blow of its gavel. The Republic could survive without a Supreme Court. With the current court, it might not.

As they demolish democracy and encourage immorality, members of the Kennedy crew should ponder a revolutionary manifesto that predates the Constitution. It sets forth the people's right to "alter or abolish" any government that becomes destructive of the ends for which this nation was founded.

Don Feder, *High Court Wars on Ethical Tradition*, BOSTON HERALD, May 24, 1996, at 25.

247. See Greenhouse, *supra* note 239, at A20. The Court's decision does not offer any new rights for homosexuals and its impact on other cases is undetermined. *Id.* It is "a constitutional shield rather than a sword." *Id.*

248. 92 F.3d 446 (7th Cir. 1996).

249. *Id.* at 460. The court explained it was "unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation." *Id.* at 458. While the court explicitly stated that it was not relying on *Romer*, it con-

courts are reviewing legislative acts similar to Colorado's Amendment 2 in light of the Supreme Court's decision.²⁵⁰

F. *The Majority*

Justice Kennedy wrote the majority opinion in *Romer* and announced that Colorado's Amendment 2 violated the Equal Protection Clause.²⁵¹ Justice Kennedy began the opinion with a quotation from the dissent of one of America's most well recognized Supreme Court decisions: "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'²⁵² Fol-

ceded that "[o]f course *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*." *Id.* at 458 n.12. The *Nabozny* case involved a man who alleged that while at school, students frequently tormented him with taunts of "faggot" and physically abused him. *Id.* at 451. He also alleged that he was humiliated when students performed a "mock rape" and urinated on him. *Id.* at 451-52. Nabozny and his parents met frequently with school officials who laughed, told them that "boys will be boys," and explained Nabozny should "expect" these incidents if he was "going to be openly gay." *Id.* at 451. Nabozny eventually settled the case with the school district for almost one million dollars. Terry Wilson, *Gay-Bashing Victim Awarded \$1 Million for School Incident*, CHL. TRIB., Nov. 21, 1996, at 12.

250. See, e.g., *Equality Found. v. City of Cincinnati*, 116 S. Ct. 2519 (1996). The Supreme Court granted certiorari in this case and following its decision in *Romer*, vacated the decision of the Sixth Circuit Court of Appeals and remanded the case for further consideration. *Id.* *Equality Foundation* involved a voter-approved amendment to the city charter of Cincinnati which would have had an effect similar to Amendment 2. Michael Kirkland, *Court Undermines Cincinnati Anti-Gay Law*, BC CYCLE, June 17, 1996. In his dissent to the denial of certiorari, Justice Scalia stated that unlike the Colorado case, which involved the state constitution, *Equality Foundation* involved a determination at the "lowest electoral subunit" to disfavor gays and lesbians. *Equality Found.*, 116 S. Ct. at 2519 (Scalia, J., dissenting).

251. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996). The Court decided the case by a vote of six-to-three with Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer joining Justice Kennedy in the majority. *Id.* at 1623-29. Justice Scalia wrote a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined. *Id.* at 1629-37 (Scalia, J., dissenting).

252. *Id.* at 1623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559) (1896) (Harlan, J., dissenting)). It is interesting trivia that the Supreme Court handed down its decision in *Plessy* on May 18, 1896, almost exactly 100 years before the May 20, 1996, decision in *Romer*. See *Plessy*, 163 U.S. at 537. A quotation from a famous dissent sending strong notions of justice for all Americans was presumably not unintentional. See Chai Feldblum, *Opinions Steeped in Moral Vision*, CONN. LAW. TRIB., Aug. 5, 1996, at 14 (citing *Bowers v. Hardwick*, 748 U.S. 186 (1986) (five to four decision) (Scalia, J., dissenting)).

lowing this forceful opening quotation, Justice Kennedy described the factual situation that brought *Romer* before the Court, including the "contentious campaign" for passage of Amendment 2 and the city ordinances that it was designed to repeal.²⁵³ He maintained that "Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class."²⁵⁴ The Court stated that it was invalidating Amendment 2, but "on a rationale different from that adopted by the State Supreme Court."²⁵⁵

The Court's substantive analysis of Amendment 2 began by reviewing the State of Colorado's principal argument in support of the amendment's constitutionality.²⁵⁶ Colorado maintained that Amendment 2's purpose was simply to deny homosexuals special rights.²⁵⁷ The Court relied on the Colorado Supreme Court's interpretation of Amendment 2 to declare that the State's "reading of the amendment's language [was] implausible."²⁵⁸ Further, the Court stated that "[t]he amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."²⁵⁹

The Court proceeded by describing the history, purpose, and operation of legislation designed to prevent discrimination.²⁶⁰ At common law, discrimination was unlawful based upon a general duty owed by those engaged in public employment.²⁶¹ The insufficiency of this common law duty to combat discrimination gave rise to specific legislative acts designed to protect particular persons from discrimination.²⁶² Colorado followed this pattern by passing legislation which would protect persons on the basis of "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability . . . and, in recent times, sexual orientation."²⁶³ Amendment 2, however, would eliminate sexual orientation as a protected group in both private transactions and the public arena.²⁶⁴

The majority reasoned that "[i]t is a fair, if not necessary, inference"

253. *Romer*, 116 S. Ct. at 1623.

254. *Id.*

255. *Id.* at 1624.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 1625.

260. *Id.* at 1625-26.

261. *Id.* at 1625.

262. *Id.*

263. *Id.* at 1626.

264. *Id.*

that laws of general applicability, designed to prevent things like arbitrary discrimination, may not be used by homosexuals as legal protection.²⁶⁵ During the decision-making process, an official, probably a judge, must decide whether a person's sexual orientation is "arbitrary" as understood by the statute.²⁶⁶ This determination alone "would itself amount to a policy prohibiting discrimination on the basis of homosexuality" and thus violate Amendment 2.²⁶⁷ The Court stated that it did not need to determine whether courts could enforce Colorado's laws of general applicability to protect homosexuals because "the amendment imposes a special disability upon [homosexuals] alone."²⁶⁸ The Court noted that only homosexuals were denied the protection of anti-discrimination laws that "others enjoy or may seek without constraint."²⁶⁹

Next, the Court turned its attention to whether Amendment 2 denies equal rights or special rights.²⁷⁰ In directly dismissing the special rights rhetoric, the Court declared it found "nothing special in the protections Amendment 2 withholds. These are protections taken for granted by

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 1627.

