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

Gary Alan Collis
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I. INTRODUCTION

Homosexuals are one of the most reviled minority groups in the United States. They are victims of "hate" crimes more often than any other group. 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 Constitution in Romer v. Evans.

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. The Court handed down its decision on May 20, 1996, and the opinion's implications are wide, yet not totally settled. The decision may affect government policy regarding political equality, same sex marriages, homosexuals in the military, and other issues.


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)).


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.


7. See, e.g., Romer, 116 S. Ct. at 1623.
tary," security clearance for government employees based upon sexual orientation, and immigration. 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. 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. Part IV analyzes the history of Amendment 2 and the Court's majority and dissenting opinion in Romer. Finally, Part V analyzes the possible impact of Romer on the future of gay rights.

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. 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. Over time, the Court expanded its interpretation of the Clause and applied the Fourteenth Amendment


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, 546-46 (W.D. Wash. 1996) (holding that homosexual acts are not protected by an equal protection analysis).


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.


to the federal government through the Fifth Amendment's Due Process Clause.\textsuperscript{19}

In asserting an Equal Protection claim against a statute or government regulation, a challenger must first show an invidious classification.\textsuperscript{20} Next, the Court chooses between three standards of review to guide its decision on the case.\textsuperscript{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.\textsuperscript{22} There are only two scenarios in which a government regulation will be evaluated under a heightened standard: when it infringes on a fundamental right\textsuperscript{23} or when it targets a suspect classification.\textsuperscript{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.\textsuperscript{25} An intermediate standard is used occasionally,

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\item 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.
\item 23. See Zablocki v. Redhall, 434 U.S. 357, 363 (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.
\item 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)).
\item 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 class is involved. To survive this intermediate level scrutiny, regulations of a quasi-suspect class must have a substantial relationship to an important government objective.

The Supreme Court has identified several factors for determining whether a particular class of people constitute a suspect class. Class members must have an immutable characteristic, be politically powerless, and have suffered from a history of discrimination. Homosexuality usually fails this test by failing to establish an immutable characteristic. When analyzing immutability, most have considered homosexuality strictly an issue of conduct that does not involve any irrepressible internal identification and understandings of self. 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. As a result of these problems, the Supreme Court has refused to declare homosexuals a suspect class. 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).


27. Hilton, supra note 21, at 452.


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


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.


[H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifest-
clared race, gender, alienage, and illegitimacy either suspect or quasi-suspect classifications which trigger the heightened form of judicial scrutiny.

III. THE ELIMINATION OF THE DUE PROCESS ARGUMENT

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

In the 1982 case Bowers v. Hardwick, 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-
 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. The Eleventh Circuit reversed the district court’s decision to grant the government’s motion to dismiss. 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.

The case reached the Supreme Court, and in a five-to-four decision the Court reversed the Eleventh Circuit. 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.” 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.” 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,

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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.
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).
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. 50

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. 56 In Bowers, the Court's opinion rested entirely upon the Due Process Clause, a reliance which distressed the dissenters. 55 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).
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%.

Amendment 2 stated:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

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

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. 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. Looking at the laws in Romer on their face make it apparent that this explanation is not valid. 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. A second potential explanation of special rights is that homosexuals will use the laws primarily for protection, even though the laws are facially neutral. While homosexuals may be more likely than heterosexuals to seek protection under such laws, homosexuals also are more likely to be victims of discrimination. 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. 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.
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.\textsuperscript{72}

In Colorado, the groups arguing that laws and ordinances banning discrimination created special rights were victorious at the ballot box.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.""\textsuperscript{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.\textsuperscript{77} The Supreme Court of Colorado affirmed this injunction on July 19, 1993.\textsuperscript{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.\textsuperscript{79} Yet Amendment 2 had other, more substantial costs.\textsuperscript{80} Hate crimes increased by as much as 800% following

\textsuperscript{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.

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

\textsuperscript{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.

\textsuperscript{75} Id.

\textsuperscript{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)).

\textsuperscript{77} Id. at 846.

\textsuperscript{78} Evans, 854 P.2d at 1270.

\textsuperscript{79} Grauerholz, supra note 72, at 851.

