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William M. Wilson III

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Romer v. Evans: "Terminal Silliness," or Enlightened Jurisprudence?

> *But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution ... neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.*[1]

Justice Harlan delivered the above admonition in his famous dissent to *Plessy v. Ferguson.*[2] By resurrecting this language in the 1996 opinion *Romer v. Evans*,[3] the Supreme Court acknowledged that the loathsome specter of discrimination still hovers over this country one hundred years after Justice Harlan's enlightened insight. But not all agree that sexual orientation—the classification at issue in *Romer*—merits the same legal protections as race. Nor do all agree that Colorado Constitutional Amendment 2—the target of the Supreme Court's review—deprived homosexuals of anything more than preferential treatment.

Amendment 2 was a response to ordinances passed in several of Colorado's municipalities which banned discrimination based upon sexual orientation in housing, employment, education, public accommodations, and health and welfare services.[4] The Amendment stated:

> *No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.* 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

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1. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (emphasis added).

2. *See id.* at 552-64 (Harlan, J., dissenting). *Plessy* held that a law requiring separate but equal accommodations for blacks and whites in railway coaches did not violate the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 548.

3. 116 S. Ct. 1620 (1996).

4. *See id.* at 1623 (citing ASPEN, COLO., MUNICIPAL CODE § 13-98 (1977); BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-11 (1987); DENVER, COLO., REV. MUNICIPAL CODE art. IV, §§ 28-91 to 28-116 (1991)).

> to have or claim any minority status, quota preferences, protected status or claim of discrimination. This section of the Constitution shall be in all respects self-executing.[5]

On November 3, 1993, Colorado voters approved the Amendment by a vote of 813,966 (53.4%) to 710,151 (46.6%).[6]

The issue at stake in *Romer* was whether Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.[7] In a six-to-three decision, the Supreme Court held that it did violate the Equal Protection Clause because: (1) "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense," and (2) the Amendment did not bear a rational relationship to a legitimate state interest.[8] In dissent, Justice Scalia countered by arguing that Amendment 2 did nothing more than "prohibit[] *special treatment* of homosexuals"[9] and that it rationally furthered the legitimate state interest of "preserv[ing] traditional sexual mores."[10]

This Note first summarizes the precedent for equal protection analysis.[11] It then outlines the events giving rise to *Romer*[12] and examines the majority's analysis as well as Justice Scalia's counterarguments.[13] Next, the Note reviews background cases involving the constitutional rights of homosexuals.[14] It then analyzes the strengths and weaknesses of the majority's reasoning[15] and assesses *Romer*'s impact on gay rights and constitutional jurisprudence in general.[16]

The Equal Protection Clause of the Fourteenth Amendment

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5. COLO. CONST. art. II, § 30b, *held unconstitutional by* Romer v. Evans, 116 S. Ct. 1620 (1996).

6. *See* Evans v. Romer, 882 P.2d 1335, 1338 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996).

7. *See Romer*, 116 S. Ct. at 1624. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

8. *Romer*, 116 S. Ct. at 1628-29. Justice Kennedy wrote the majority opinion which was joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. *See id.* at 1623.

9. *Id.* at 1630 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissent. *See id.* at 1623.

10. *Id.* at 1629 (Scalia, J., dissenting).

11. *See infra* notes 17-59 and accompanying text.

12. *See infra* notes 60-70 and accompanying text.

13. *See infra* notes 71-128 and accompanying text.

14. *See infra* notes 129-77 and accompanying text.

15. *See infra* notes 178-291 and accompanying text.

16. *See infra* notes 292-314 and accompanying text.

provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[17] The Supreme Court has determined that this clause "is essentially a direction that all persons similarly situated should be treated alike."[18] Generally speaking, Fourteenth Amendment equal protection challenges may derive from state legislative acts[19] or from state constitutional provisions,[20] as was the case in *Romer*.[21] The Court has developed three levels of judicial review for equal protection challenges: strict scrutiny, intermediate scrutiny, and rational review.[22]

Courts apply the highest level of review, strict scrutiny, when a legal classification either encroaches upon a fundamental right or targets a suspect class.[23] Fundamental rights are rights "explicitly or implicitly guaranteed by the [United States] Constitution."[24] Such rights include interstate travel,[25] privacy,[26] First Amendment guaran-

17. U.S. CONST. amend. XIV, § 1. Equal protection claims against the federal government arise under the Fifth Amendment's Due Process Clause, *see* U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."), into which the Court has read an implicit Equal Protection Clause, *see* Schneider v. Rusk, 377 U.S. 163, 168 (1964) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954))); Charles C. Steward Machinery Co. v. Davis, 301 U.S. 548, 585 (1937) (stating in dicta "that discrimination, if gross enough, is . . . subject under the Fifth Amendment to challenge"). The "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

18. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

19. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (upholding against an equal protection challenge an Oklahoma state statute that regulated the dispensation of eyeglasses).

20. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 471 (1991) (applying rational relation review to a state constitutional provision).

21. *See Romer*, 116 S. Ct. at 1623.

22. *See, e.g.*, *Cleburne*, 473 U.S. at 440-42 (describing the three levels of review).

23. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58 (1988).

24. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). These are rights " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' " Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (alteration in original)). Another characterization is that fundamental rights are " 'deeply rooted in this Nation's history and tradition.' " *Id.* at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). The Court does not create these rights; it merely recognizes that they are "explicitly or implicitly guaranteed by the Constitution." *Rodriguez*, 411 U.S. at 33-34.

25. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.").

26. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that the mar-

tees,[27] and participation in state elections on an equal basis with other voters.[28] Since the 1970s, however, the Supreme Court has been reluctant to recognize new fundamental rights.[29] For example, it has refused to recognize a fundamental right to education,[30] housing,[31] welfare payments,[32] or government employment.[33]

Suspect classes are those classes whose members historically have "been subjected to discrimination," "exhibit obvious, immutable, or distinguishing characteristics," and are "a minority or politically powerless."[34] Additionally, members of suspect classes exhibit identifying characteristics that are beyond their control[35] and experience discrimination for characteristics that are "not truly indicative of their abilities."[36] As a result, members of suspect classes

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riage relationship falls within the "zone of privacy created by several fundamental constitutional guarantees").

27. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) ("[T]his freedom [of association] protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.").

28. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court stated:

> [T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.

Id. at 566 (citation omitted).

29. *See Rodriguez*, 411 U.S. at 33-34 (announcing that the Court will only recognize a right as fundamental if it is "explicitly or implicitly guaranteed by the Constitution"); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 900 n.5 (2d ed. 1991) ("Since 1973 the Court has generally adhered to the *Rodriguez* reformulation [of the fundamental rights test]. That is, although the Court has continued to enforce 'fundamental' interest analysis in the areas of procreation, voting, access to the courts, and travel, it has essentially frozen the list of 'fundamental' interests ...."); *see also Bowers*, 478 U.S. at 195 ("There should be ... great resistance to expand the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental.").

30. *See Rodriguez*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

31. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("We are unable to perceive ... any constitutional guarantee of access to dwellings of a particular quality ....").

32. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (holding that there was no basis for applying a standard other than the rational basis test in determining whether a Maryland statute capping monthly welfare grants violated the Equal Protection Clause).

33. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) ("This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental.").

34. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

35. *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

36. *Murgia*, 427 U.S. at 313. The "Supreme Court has never articulated a precise test for determining which groups should be regarded as suspect or quasi-suspect." Equality Found. v. City of Cincinnati, 860 F. Supp. 417, 434 (S.D. Ohio 1994). The lack of a precise

"command extraordinary protection from the majoritarian political process."[37] The Supreme Court has applied strict scrutiny to suspect classifications based on alienage, race, and ancestry[38] because these classifications are likely to reflect prejudice and are unlikely to soon be rectified by the legislative process.[39] The Court has declined to apply strict scrutiny to classifications based on age[40] or familial relationship.[41] Once a law has been shown to affect a fundamental right or a suspect class, in order to survive strict scrutiny, it must serve a *compelling* state interest, and it must be *narrowly tailored* to serve the state interest in the least restrictive manner possible.[42]

Intermediate scrutiny, which falls somewhere between strict

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test is evidenced by the "stereotype" requirement in *Murgia* not being mentioned in *Lyng*. *Compare Murgia*, 427 U.S. at 313 (defining suspect classes as those which have "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))), *with Lyng*, 477 U.S. at 638 (characterizing suspect classes as those which have historically "been subjected to discrimination ... [and which] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and are ... a minority or politically powerless" (citing *Murgia*, 427 U.S. at 313-14)).