269. *Id.* The Court's entire opinion discusses homosexuals as members of an identifiable class seemingly without any of the difficulty that other courts have faced. For example, the Sixth Circuit Court of Appeals stated that homosexuals are an "unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual 'orientation' simply do not, as such, comprise an identifiable class." *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995), *cert. granted*, 116 S. Ct. 2519 (1996). Even Justice Scalia's dissent does not maintain that homosexuals are not identifiable for purposes of Equal Protection analysis. *See Evans*, 116 S. Ct. at 1631 (Scalia, J., dissenting) (arguing that the passage of Amendment 2 was a rational decision by the voters of Colorado and consistent with the Equal Protection Clause). Presumably, every member of the Court is aware that it has declared other traits, such as illegitimacy and alienage, as having "unapparent characteristics" which make them suspect classes subject to heightened Equal Protection analysis. *See Amicus Brief of Human Rights Campaign Fund et al.* at 11, *Romer*, 116 S. Ct. at 1620 (No. 94-1039). It is possible that Justice Scalia recognized the contradiction in the Sixth Circuit's opinion in declaring that homosexuals are not identifiable for Equal Protection analysis but are sufficiently identifiable to enforce a statute against them. *See Equality Found.*, 54 F.3d at 261.

270. *Romer*, 116 S. Ct. at 1627. Matt Coles, a leading gay rights advocate affiliated with the American Civil Liberties Union, stated that the Court went "out of its way to take on the 'special rights' rhetoric." *Greenhouse*, *supra* note 239, at A20.

most people either because they already have them or do not need them.²⁷¹

Next, the Court reviewed the standards for determining when an Equal Protection violation has occurred.²⁷² The Court stated that when no fundamental right is infringed and no suspect class is burdened,²⁷³ a law will be upheld if it bears “a rational relation to some legitimate end.”²⁷⁴

Following its discussion of the law, the Court took issue with the sufficiency of the traditional analysis as applied to Amendment 2.²⁷⁵ According to the majority, “Amendment 2 fails, indeed defies, even this conventional inquiry.”²⁷⁶ The Court separated its analysis into two points that are, in actuality, the same.²⁷⁷ First, Amendment 2 was a virtually unprecedented example of a direct violation of the words of the Equal Protection Clause.²⁷⁸ Because of its novelty and scope, Amendment 2 “con-

271. *Romer*, 116 S. Ct. at 1627. Those who oppose the decision of the Court continue to maintain that Amendment 2 would have done nothing more than deny special rights. David Frum, *Suspect Jurisprudence*, WKLY. STANDARD, June 3, 1996, at 11 (“Kennedy pounds away at the claim that gay rights are ‘special rights.’”). Frum stated that Kennedy’s position that “smokers, the short, the unathletic, and the bald” do not need protection from discrimination may or may not be true. *Id.* This analysis failed to recognize that Justice Kennedy also stated that under Amendment 2, all groups, other than homosexuals, including smokers, the short, the unathletic, and the bald, “may seek without constraint” legal protection from discrimination if the need presents itself. *See Romer*, 116 S. Ct. at 1627.

272. *Romer*, 116 S. Ct. at 1627-28 (1996).

273. *Id.* The Court failed to declare homosexuals a suspect class despite the argument of some gay rights organizations that homosexuals qualify under the traditional factors. *See Amicus Brief of Human Rights Campaign Fund et al.* at 30, *Romer*, 116 S. Ct. at 1620 (No. 94-1039). According to gay rights advocates, the traditional “warning signs,” including a history of discrimination, political powerlessness, and immutability of a characteristic, apply to homosexuals. *Id.* at 5-25.

274. *Romer*, 116 S. Ct. at 1627.

275. *Id.* at 1628.

276. *Id.* at 1627.

277. *See id.* at 1627-28.

278. *Id.* There is widespread agreement that the Court’s first point adopts the argument presented by five constitutional scholars, including Harvard Law School Professor Laurence Tribe, through an amicus brief. *See Greenhouse, supra* note 239, at A20; Feldblum, *supra* note 252, at 14. This amicus brief argues that Amendment 2 constituted a “per se” violation of the Equal Protection Clause. *See Amicus Brief of Laurence Tribe et al.* at 3, *Romer*, 116 S. Ct. at 1620 (No. 94-1039). Professor Tribe stated that discrimination is a wrong that the state can correct through the legal process just as it corrects the wrong of criminal acts through the legal process. *Id.* at 4-5. If the voters of Colorado excluded homosexuals from their laws protecting citizens from criminal activity, such as physical assault, it would be easier to see how the exclusion would violate the Equal Protection Clause. *Id.* at 5. Professor Tribe argued that no state has a duty to provide a legal remedy for discrimination, or even for a criminal wrong, but he maintained that the Equal Protection Clause surely forbids a state from denying “even the possibility of protection under any state

found[ed] this normal process of judicial review."²⁷⁹ The Court concluded its first point by stating that Amendment 2 was "not within our constitutional tradition" and that it imposed a "denial of equal protection of the laws in the most literal sense."²⁸⁰

Before discussing its second point, the Court distinguished the fact pattern in *Romer*, with an earlier polygamy case.²⁸¹ In *Davis v. Beason*,²⁸² the Court upheld an Idaho statute barring polygamists and advocates of polygamy from voting or holding office.²⁸³ The *Davis* Court determined that the law at issue only denied the right to vote to those who had broken the law or "advocate[d] a practical resistance to the [law]."²⁸⁴ The *Romer* Court overruled *Davis* to the extent that it denied the right to vote to those advocating a particular position; the Court stated, however, that if *Beason* stood for the proposition that the state may deny convicted felons the right to vote, it was "unexceptional."²⁸⁵ The Court held that if the Idaho statute punished persons because of their "status," it would face the difficult challenge of overcoming a strict scrutiny analysis—a "doubtful outcome."²⁸⁶

or local law from a whole category of harmful conduct." *Id.* at 2. In arguing that Amendment 2 constituted a "rare per se violation," Professor Tribe opined that the Court may declare it unconstitutional without even entering the traditional analysis regarding the nature of the rights affected and their rationality. *Id.* at 3-4. He argued Amendment 2's "facial unconstitutionality flows directly from the plain meaning of the Fourteenth Amendment's text." *Id.* at 4. Tribe maintained that this could explain why "[n]ever since the enactment of the Fourteenth Amendment has this Court confronted a measure quite like Amendment 2." *Id.* at 3.