\textsuperscript{80} See Batterman, supra note 6, at 941-43.
its passage, which is consistent with the effect of anti-gay rights cam-
paigning in other states.81 During a similar debate in Oregon, a lesbian
and gay newspaper in Portland received a note which read: "After 9 pass-
es 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 heterosexu-
als.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 indepen-
dently 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 Jus-
tices, including Justice Scalia, have expressed for broad interpretation of
previous decisions exemplifies the controversial nature of this deci-
son.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 861 (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." 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. 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.

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." 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. The court cited cases such as Dunn v. Blumstein, Harper v. Virginia Board of Elections, and Kramer v. Union Free School District 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 963-56. 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).
position that the right to political participation is fundamental. 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." In each of these cases, the Supreme Court applied the strict scrutiny test and concluded that the laws were unconstitutional.

2. Reapportionment Cases

The *Evans* court next added Supreme Court cases concerning reapportionment of representation to its discussion of equal participation in the political process. The court first considered *Reynolds v. Sims*. 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. 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." 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.

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.

3. Access to the Ballot Cases

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

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101. Grauerholz, supra note 72, at 865.
104. *Id.* at 568.
105. *Id.* at 560 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964)).
107. See Grauerholz, supra note 72, at 868.
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

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.
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." 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." 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." 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.

Next, the court looked at Washington v. Seattle School District No. 1. 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. 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. The Court held that the initiative was unconstitutional because it was not based upon "neutral principles." 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.' 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. "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."

120. Id.
121. Evans, 854 P.2d at 1279.
122. Id. at 1283.
123. Id. at 1279-80.
125. Id. at 469-67.
126. Id. at 469-70; see Hunter v. Erickson, 393 U.S. 385, 394 (1969) (Harlan, J., concurring).
128. Id. at 470 (emphasis in original) (quoting Hunter, 393 U.S. at 393).
130. Id.
As further support for the proposition that these cases were not based on race, the Evans court analyzed Gordon v. Lance.\(^\text{131}\) 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.\(^\text{132}\) 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."\(^\text{133}\) 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.\(^\text{134}\) 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.\(^\text{135}\) 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.\(^\text{136}\)

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.\(^\text{137}\) The Evans court stated:

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

\(^{131}\) 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. He analyzed the rationale of the district court's original preliminary injunction and the rationale of the majority and determined that no right to equal participation in the political process existed. The dissent rejected the notion that voter rights and ballot access cases stand for any principle beyond those expressly stated by the Court.

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. The dissent reasoned that Hunter and Seattle School District, both cited by the majority, were nothing more than traditional racial classification cases. The dissent quoted extensively from portions of Hunter in which the Supreme Court emphasized the importance of plaintiff's membership in a racial minority. According to the dissent, Seattle School District was also a simple racial case. The dissent dismissed Gordon v. Lance, 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."

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. In James, the Supreme Court upheld a voter-initiated amendment to the California Consti-
tution which would have forbidden municipalities from building or acquiring public housing projects without a voter-approved referendum.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{155}

\subsection*{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.\textsuperscript{156} The State argued that it had six compelling reasons to justify Amendment 2.\textsuperscript{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)

\begin{enumerate}
\item\textsuperscript{151} Id. at 140-41.
\item\textsuperscript{152} Id. at 142.
\item\textsuperscript{153} Evans, 854 P.2d at 1297-98 (Erickson, J., dissenting).
\item\textsuperscript{154} Id. at 1301 (Erickson, J., dissenting).
\item\textsuperscript{155} Id. (Erickson, J., dissenting).
\item\textsuperscript{157} See id. at 755-62.
\end{enumerate}
promoting the physical and psychological well-being of children.\textsuperscript{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.\textsuperscript{159} The plaintiffs again appealed this decision to the Colorado Supreme Court and the court delivered an opinion on October 11, 1994.\textsuperscript{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.\textsuperscript{161}

E. To the Supreme Court of the United States

On February 21, 1995, the United States Supreme Court granted Petitioners' writ of certiorari.\textsuperscript{162} The Court heard oral arguments on October 10, 1995.\textsuperscript{163}

1. Brief for Petitioners

Petitioners\textsuperscript{164} 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."\textsuperscript{165} This concern over federal interference in the internal political decision-making process of the State

\textsuperscript{158} Id. at 755.
\textsuperscript{159} Id. at 760.
\textsuperscript{160} See Evans, 882 P.2d at 1335.
\textsuperscript{161} Id. at 1360. 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.").
\textsuperscript{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.
\textsuperscript{165} Brief for Petitioners at 10, Romer (No. 94-1039).
of Colorado constituted the primary argument for overturning the lower court ruling. Petitioners pointed to Luther v. Borden and San Antonio Independent School District v. Rodriguez, among other cases, as support for their position that a state may organize its internal political functions as it chooses. 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. 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.