37. *Rodriguez*, 411 U.S. at 28.

38. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); *see also* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." (footnotes omitted)); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

39. *See Cleburne*, 473 U.S. at 440. Classifications on these bases are "suspect" because they "tend to be irrelevant to any proper legislative goal" and "are more likely than others to reflect deep-seated prejudice." *Plyler*, 457 U.S. at 216 n.14. Furthermore, "[l]egislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Id.*

40. *See Murgia*, 427 U.S. at 313 (declining to find that the aged meet the characteristics of a suspect class).

41. *See Lyng*, 477 U.S. at 638-43 (judging, in the context of the federal food stamp program, that Congress could rationally classify according to whether household members were close or distant relatives, and that close relatives—that is, parents, children, and siblings—are not members of a suspect or quasi-suspect class).

42. *See, e.g.*, *Plyler*, 457 U.S. at 217. An alternative formulation of the strict scrutiny test is that the classification must be "necessary" to promote a compelling state interest. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342 (1972). In *Dunn*, the Court clarified that "legal 'tests' do not have the precision of mathematical formulas" and that "[t]he key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes." *Id.* at 342-43.

scrutiny and rational review, has been applied in cases involving discriminatory classifications based on sex or illegitimacy.[43] Groups which garner intermediate scrutiny are known as quasi-suspect classes.[44] The Supreme Court has declined to apply intermediate review to classifications based on age,[45] mental retardation,[46] or familial relationship.[47] The Court has never explicitly distinguished between the characteristics of suspect and quasi-suspect classes.[48] Neverthe-

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43. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 459 (1988). Intermediate scrutiny is reserved for "statutes distributing benefits and burdens between the sexes in different ways [because they] very likely reflect outmoded notions of the relative capabilities of men and women." *Cleburne*, 473 U.S. at 441; *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 & n.10 (1982) (stating that objectives are illegitimate when they reflect stereotypic notions of gender roles); Craig v. Boren, 429 U.S. 190, 198-99 (1976) (discussing outdated stereotypes of gender classifications). Classifications based on illegitimacy also receive intermediate scrutiny because illegitimacy "is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society.' " *Cleburne*, 473 U.S. at 441 (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)).

The Court recently applied what it called "skeptical scrutiny" to classifications based on gender. *See* United States v. Virginia, 116 S. Ct. 2264, 2274 (1996). The Court stressed that "gender-based government action must demonstrate an 'exceedingly persuasive justification,' " *id.* (quoting *Hogan*, 458 U.S. at 724), and that the burden is on the State to prove that the classification is substantially related to important governmental objectives, *see id.* The Court further held that the justification cannot be hypothetical and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* at 2275. Justice Scalia, in dissent, criticized the Court for "effectively" applying strict scrutiny. *See id.* at 2294 (Scalia, J., dissenting).

44. *See, e.g., Murgia*, 427 U.S. at 325 (Marshall, J., dissenting).

45. *See id.* at 312-14. After declining to find that the aged were a suspect class, *see id.* at 312-13, the Court proceeded to apply rational basis review *without considering* whether they might be a quasi-suspect class, *see id.* at 314.

46. *See Cleburne*, 473 U.S. at 442-47 (finding that the mentally retarded have characteristics which truly are indicative of their abilities, and that they benefit from favorable legislation and are not politically powerless).

47. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (holding, without elaboration, that close relatives do not meet *any* of the elements of a suspect or quasi-suspect class).

48. *See* Evans v. Romer, No. CIV.A.92-CV-7223, 1993 WL 518586, at *12 (City & County of Denver, Colo. Dist. Ct. Dec. 14, 1993) (unpublished trial court decision) ("Case law has not clearly differentiated between the elements of a 'suspect' class and a 'quasi-suspect' class."), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). *Murgia* suggests that there is not a difference—the Court did not even *consider* whether a classification based on age was quasi-suspect once it determined that the classification was not suspect. *See Murgia*, 427 U.S. at 314. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court characterized classifications which disadvantage a suspect class as "presumptively invidious." *Id.* at 216. It then noted that "certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties," and that it is in these situations that intermediate scrutiny should be applied. *Id.* at 217. Thus, "[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this [intermediate] standard to aid us in determining the rationality of the legislative choice." *Id.* at 218 n.16.

less, like members of suspect classes, members of quasi-suspect classes historically must have "been subjected to discrimination," "exhibit obvious, immutable, or distinguishing characteristics," and be "a minority or politically powerless."[49] Also, like suspect classes, members of quasi-suspect classes face discrimination for possessing characteristics beyond their control which are not truly indicative of their abilities.[50] A legal classification affecting a quasi-suspect class must be *substantially* related to an *important* government interest to withstand intermediate scrutiny.[51]

The least rigorous level of review is the rational basis test.[52]

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49. *Lyng*, 477 U.S. at 638.