279. *Romer*, 116 S. Ct. at 1628. The Court identified the fact that no similar case had ever appeared before it as "itself instructive." *Id.* The majority reasoned, "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

280. *Id.*

281. *Id.* Even though no party in *Romer* discussed the polygamy decision, the Court mentioned it because it was "relied upon by the dissent." *Id.*

282. 133 U.S. 333 (1890).

283. *Id.* at 341.

284. *Id.* at 347.

285. *Romer*, 116 S. Ct. at 1628. In his dissent, Justice Scalia did not challenge these conclusions. *See id.* at 1635-36 (Scalia, J., dissenting).

286. *Id.* at 1628. Justice Scalia's dissent spent a great deal of time drawing an analogy between laws limiting the rights of polygamists and those limiting the rights of homosexuals. *See id.* at 1635-36 (Scalia, J., dissenting). After referring to several state constitutions that forbid polygamy, Justice Scalia discussed the impact that these statutes have on those who have a "polygamous 'orientation.'" *Id.* at 1635 (Scalia, J., dissenting). The characterization of a polygamous orientation as similar to a homosex-

Next, the Court addressed the most controversial and debated issue of the case.²⁸⁷ The Court analyzed Amendment 2 using traditional Equal Protection principles and found that no rational reason existed for treating homosexuals differently.²⁸⁸ The Court stated that Colorado's rationale for Amendment 2, including protecting the freedom of association, were "so far removed" from the "breadth of the Amendment" that "we find it impossible to credit them."²⁸⁹ The Court held that Amendment 2 was, in reality, "born of animosity."²⁹⁰ The majority reasoned: "[I]f the

ual orientation shows how the viewpoint of homosexuals has undergone little change since the Supreme Court's decision in *Bowers v. Hardwick*. See *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (five to four decision) (Burger, J., concurring) (mentioning Blackstone's description of homosexuality as a "heinous" and disgraceful act). Notably, the Court apparently disagreed with Justice Scalia's belief that homosexuality involves nothing more than the gender of the person with whom someone chooses to have sexual relations. See Frum, *supra* note 271, at 11 (arguing that the Court already views homosexuals as a suspect class). It is arguable that without saying as much, the Court recognized the likelihood that homosexuality is an immutable characteristic, as other courts have done. See *Nabozny v. Podlesny*, 92 F.3d 446, 457 n.10 (7th Cir. 1996) (stating that it "seem[s] dubious to suggest that someone would choose to be homosexual, absent some genetic predisposition, given the considerable discrimination leveled against homosexuals"). Black's legal dictionary describes polygamy as "more than one wife or husband at the same time." BLACK'S LAW DICTIONARY 1159 (6th ed. 1990). While certain persons may have a genetic predisposition to more than one sexual partner, no court has cited a study showing a genetic predisposition to acquire more than one marriage license, as opposed to studies showing a predisposition to homosexuality. See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 84, 159 n.247 (1994) (discussing five studies showing a biological explanation for homosexuality). If the Court believes homosexuality is a genetic phenomenon, unlike polygamy, the Court will likely find it more problematic to allow the government to treat homosexuals differently. See *Romer*, 116 S. Ct. at 1635 (Scalia, J., dissenting) ("The Court's disposition today suggests that these [anti-polygamy] provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.").

287. *Romer*, 116 S. Ct. at 1628-29.

288. *Id.* at 1629. It is rare that a statute does not meet this low, rational basis standard of review. *But see* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985) (holding that a city may not deny a special use permit to the mentally retarded for operation of a group home because the denial was not rationally related to a legitimate government interest). The *Romer* result has caused some to say that the Court has "reinvigorate[d] rational-basis scrutiny." Marcia Coyle, *Court: 'Animus' in Colorado Gay Law*, NAT'L L.J., June 3, 1996, at A11 (quoting Georgetown University Law Professor Chai R. Feldblum). Indeed, this result is so rare that rational basis review had been described as "minimal scrutiny in theory and virtually none in fact," Martin Schwartz, *Equal Protection Developments*, N.Y.L.J., Sept. 17, 1996, at 3 (quoting Gerald Gunther, *The Supreme Court, 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model of Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

289. *Romer*, 116 S. Ct. at 1629.

290. *Id.* at 1628. The Court's position that animosity motivated the enactment of

constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."²⁹¹ The Court held that the damage done to homosexuals in Colorado would "outrun and belie" any legitimate purpose behind Amendment 2.²⁹² The Court used forceful language to support its decision; specifically, that the classification undertaken in Colorado was done "for its own sake,"²⁹³ which was "obnoxious to the prohibitions of the Fourteenth Amendment."²⁹⁴ Finally, the Court concluded that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment by "classif[y]ing homosexuals not to further a proper legislative end but to make them unequal to everyone else. . . . A State cannot so deem a class of persons a stranger to its laws."²⁹⁵

G. *The Dissent*

Justice Scalia began his dissent by stating that the Court had confused a culture war for a "fit of spite."²⁹⁶ The dissent then asserted that Colorado voters did not enact Amendment 2 out of animus toward homosexuals, but to "preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws."²⁹⁷ Justice Scalia attacked the majority's position and opined that the decision supports the proposition that "opposition to homosexuality is as reprehensible as racial or religious bias."²⁹⁸ Justice Scalia's introduction concluded by mentioning a topic found throughout his dis-

Amendment 2 drew harsh criticism from some, including Justice Scalia. *Id.* at 1636 (Scalia, J., dissenting); Stuart Taylor, *Games Justices Play*, RECORDER, May 29, 1996, at 4 (stating that the Court's opinion contained "slurs tarring the votes [sic] of Colorado as bigots").

291. *Romer*, 116 S. Ct. at 1628 (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

292. *Id.* at 1629.

293. *Id.*

294. *Id.* (quoting *The Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

295. *Id.*

296. *Id.* (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined the dissent. *Id.* (Scalia, J., dissenting); see also Jeremy Rabkin, *The Supreme Court in the Culture Wars*, PUB. INTEREST, Fall 1996, at 3-26 (discussing the origin of the German term "Kulturkampf" and its application to American culture wars).

297. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

298. *Id.* (Scalia, J., dissenting).

sent—that the majority opinion reflects the bias of “the elite class from which the Members of this institution are selected.”²⁹⁹

In Part I of his dissent, Justice Scalia attacked the Court’s position that Amendment 2 placed homosexuals in a less favorable position than before; rather, according to Justice Scalia, the amendment made them equal with other citizens.³⁰⁰ The dissent asserted that, contrary to the majority’s reasoning, the Colorado Supreme Court stated that Amendment 2 would not deny gays and lesbians the protection of laws of general applicability.³⁰¹ As support for his contention, Justice Scalia pointed to a footnote in the lower court opinion contending that the intent of Amendment 2 was not to impact laws of general applicability.³⁰² After discounting the possibility of courts denying homosexuals relief under laws of general applicability, Justice Scalia opined that the “[a]mendment prohibits special treatment of homosexuals, and nothing more.”³⁰³

Justice Scalia asserted that the Court’s opinion created an Equal Protection violation every time a state makes it more difficult for one group to change state law than any other group.³⁰⁴ The dissent continued by outlining several examples of the need for one group of citizens to change a law at one level of government (e.g., the state level), while another group of citizens changes the law at a different level (e.g., the local level).³⁰⁵ Justice Scalia argued that if this type of situation gave rise to an Equal Protection violation, then the law had achieved “terminal

299. *Id.* (Scalia, J., dissenting). This type of attack on members of the Court has caused some to characterize Scalia’s style as insulting and bombastic. See James Kunen, *One Angry Man*, TIME, July 8, 1996, at 48-49. Justice Scalia does not explain how he was able to avoid becoming a member of the elite class while attending Georgetown, the University of Chicago, and Harvard. *Id.* Indeed, Justice Scalia’s sometimes personal insults leveled at his fellow Justices have left some, notably Justice O’Connor, quite angry at his style. David Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, § 6, at 68-69. Justice Scalia has even turned his sharp rhetoric on those with whom he is regularly in agreement. See, e.g., *United States v. Virginia*, 116 S. Ct. 2264, 2305 (1996) (Scalia, J., dissenting). In *United States v. Virginia*, Chief Justice Rehnquist suggested that the Virginia Military Institute should have read earlier Court cases and understood that their institution was in violation of the Equal Protection Clause. *Id.* at 2289 (Rehnquist, C.J., concurring). Justice Scalia responded, “Any lawyer who gave that advice to the Commonwealth [of Virginia] ought to have been either disbarred or committed.” *Id.* at 2305 (Scalia, J., dissenting).

300. *Romer*, 116 S. Ct. at 1629-31 (Scalia, J., dissenting).

301. *Id.* at 1629-30 (Scalia, J., dissenting).

302. *Id.* at 1630 (Scalia, J., dissenting). Justice Scalia may have given too much weight to one ambiguous sentence in a footnote of the lower court’s opinion. See Feldblum, *supra* note 252, at 14.

303. *Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting).

304. *Id.* (Scalia, J., dissenting).

305. *Id.* at 1630-31 (Scalia, J., dissenting).

silliness.³⁰⁶ He acknowledged that the Court might find a rational reason for allowing the government to treat groups differently in his examples, but continued to express his shock that the Court could not find such a rational reason for Amendment 2.³⁰⁷

In Part II of his dissent, Justice Scalia discussed *Bowers v. Hardwick*.³⁰⁸ Justice Scalia began by chastising the Court for not mentioning *Bowers* in its opinion.³⁰⁹ He maintained that if it was "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."³¹⁰ The dissent argued that Amendment 2 was not as damaging to homosexuals as the ban on sodomy because sodomy "defines the class."³¹¹ Justice Scalia challenged Respondents' position that *Bowers* was not controlling because some homosexuals do not engage in homosexual sodomy.³¹² Quoting the Sixth Circuit Court of Appeals, which found it "virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct," Justice Scalia discounted Respondents' position.³¹³ The dissent argued that if it is rational to criminalize the conduct, it is surely rational to deny "special favor and protection" for those who desire to engage in the criminal con-

306. *Id.* at 1630 (Scalia, J., dissenting).

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

308. *Id.* (Scalia, J., dissenting) at 1631; *Bowers*, 478 U.S. 186 (1986).

309. *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting).

310. *Id.* (Scalia, J., dissenting) (emphasis in original). Justice Scalia's reading of *Bowers* as declaring it constitutional to outlaw homosexual conduct is misleading. See *Bowers*, 478 U.S. at 196 (upholding the constitutionality of limiting homosexual sodomy). Homosexuals engage in other activities with members of the same sex, such as kissing and hand holding, which are certainly homosexual conduct, although not discussed in *Bowers*. See Feldblum, *supra* note 252, at 63 (arguing that sodomy does not "define" homosexuals).

311. *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting) (quoting *Padula v. Webster*, 822 F.2d 97, 103 (1987)).

312. *Id.* at 1631-32 (Scalia, J., dissenting).

313. *Id.* (Scalia, J., dissenting) (citing and quoting *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995), *cert. granted*, 116 S. Ct. 2519 (1996)). Ironically, the quotation provided by Justice Scalia came from a case since vacated by the Supreme Court. See *Equality Found.*, 116 S. Ct. at 2519. In addition, if the Amendment treats homosexuals differently based upon status, the constitutional analysis becomes even more difficult. Cf. *Romer*, 116 S. Ct. at 1628 (discussing the applicability of the strict scrutiny doctrine when treating classes of persons differently based upon status).

duct.³¹⁴ Even if the classification is “imperfect,” the dissent reasoned, that does not make the law regulating that class of persons a violation of Equal Protection.³¹⁵

In Part III of the dissent, Justice Scalia asserted that Amendment 2 was not a result of public hostility toward homosexuals, as the majority claimed.³¹⁶ Justice Scalia assaulted the majority’s position which “contains grim, disapproving hints that Coloradans have been guilty of ‘animus’ or ‘animosity’ toward homosexuality, as though that has been established as Unamerican.”³¹⁷ Justice Scalia maintained, however, that it is acceptable to disapprove of certain conduct, for example, murder or animal cruelty.³¹⁸ He stated that Amendment 2 did not reflect any desire to harm homosexuals and that the majority’s “portrayal of Coloradans as a society fallen victim to pointless, hate-filled ‘gay-bashing’ is so false as to be comical.”³¹⁹ To support his contention that Coloradans were not motivated by animus, Justice Scalia pointed out that Colorado repealed its statute banning same-sex sodomy, although he noted that this did not mean they had abandoned their view that homosexuality is wrong.³²⁰ Justice Scalia asserted that although Colorado eliminated a ban on homo-