Next, Petitioners argued that Amendment 2 did not involve a suspect or quasi-suspect class. 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. Therefore, strict scrutiny would apply to the Equal Protection claim only if Romer involved a "federally-guaranteed fundamental right." 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." Petitioners buttressed this position by arguing that the cases relied upon by the majority in Evans, such as Hunter v. Erickson and Washington v. Seattle School District, did not create a fundamental right but instead protected a suspect class.

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166. Id. at 14-16.
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.
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," petitioners cited to James v. Valtierra. 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. The Court upheld the amendment and indicated its decision did not conflict with Hunter because unlike Hunter, James did not involve racial issues. 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.

Finally, Petitioners claimed that the majority "rewrote" James using "mystifying" logic and insisted that "the Hunter rule comes into play only to protect racial minorities—or at its most expansive, members of a suspect class." Petitioners next addressed the other types of cases upon which the Evans court relied. 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. Furthermore, "[r]ather than burdening any person's rights to vote or associate, Amendment 2 simply raises a certain issue to a constitutional level." 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."

1270, 1286-1302 (Colo. 1993) (Erickson, J., dissenting).
179. Brief for Petitioners at 20, Romer (No. 94-1039).
181. Brief for Petitioners at 21, Romer (No. 94-1039).
182. James, 402 U.S. 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." 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. 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.'" Petitioners next discussed a series of cases in which the Supreme Court deferred to a state's ability to structure itself politically. 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. 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.

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).


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. Marcosson, 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. 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. 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. Second, Petitioners asserted that Amendment 2 might interfere with religious, familial, personal, and associational freedoms. 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." 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." They maintained that having many different municipal ordinances "seriously fragment[ed] Colorado's body politic."

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) 763, 767 (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 766.
202. Brief for Petitioners at 47, Romer (No. 94-1039).
2. Brief for Respondents

The Respondents' brief mirrored the position of the lower court.

majority in *Evans*. After setting forth the history of Amendment 2 and its treatment by the Colorado Supreme Court, 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.

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. Respondents contended that the Supreme Court may intervene when these structures “burden a federally protected right.”

Next, Respondents argued that the right to participate equally in the political process is fundamental and applies to everyone, not simply to suspect classifications. In support of this position, Respondents cited the cases used by the *Evans* majority. 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.” While conceding that the cited cases involved racial classifications, Respondents argued that the outcomes of the cases did not turn solely upon race.

Respondents then attempted to explain what the Court intended when Justice Harlan used the “neutral principle” approach to political restructuring in *Hunter v. Erickson*. 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. 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.*


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.


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.

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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. 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. Respondents argued that the group must be identified "independent" of their common position in opposition to or support for a particular measure.

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The State's parade of horribles 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. The 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.

Finally, Respondents argued that Amendment 2 could not survive even under the rational basis test. 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."

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. 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." Petitioners asserted that Respondents were asking the Court to overturn its decision in James v. Valtierra

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.
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."

Next, Petitioners asserted that the Amendment did not shut homosexuals out of the political process because homosexuals could still vote and even repeal Amendment 2.228 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."229

Petitioners took issue with some of the assertions made by Respondents concerning the potential consequences of Amendment 2.230 Petitioners asserted that Amendment 2 had never been interpreted and that Respondents should not rely upon "extreme hypotheticals" to invalidate an otherwise constitutional provision.231 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."232
Petitioners concluded by arguing that Amendment 2 passed the rational basis test. 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. 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. 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.

4. The Decision

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

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.
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
Commentators described the Court's decision as a "landmark victory for gay rights" and one "written with a generous tenor toward the legal rights of homosexuals." 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 decision and even calls for revolution.

While the complete impact of the Court's decision has yet to be determined, Romer will likely effect other cases pending before federal courts. For example, in Nabozny v. Podlesny, 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. 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 demeanes 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.

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.

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, "[The 'Romer Six,' the six Supreme Court Justices who declared Amendment 2 unconstitutional, must be impeached." Id.