50. *See Cleburne*, 473 U.S. at 441. Akin to the Court not having differentiated between suspect and quasi-suspect classes, the Court has not definitively articulated the characteristics of a quasi-suspect class. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33, at 1614 (2d ed. 1988).

51. *See, e.g.*, *Plyler*, 457 U.S. at 217-18 ("[I]n these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State."); Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

52. Some courts have distinguished between the traditional rational basis review and an "active" rational basis review, which involves a somewhat heightened application of the rational basis test. *See, e.g.*, United States v. Then, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring) ("Judges and commentators have noted that the usually deferential 'rational basis' test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination."); Pruitt v. Cheney, 963 F.2d 1160, 1165-66 (9th Cir. 1991) ("It is true that we found the discrimination against homosexuals in . . . [a prior] case to have a rational basis, but it is clear that we applied the type of 'active' rational basis review employed by the Supreme Court in [*Cleburne*]." (citation omitted)). The genesis of this distinction was Justice Marshall's opinion in *Cleburne*, in which he argued that the Court applied a stricter rational basis test than it had in the past. *See Cleburne*, 473 U.S. at 458-60 (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing that the Court implicitly adopted a "second order" level of scrutiny). Justice Marshall took issue with the Court's statement that the *record* did not reveal a rational basis for the ordinance at issue; he argued that under rational basis review the Court does not sift through the record in order to find a factual foundation for policy decisions. *See id.* at 458 (Marshall, J., concurring in the judgment in part and dissenting in part). Additionally, although he shared concerns with the majority over the ordinance's imprecise classifications, Justice Marshall asserted that "[i]n normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional." *Id.* at 459 (Marshall, J., concurring in the judgment in part and dissenting in part).

Despite Justice Marshall's contentions and subsequent references by lower courts to "active" rational basis review, the Supreme Court has never recognized such a distinction. *See* Heller v. Doe, 509 U.S. 312, 319-21 (1993). In *Heller*, the Supreme Court discussed rational basis scrutiny and stated that its correct application includes: a presumption of constitutional validity, a burden on the plaintiff, and a lack of need for the record to provide a supportive basis for the legislation. *See id.* The Court did not endorse varying

When no protected rights or classes are involved, legislation "will be sustained [against equal protection challenge] if the classification drawn by the statute is rationally related to a legitimate state interest."[53] The rational basis test "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[54] Rather, courts merely must determine whether there is "any reasonably conceivable state of facts that could provide a rational basis for the classification."[55] Furthermore, "the Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted."[56] As a result, when the Court applies the rational basis test, the legislative classification "is accorded a strong presumption of validity,"[57] and " '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record."[58] Finally, a classification does not fail because it is imperfectly drawn or results in some inequality.[59]

In *Romer*, nine days after Amendment 2 passed, nine homosexual individuals joined with the City and County of Denver, the City of Boulder, the City of Aspen, the City Council of Aspen, and a Boulder Valley School District and filed suit in the District Court for the City and County of Denver to enjoin Amendment 2's enforcement, claiming that it was unconstitutional.[60] After rejecting a request for an expedited hearing on the merits, the court granted a

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levels of rational basis scrutiny and specifically stated that *Cleburne* did *not* "apply a different standard of rational-basis review from that just described." *Id.* at 321. For a discussion of "active" rational basis review and whether it has survived *Heller*, see Alfonso Madrid, Comment, *Rational Basis Review Goes Back to the Dentist's Chair: Can the Toothless Test of* Heller v. Doe *Keep Gays in the Military?*, 4 TEMP. POL. & CIV. RTS. L. REV. 167, 183-209 (1994).

53. *Cleburne*, 473 U.S. at 440.

54. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

55. *Id.*

56. Vance v. Bradley, 440 U.S. 93, 97 (1979) (footnote omitted).

57. *Heller*, 509 U.S. at 319.