314. *Romer*, 116 S. Ct. at 1632 (Scalia, J., dissenting). Justice Scalia’s arguments concerning *Bowers* may demonstrate that the Court has done damage to the sodomy precedent with its ruling in *Romer*. Coyle, *supra* note 288, at A11. Notre Dame Law Professor Douglas Kmiec stated, “[T]he majority has overruled *Bowers* sub silentio.” Richard C. Reuben, *Gay Rights Watershed?*, A.B.A. J., July 1996, at 30 (quoting Notre Dame Law Professor Douglas Kmiec). Because the Court decided *Bowers* on Due Process grounds, and *Romer v. Evans* was decided on Equal Protection grounds, there is a distinction between the two cases. Compare *Bowers*, 478 U.S. at 186 (holding homosexual sodomy not protected by the Due Process clause), with *Romer*, 116 S. Ct. at 1620 (holding that public animus is not a legitimate government interest for Equal Protection purposes). Of course, *Bowers* was extremely controversial at the time it was decided by a five-to-four vote, and caused retired Justice Lewis Powell to state that he had made a mistake by voting with the majority. *Bowers*, 478 U.S. at 186; JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL JR. 530 (1994).

315. *Romer*, 116 S. Ct. at 1632 (Scalia, J., dissenting) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

316. *Id.* at 1633-36 (Scalia, J., dissenting).

317. *Id.* at 1633 (Scalia, J., dissenting). Justice Scalia also maintained that America’s “moral heritage” should not allow Americans to “hate any human being or class of human beings.” *Id.* (Scalia, J., dissenting).

318. *Id.* (Scalia J., dissenting). This assertion further illustrates Justice Scalia’s belief that homosexuality is not a biological orientation, but rather conduct similar to other types of nonbiological behavior, like murder or cruelty to animals. See *supra* note 286 and accompanying text (discussing the potential biological explanation for homosexual orientation).

319. *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting).

320. *Id.* (Scalia, J., dissenting). Justice Scalia’s acknowledgement that Colorado does not have a law banning homosexual sodomy is at odds with his earlier reliance upon *Bowers* to support Amendment 2. See *id.* at 1629 (Scalia, J., dissenting).

sexual sodomy from its criminal code, the Court must acknowledge that moral objections to homosexuality remain.³²¹ According to the dissent, those who disapprove of homosexuality have difficulty opposing homosexual agendas because homosexuals tend to live in greater concentration in certain communities, have high disposable incomes, and care deeply about issues of concern to homosexuals.³²² The dissent emphasized that homosexuals had gained political clout in several cities in Colorado,³²³ these events had thus led the voters of Colorado to decide whether to protect homosexuals from discrimination in a statewide, single-issue format.³²⁴

In concluding Part III of the dissent, Justice Scalia criticized the Court for not relying upon any case law in reaching its conclusion that Amendment 2 must be unconstitutional because no similar legislation had ever been enacted.³²⁵

Justice Scalia began Part IV of his dissent by analogizing Amendment 2 to regulations against polygamy.³²⁶ The dissent then challenged the Court's alleged improper participation in a cultural war and engaged in a mixture of criticism of the Court's legal judgment and disdain for the "lawyer class."³²⁷ Justice Scalia stated, "I think it is no business of the courts (as opposed to the political branches) to take sides in this culture war."³²⁸ Justice Scalia accused the Court of developing a "novel and ex-

321. *Id.* at 1633-34 (Scalia, J., dissenting).

322. *Id.* at 1634 (Scalia, J., dissenting).

323. *Id.* (Scalia, J., dissenting).

324. *Id.* (Scalia, J., dissenting).

325. *Id.* (Scalia, J., dissenting). A conflict exists between criticizing the majority for not citing any case law (even if one accepts this questionable criticism) and acknowledging that legislation like Amendment 2 had never before presented itself. Justice Scalia's contention that a rational reason exists for Amendment 2 simply because states have regulated homosexuality before and homosexuality remains morally objectionable to some is every bit as "facially absurd" as any position taken by the majority. *See id.* (Scalia, J., dissenting). In addition, no connection has ever been supported, or even asserted, as to how protecting homosexuals from discrimination in employment and housing fosters the "piecemeal deterioration of the sexual morality favored by a majority of Coloradans." *See id.* at 1637 (Scalia, J., dissenting). Justice Scalia's dissent completely ignores any evidence which may exist to show that a person's legal status with regard to employment or housing makes him or her more or less likely to subscribe to traditional sexual morality.

326. *Id.* at 1636 (Scalia, J., dissenting). *See supra* note 286 (discussing the dissent's polygamy analogy).

327. *Romer*, 116 S. Ct. at 1636-37 (Scalia, J., dissenting).

328. *Id.* at 1637 (Scalia, J., dissenting). One can argue that the dissent has taken a side in this conflict just as much as the majority. *See* Feldblum, *supra* note 252, at

travagant constitutional doctrine to take victory away from traditional forces."³²⁹

Justice Scalia asserted that the Court's decision was "insulting" to the voters of Colorado and described homosexuals as an influential minority in media and politics.³³⁰ The dissent explained that the Court is sympathetic to homosexuals because they express "the views and values of the lawyer class from which the Court's Members are drawn."³³¹ According to the dissent, these views and values are evident in the Bylaws of the Association of American Law Schools which require campus recruiters to pledge that they are willing to hire homosexuals.³³² Justice Scalia ob-

14 ("How else did he decide whether Amendment 2 was, or was not, motivated solely by inappropriate 'animus' toward a targeted group?"). The dissent could only uphold Amendment 2 by accepting the belief that the state supports sexual morality by preventing homosexuals from achieving redress from discrimination. *Id.* ("It is a decision profoundly based on morality on the part of the judge . . .").

329. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting). Many outside the Court have made the assertion that the majority's action in striking Amendment 2 was particularly political because the amendment was adopted by a vote of the people of Colorado. See Douglas W. Kmiec, *When the Federal Judiciary Gets in the Way*, CHL TRIB., Nov. 18, 1996, at 19. One commentator even called the Supreme Court a "spilled teenager" for reversing political referendums. *Id.* ("Coloradans thought this troubling issue best resolved outside government, where moral and religious teaching could distinguish hateful discrimination from decisions reasonably aimed at not affirming a sexual practice antagonistic to culture and family."). Adopting this line of reasoning could result in the enforcement of measures which many, including six Justices of the United States Supreme Court, believe to be unconstitutional, simply because a majority of the voters think it is wise. Indeed, Justice Scalia did not have difficulty reversing the will of the elected representatives of the people, presumably operating within the political framework, when he voted to declare federal affirmative action programs unconstitutional. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118-19 (1995) (Scalia, J., concurring) (discussing failure of government contract programs which give preference to minorities to survive strict scrutiny under the Equal Protection Clause). Commentators have taken this red herring argument to its absurd conclusion by arguing that if the Justices are "free to legislate their preferences," they should be forced to run for office. Mona Charen, *Voters Should Pick Justices*, DAYTON DAILY NEWS, June 1, 1996, at A11. By describing the result in *Romer* as "an unconscionable usurpation of power that rightly belongs to you and me," commentators instruct the Justices to abdicate their role as interpreters of the Constitution and allow the voters themselves to judge when the state stymies its guarantees. See *id.*

330. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

331. *Id.* (Scalia, J., dissenting).

332. *Id.* (Scalia, J., dissenting). The Dean of Students at Boalt Hall School of Law responded to Justice Scalia by saying,

The notion that we're an elite group of people who are out of touch with the mass of society is unjustified. The association was out front in refusing to let schools discriminate on the basis of sex, too. It's appropriate that law schools take principled positions on things like that.

Mike McKee, *Scalia's Dissent Dismays Law Schools*, RECORDER, May 28, 1996, at 5 (quoting Leslie Oster, Dean of Student Affairs).

served that employers can refuse to hire a person based upon a multitude of factors, but not homosexuality.³³³

The dissent summarized by asserting that the majority "opinion has no foundation in American constitutional law, and barely pretends to."³³⁴ In conclusion, Justice Scalia stated that upholding the lower court ruling was "an act, not of judicial judgment, but of political will."³³⁵

V. IMMEDIATE IMPACT OF THE SUPREME COURT'S DECISION ON THE CONSTITUTIONALITY OF AMENDMENT 2.

A. *The Supreme Court Decision Will Prevent Government Endorsement of Discrimination Against Gays, Lesbians, Bisexuals, and Others.*

Fundamentalist Christian organizations, many with ties to political activist and televangelist Pat Robertson, were the primary advocates of Amendment 2.³³⁶ Although documents submitted to the Supreme Court

333. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting). "These are protections taken for granted by most people either because they already have them or do not need them . . ." *Id.* at 1627. Following this logic would result in the conclusion that there has been insufficient evidence of discrimination against Republicans, snail-eaters, and Chicago Cubs fans to warrant protection, thus they do not need antidiscrimination laws. *See id.* at 1637 (Scalia, J., dissenting). Unlike homosexuals affected by Amendment 2, however, these groups would be free to organize and petition their elected representatives for redress. *See id.* at 1628 (stating "It is not within our constitutional tradition to enact laws of this sort.")

334. *Id.* at 1637 (Scalia, J., dissenting).

335. *Id.* (Scalia, J., dissenting). Justice Scalia continues to assert that the decision in *Romer* was a political act. *See United States v. Virginia*, 116 S. Ct. 2264, 2308 (1996) (Scalia, J., dissenting) ("But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal views of what would make a 'more perfect Union' can impose its own favored social and economic dispositions nationwide."); *Wabaunsee County v. Umbehr*, 116 S. Ct. 2342, 2373 (1996) (Scalia, J., dissenting) ("While the present Court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress."). *Virginia*, 116 S. Ct. at 2308 (Scalia, J., dissenting).

336. *See Batterman, supra* note 6, at 940 n.181. Over the past decade, 53 fundamentalist organizations moved their headquarters to Colorado Springs, Colorado. *Id.* at 939. These organizations have income which exceeds \$357 million and they employ a significant number of people. *Id.* This substantial presence in Colorado Springs has increased the influence of fundamentalist groups in the area, particularly Colorado for Family Values. *Id.* at 939-40. While CFV claimed that they were only interested in the passage of Amendment 2, they have yet to disband as promised, and they have become involved in other fundamentalist causes in Colorado. *Id.* at 940.

on behalf of supporters of Amendment 2 presented arguably credible reasons for supporting the Amendment, including protecting limited state resources,³³⁷ much of their public rhetoric was inflammatory and hateful.³³⁸ For example, Colorado for Family Values (CFV) and other groups argued that homosexuals were child molesters³³⁹ who filled up the hospitals with AIDS patients, increased insurance rates, and, if allowed to marry, would produce “wretched victim[.]” children.³⁴⁰ While many Coloradans likely did not have these hateful purposes in mind when voting for Amendment 2,³⁴¹ the rhetoric of the vocal and active supporters exemplifies the true intentions of those whose efforts were instrumental in passing Amendment 2.³⁴² If Amendment 2 had been upheld, it is reasonable to believe that the voices of those who hate homosexual men and women would have been empowered and therefore become louder. Public discourse of this nature leads directly to threats, vandalism, battery, and murder.³⁴³ While this does not relate to the constitutionality of Amendment 2, it is the reality in which many homosexuals live.

Some supporters of Amendment 2 have attempted to portray those who object to the bigoted, yet effective, rhetoric of these anti-gay organizations as people who seek “to stigmatize, marginalize, and silence religious traditionalists, and to fence them out from authentic participation in the economic and social life of the community.”³⁴⁴ It strains logic to understand how Amendment 2 supporters can consider resisting an attempt, driven primarily by religious fundamentalists, to deprive gays and lesbians of civil rights protection by publicizing the fundamentalists’

337. Reply Brief for Petitioners at 14-17, *Romer* (No. 94-1039).

338. See Grauerholz, *supra* note 72, at 848.

339. In fact, mental health professionals maintain that homosexuals are no more likely to be child molesters than heterosexuals. *Id.* at 850 n.69.

340. *Id.* at 848 (quoting Answer Brief for Plaintiff-Appellees at 10-11), *Romer* (No. 94-1039).

341. “The record demonstrate[d] that Coloradans are largely tolerant of homosexuality” Reply Brief for Petitioners at 15, *Romer* (No. 94-1039).