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.

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.

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

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.\footnote{250}

F. The Majority

Justice Kennedy wrote the majority opinion in \textit{Romer} and announced that Colorado’s Amendment 2 violated the Equal Protection Clause.\footnote{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.’”\footnote{252} Follow-

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ollowing 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. 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." The Court stated that it was invalidating Amendment 2, but "on a rationale different from that adopted by the State Supreme Court."

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. Colorado maintained that Amendment 2's purpose was simply to deny homosexuals special rights. 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." 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."

The Court proceeded by describing the history, purpose, and operation of legislation designed to prevent discrimination. At common law, discrimination was unlawful based upon a general duty owed by those engaged in public employment. The insufficiency of this common law duty to combat discrimination gave rise to specific legislative acts designed to protect particular persons from discrimination. 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." Amendment 2, however, would eliminate sexual orientation as a protected group in both private transactions and the public arena.

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

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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. 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. This determination alone "would itself amount to a policy prohibiting discrimination on the basis of homosexuality" and thus violate Amendment 2. 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." The Court noted that only homosexuals were denied the protection of antidiscrimination laws that "others enjoy or may seek without constraint."

Next, the Court turned its attention to whether Amendment 2 denies equal rights or special rights. 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-
found[ed] this normal process of judicial review." 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."

Before discussing its second point, the Court distinguished the fact pattern in Romer, with an earlier polygamy case. In Davis v. Beason, the Court upheld an Idaho statute barring polygamists and advocates of polygamy from voting or holding office. 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]." 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.

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."
Next, the Court addressed the most controversial and debated issue of the case.\textsuperscript{287} The Court analyzed Amendment 2 using traditional Equal Protection principles and found that no rational reason existed for treating homosexuals differently.\textsuperscript{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."\textsuperscript{289} The Court held that Amendment 2 was, in reality, "born of animosity."\textsuperscript{290} The majority reasoned: "[I]f the

\[\text{\textit{italics}: personal opinions of the Court members.}\]

personal orientation shows how the viewpoint of homosexuals has undergone little change since the Supreme Court's decision in \textit{Bowers v. Hardwick}. See \textit{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, \textit{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 Nabozy 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, \textit{Disinheritance and the Modern Family}, 45 CASE W. RES. L. REV. 84, 159 n.247 (1994) (discussing 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 \textit{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.").


288. \textit{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, 436 (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 \textit{Romer} result has caused some to say that the Court has "reinvigorate[d] rational-basis scrutiny." Marcia Coyle, \textit{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, \textit{Equal Protection Developments}, N.Y.L.J., Sept. 17, 1996, at 3 (quoting Gerald Gunther, \textit{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)).


290. \textit{Id.} at 1628. The Court's position that animosity motivated the enactment of
A 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." The Court held that the damage done to homosexuals in Colorado would "outrun and belie" any legitimate purpose behind Amendment 2. The Court used forceful language to support its decision; specifically, that the classification undertaken in Colorado was done "for its own sake," which was "obnoxious to the prohibitions of the Fourteenth Amendment." Finally, the Court concluded that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment by "classifying 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."

G. The Dissent

Justice Scalia began his dissent by stating that the Court had confused a culture war for a "fit of spite." 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." 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." 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 Pay, 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. 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.

In Part II of his dissent, Justice Scalia discussed *Bowers v. Hardwick.* Justice Scalia began by chastising the Court for not mentioning *Bowers* in its opinion. 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." The dissent argued that Amendment 2 was not as damaging to homosexuals as the ban on sodomy because sodomy "defines the class." Justice Scalia challenged Respondents' position that *Bowers* was not controlling because some homosexuals do not engage in homosexual sodomy.2 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. 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-

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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).
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 87, 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).

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duct.\footnote{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.\footnote{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.\footnote{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."\footnote{317} Justice Scalia maintained, however, that it is acceptable to disapprove of certain conduct, for example, murder or animal cruelty.\footnote{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."\footnote{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.\footnote{320} Justice Scalia asserted that although Colorado eliminated a ban on homo-

\footnote{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).


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.\textsuperscript{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.\textsuperscript{322} The dissent emphasized that homosexuals had gained political clout in several cities in Colorado,\textsuperscript{323} these events had thus led the voters of Colorado to decide whether to protect homosexuals from discrimination in a statewide, single-issue format.\textsuperscript{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.\textsuperscript{325}

Justice Scalia began Part IV of his dissent by analogizing Amendment 2 to regulations against polygamy.\textsuperscript{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."\textsuperscript{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."\textsuperscript{328} Justice Scalia accused the Court of developing a "novel and ex-

\textsuperscript{321} Id. at 1633-34 (Scalia, J., dissenting).
\textsuperscript{322} Id. at 1634 (Scalia, J., dissenting).
\textsuperscript{323} Id. (Scalia, J., dissenting).
\textsuperscript{324} Id. (Scalia, J., dissenting).
\textsuperscript{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. See supra note 286 (discussing the dissent's polygamy analogy).
\textsuperscript{326} See Feldblum, supra note 252, at 1029.
travagant constitutional doctrine to take victory away from traditional forces.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{332} Justice Scalia ob-

\textsuperscript{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. \textit{Id.} ("It is a decision profoundly based on morality on the part of the judge . . . .").

\textsuperscript{329} \textit{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. \textit{See} Douglas W. Kmiec, \textit{When the Federal Judiciary Gets in the Way}, CHL TRIB., Nov. 18, 1996, at 19. One commentator even called the Supreme Court a "spoiled teenager" for reversing political referendums. \textit{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. \textit{See} Adarand Constructors, Inc. \textit{v.} Pena, 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, \textit{Voters Should Pick Justices}, DAYTON DAILY NEWS, June 1, 1996, at A11. By describing the result in \textit{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. \textit{See id.}

\textsuperscript{330} \textit{Romer}, 116 S. Ct. at 1637 (Scalia, J., dissenting).

\textsuperscript{331} \textit{Id.} (Scalia, J., dissenting).

\textsuperscript{332} \textit{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.

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

The dissent summarized by asserting that the majority “opinion has no foundation in American constitutional law, and barely pretends to.”\textsuperscript{334} In conclusion, Justice Scalia stated that upholding the lower court ruling was “an act, not of judicial judgment, but of political will.”\textsuperscript{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.\textsuperscript{336} Although documents submitted to the Supreme Court

\begin{itemize}
\item \textsuperscript{333}\textit{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 . . . .” \textit{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. \textit{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. \textit{See id.} at 1628 (stating “It is not within our constitutional tradition to enact laws of this sort.”).
\item \textsuperscript{334} \textit{Id.} at 1637 (Scalia, J., dissenting).
\item \textsuperscript{335} \textit{Id.} (Scalia, J., dissenting). Justice Scalia continues to assert that the decision in \textit{Romer} was a political act. \textit{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.”); \textit{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.”). \textit{Virginia}, 116 S. Ct. at 2308 (Scalia, J., dissenting).
\item \textsuperscript{336} \textit{See Batterman, supra note 6, at 940 n.181. Over the past decade, 53 fundamentalist organizations moved their headquarters to Colorado Springs, Colorado. \textit{Id.} at 939. These organizations have income which exceeds $357 million and they employ a significant number of people. \textit{Id.} This substantial presence in Colorado Springs has increased the influence of fundamentalist groups in the area, particularly Colorado for Family Values. \textit{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. \textit{Id.} at 940.
\end{itemize}
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'
quotations an attempt to “stigmatize” the supporters. 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.” 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.

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. 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. 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?” Although the Court considered this question a serious one, it went unanswered during oral argument. The question of who is a homosexual is a relatively new question because “homosexual” is a relatively new term.

Absent a clear-cut answer to this question, the potential for discrimination against persons against whom discrimination is not intended is a possibility. 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 969-62.
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, 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. 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." 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." 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. 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.

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.


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

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


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. 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.

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. Groups have used this special rights language to oppose other pieces of landmark civil rights legislation, including the Civil Rights Act of 1964. 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. The argument that people should have the right to discriminate,
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. 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. Romer could also demonstrate that the Court has, without saying as much, granted homosexuals a form of heightened scrutiny.

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. During oral argument of Romer, a Justice asked the Solicitor General of Colorado: “Having 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?” 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.

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368. See Evans v. Romer, 854 P.2d 1270, 1285-86 n.28 (Colo. 1993).

369. See Marcussen, 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.


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

GARY ALAN COLLIS

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).