342. Some have argued that proponents of Amendment 2 used scare tactics to disguise the implications of the amendment. See Grauerholz, *supra* note 72, at 849 n.63. This rhetoric went to the extreme of arguing that homosexuals often have had sex with 1000 partners, and that they enjoy ingesting urine and feces as a part of their sexual routine. Batterman, *supra* note 6, at 938 nn.166-68.

343. See Grauerholz, *supra* note 72, at 852 & nn.82-86. “[A] Colorado Springs psychotherapist who had a bumper sticker on her car that read ‘Celebrate Diversity,’ was knocked unconscious, had crosses cut into her hands, and had her office spray-painted with the words ‘Stop Evil’ and ‘Seek God.’” Batterman, *supra* note 6, at 936 n.187 (citing Paul McEnroe, *Violence Is Apparent Fallout of Colorado Law on Gays*, STAR TRIB., Jan. 25, 1993, at 1A).

344. Duncan & Young, *supra* note 22, at 126.

quotations an attempt to "stigmatize" the supporters.³⁴⁵ This mischaracterization of the views of Amendment 2's opponents also entails the idea that, "the effect of Amendment 2 and similar grassroots initiatives is not to stigmatize and harm homosexuals, but rather to remove the stigma and associated harms inflicted on traditional believers by state and local homosexual rights legislation."³⁴⁶ Upholding Amendment 2 would undoubtedly have mobilized voices such as these and continued the assault on civil rights protection for gays and lesbians around the country.³⁴⁷

Homosexuals would not have been the only people affected by the enactment of Amendment 2, because homosexuality is not a characteristic which, like race or gender, is easily perceived.³⁴⁸ This concern led to pointed questioning by the Justices during the oral argument of the Solicitor General of Colorado, Timothy M. Tymkovich, as to exactly who would fall into the classification created by Amendment 2.³⁴⁹ For example: "[H]ow do you interpret the bisexual orientation language, homosexual, lesbian, or bisexual orientation? Does that require any conduct, or is it just a disposition?"³⁵⁰ Although the Court considered this question a serious one, it went unanswered during oral argument.³⁵¹ The question of who is a homosexual is a relatively new question because "homosexual" is a relatively new term.³⁵²

Absent a clear-cut answer to this question, the potential for discrimination against persons against whom discrimination is not intended is a possibility.³⁵³ Therefore, because of the difficulty of identifying homo-

345. See Batterman, *supra* note 6, at 938 n.168.

346. Duncan & Young, *supra* note 22, at 129.

347. See Batterman, *supra* note 6, at 916 nn.7 & 9.

348. *Id.* at 959-62.

349. See Transcript of Oral Argument, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039), available in 1995 WL 605822, at *3-30 (Oct. 10, 1995).

350. *Id.* at *8-9. After some give-and-take between the Solicitor General and the Justices in which the State indicated that conduct would be the best way to define homosexual, bisexual, and lesbian orientation, a Justice asked: "Well, is it the sole indicator? Are you representing to this Court that Colorado's position is that the class defining characteristic is conduct as opposed to preference or proclivity or whatnot?" *Id.* at *10.

351. The Solicitor General described the question as "immaterial" to the issue before the Court. *Id.* at *10.

352. Batterman, *supra* note 6, at 960. The term "homosexual" was first used in 1869 in a German pamphlet. *Id.*

353. Even the leadership of CFV conceded that identifying a homosexual by appearance is difficult. *Id.* at 971.

sexuals based upon appearance and superficially obvious characteristics that many associate with homosexuality,³⁵⁴ the amendment could have subjected heterosexuals to various forms of discrimination because of an assumption that they were homosexual. Discrimination against heterosexual persons who are suspected homosexuals could occur if a heterosexual were reading literature published by a gay organization in public, attending a gay rights event, or even simply associating with gay or lesbian friends.³⁵⁵ This potential for discrimination under Amendment 2 against suspected homosexuals would have created an environment of suspicion and fear resulting in hardship or tragedy for homosexuals and heterosexuals alike.

B. The Court's Decision Ensures that Homosexuals Will Not Be Shut Out of the Political Process.

"[N]o citizen has been disenfranchised, prevented from casting an equally weighted vote, or in any way hindered in electing the representative of his or her choice by Amendment 2."³⁵⁶ Supporters of Amendment 2 were fond of noting that the amendment did not inhibit the right of homosexuals to vote, thus implying that voting is the only definition of the "political process."³⁵⁷ The political process, however, is more than voting—it also includes the equal chance to receive legislation which protects the interests of those who desire it.³⁵⁸ It seems the very purpose behind Amendment 2 was to shut homosexuals out of the halls of power in Colorado; otherwise, Amendment 2's supporters would have been content to allow the people's representatives to decide this issue, just as they decide other civil rights issues in the state.³⁵⁹ Therefore, the

354. Many view effeminacy as an indication that a man is homosexual. *Id.* at 970-72. Similarly, society often perceives masculine women as lesbians. *Id.* at 970 n.435. While sometimes, perhaps even with disproportionate frequency, these characteristics are present in gay and lesbian persons, it is also reasonable to assume that many heterosexuals display similar characteristics. *Id.* at 970-74.

355. *Id.* at 972-74.

356. Reply Brief for Petitioners at 4, *Romer v. Evans*, 116 S. Ct. 1620 (No. 94-1039).

357. See Duncan & Young, *supra* note 22, at 109-11.

358. See generally Batterman, *supra* note 6, at 943-46 (discussing the importance of using the legislative process as a protective mechanism).

359. *Evans v. Romer*, 854 P.2d 1270, 1285 n.28 (Colo. 1993).

While the State is quite right that the plaintiff class, like any other members of society, has no right to successful participation in the political process, the fact remains that its unsuccessful participation is mandated by the provisions of Amendment 2. In contrast to all other members of the electorate whose successful or unsuccessful participation in the process cannot be determined until ballots, votes, charters, etc., have been counted or voted upon, with the exception of a state constitutional amendment, gay men, lesbians, and bisexuals are told that 'you can appeal to government on those issues of

primary purpose of Amendment 2 was to dilute the influence of gays, lesbians, and bisexuals in the political arena.³⁶⁰ The decision of the United States Supreme Court ensured that homosexuals will be free to participate in the political process and exercise their civic right to petition their elected representatives for relief.³⁶¹

C. Upholding Amendment 2 Would Not Have Granted "Special Rights" to Gays, Lesbians, and Bisexuals.

In the debate over Amendment 2, supporters often stated that they were simply trying to prevent any group from getting special rights over any other group.³⁶² Groups have used this special rights language to oppose other pieces of landmark civil rights legislation, including the Civil Rights Act of 1964.³⁶³ The logical flip-side to the special rights argument is that allowing gays and lesbians the right to equal treatment infringes upon the right to discriminate by those who disapprove of homosexuals.³⁶⁴ The argument that people should have the right to discriminate,

concern to you, but you will, by virtue of Amendment 2, lose—irrespective of your ability to summon the support of others, or carry a majority in an election.'

Id.

360. During oral arguments, one Justice said, "Usually when we have an equal protection question we measure the objective of the legislature against the class that is adopted, against the statutory classification. Here, the classification seems to be adopted for its own sake. I've never seen a case like this." Transcript of Oral Argument, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039), available in 1995 WL 605822, at *4 (Oct. 10, 1995). Another Justice said, "I mean, the literal language would indicate that, for example, a public library could refuse to allow books to be borrowed by homosexuals and there would be no relief." *Id.*

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

362. Petitioners argued that the objective of Amendment 2 was to "immunize from preemption special protections that have been conferred upon homosexuals and bisexuals." Transcript of Oral Argument, *Romer* (No. 94-1039), available in 1995 WL 605822, at *10 (Oct. 10, 1995). Although the text of the amendment states that only gay, lesbian, and bisexuals may not be protected by ordinance and statute, the ordinances and statutes granting this protection to homosexuals refer to "sexual orientation" in general. See Grauerholz, *supra* note 72, at 853. Therefore, the effect of Amendment 2 apparently would have been to allow discrimination on the basis of homosexuality without eliminating a cause of action for discrimination by heterosexuals.

363. Marcossou, *supra* note 65, at 144-62.

364. See Duncan & Young, *supra* note 22, at 116-18. Duncan and Young reasoned that "gay, lesbians, and bisexuals were discouraged by Amendment Two, because it made their desire to regulate the businesses and properties of others—through restric-

however, is illogical.³⁶⁵ Whether homosexuals deserve protection from discrimination involves issues of genetics, morality, upbringing, and religion which are beyond the scope of this Note, but the concept that irrational discrimination is wrong is an ideal to which Americans have long subscribed.³⁶⁶ During oral argument of *Romer*, a Justice asked the Solicitor General of Colorado: “[H]aving the right not to be refused a job or to rent on that ground is a special right. . . . It’s not being just like everybody else?”³⁶⁷ It seems irrational to state that a person who is subject to discrimination is somehow seeking special rights when they seek the same opportunities which other groups already enjoy but do not need legislation to ensure. If accepted by society, the Supreme Court’s decision to directly attack the special rights language in striking Amendment 2 will eliminate this red herring from future debates over civil liberties.³⁶⁸

D. *The Future*

The legal ramifications of the Court’s decision in *Romer* remain unclear. Future decisions may show that the Court has adopted a new “per se” violation of the Equal Protection Clause and will apply the new doctrine only in circumstances where the facts parallel those presented in the fight over Amendment 2.³⁶⁹ It is equally plausible that the Court’s concern for the political equality of homosexuals caused them to be more skeptical of any justifications offered by the State, but this concern will not provide relief for other types of regulations affecting homosexuals.³⁷⁰ *Romer* could also demonstrate that the Court has, without saying as much, granted homosexuals a form of heightened scrutiny.³⁷¹

tive ‘gay rights’ laws—more difficult to accomplish.” *Id.* at 116.

365. Even CFV conceded that although special rights may be a good campaign slogan, it is an insufficient legal argument. See *Evans v. Romer*, 854 P.2d 1270, 1285-86 n.28 (Colo. 1993).

366. See Marcossou, *supra* note 65, at 155-56. In an attempt to break a Senate filibuster of the Civil Rights Act of 1964, Senator Hubert Humphrey argued that the right to (1) not be denied a job on a basis other than merit, and, (2) find a place to sleep at night are not special, but fundamental rights which all citizens should enjoy. *Id.*

367. Transcript of Oral Argument, *Romer* (No. 94-1039), available in 1995 WL 605822, at *19 (Oct. 10, 1995).

368. See *Romer v. Evans*, 116 S. Ct. 1620, 1625-27 (1996) (arguing that antidiscrimination laws do not grant special rights).

369. See Amicus Brief of Tribe et al. at *3, *Romer* (No. 94-1039) (advocating the adoption of a per se Equal Protection violation theory).

370. See *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting) (arguing that the majority made primarily a political decision).

371. See Frum, *supra* note 271, at 11 (arguing that homosexuals are already being treated similar to a suspect class); see also *City of Cleburne v. Cleburne Living Ctr.*,

If it is shown that the Court has granted homosexuals a form a heightened scrutiny, the implications for future sodomy, marriage, and military cases could be extensive and far reaching. The only certainty is that measures designed to make it impossible for homosexuals to seek relief from discrimination through their elected representatives are dead.³⁷²

VI. CONCLUSION

The question of whether homosexuals are protected in any way by the Equal Protection Clause has now been answered by the United States Supreme Court. The debate over gays in the military, same-sex marriages, and gay rights protections has been littered with fear, hatred, and, in some cases, violence. In many respects the debate over equal rights for homosexuals is the final battle between those who would use government to further their religious beliefs and those who believe that the government should guarantee to every citizen the right to live free of government-endorsed discrimination. The Supreme Court seized an opportunity and exercised its historical role by protecting those who, to some in American society, were not entitled to equal treatment. The tide of history is obvious: If the Supreme Court had decided against those attempting to ensure freedom for homosexual citizens, the country would have no doubt looked over its shoulder with regret.

"Therefore let us stop passing judgment on one another. Instead, make up your mind not to put any obstacle or stumbling block in your brother's way."³⁷³

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473 U.S. 432 (1985) (holding that a city may not deny a special use permit to the mentally retarded for operation of a group home because the classification is not sufficiently related to government interest).

372. See Marty Trillhaase, *ICA Drops Anti-Gay Initiative Bid*, IDAHO STATESMAN, July 2, 1996, at A1; *Oregon Anti-Gay Vote Delayed Until 1998*, CHI. TRIB., June 7, 1996, at N3 (reporting that Oregon would not put anti-gay initiative on the 1996 ballot due to likely unconstitutionality).

373. *Romans* 14:13.