58. *Id.* at 320-21 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (citation omitted)).

59. *See id.* at 321.

60. *See* Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993). The challenges to Amendment 2 were based upon claims under the First Amendment to the Federal Constitution; the Equal Protection, Due Process, Supremacy, and Guarantee Clauses of the Federal Constitution; and various provisions of the Colorado Constitution. *See id.* at 1272-73 & n.2. The defendants in the suit were Roy Romer in his official capacity as governor, the Colorado Attorney General, and the State of Colorado. *See id.* at 1270.

preliminary injunction based upon the plaintiffs' arguments that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.[61] The defendants appealed to the Colorado Supreme Court,[62] which upheld the preliminary injunction.[63] The state supreme court determined that a fundamental right to participate equally in the political process exists and that Amendment 2 infringed upon this right; hence, the state court ruled that the Amendment would be subject to strict scrutiny review on remand.[64]

On remand, the trial court applied strict scrutiny in accordance with the standard set forth by the Colorado Supreme Court: Amendment 2 would "be sustained only if [it were] supported by a compelling state interest and narrowly drawn to achieve that interest

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61. *See id.* at 1273. The plaintiffs supported their motion for a preliminary injunction by arguing that Amendment 2 deprived them of their rights of free expression and equal protection under the First and Fourteenth Amendments, respectively, to the Federal Constitution. *See id.* The trial court, however, did not rely on the First Amendment argument in granting the preliminary injunction. *See id.*

62. The defendants appealed pursuant to a Colorado appellate rule which allows an appeal from "[a]n order granting or denying a temporary injunction." COLO. APP. R. 1(a)(3). The Colorado Supreme Court granted review. *See Evans*, 854 P.2d at 1274.

63. *See Evans*, 854 P.2d at 1286.

64. *See id.* The court derived this fundamental right to equal participation in the political process from an amalgam of Supreme Court cases involving reapportionment, *see id.* at 1276 (citing Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736-37 (1964) (striking down reapportionment scheme under Equal Protection Clause); Reynolds v. Sims, 377 U.S. 533, 567-68 (1964) (reapportionment); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (reapportionment)), minority party rights, *see id.* (citing Williams v. Rhodes, 393 U.S. 23, 34 (1968) (finding impermissible restriction on minority political party's right to political participation)), direct restrictions on voting, *see id.* (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (finding impermissible infringement on fundamental right to vote); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 633 (1969) (fundamental right to vote); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667-68 (1966) (fundamental right to vote)), and attempts to limit the ability of certain groups to implement desired legislation through the normal political processes, *see id.* (citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 469-70 (1982) (invalidating on Equal Protection grounds attempts to limit political participation by certain groups); Gordon v. Lance, 403 U.S. 1, 7-8 (1971) (certain groups); Hunter v. Erickson, 393 U.S. 385, 392-93 (1969) (certain groups)). The Colorado Supreme Court reasoned that Amendment 2 infringed on the fundamental right to equal participation in the political process

> because it bar[red] gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alter[ed] the political process so that a targeted class [was] prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment.

Id. at 1285. In short, the state supreme court found that Amendment 2 "single[d] out and prohibit[ed] this class of persons from seeking governmental action favorable to it." *Id.*

in the least restrictive manner possible."[65] The six state interests offered by the defendants at trial were:

> 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) promoting the physical and psychological well-being of our children.[66]

The trial court, however, found only two of the proffered interests compelling—"the promotion of religious freedom and the promotion of family privacy"—but it stated that "[a]s to those two interests the Amendment [wa]s not 'narrowly drawn to achieve th[ose] purpose[s] in the least restrictive manner possible.' "[67]

The court also determined that homosexuals were not a suspect or quasi-suspect class.[68] Nevertheless, because Amendment 2 in-

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65. *Id.* at 1275 (citing Plyler v. Doe, 457 U.S. 202, 217 (1982)).

66. Evans v. Romer, No. CIV.A.92-CV-7223, 1993 WL 518586, at *2 (City & County of Denver, Colo. Dist. Ct. Dec. 14, 1993) (unpublished trial court decision), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996).

67. *Id.* at *9 (quoting *Evans*, 854 P.2d at 1275). The court suggested that a narrower way to protect religious freedom would be to add religious exemptions to ordinances which ban discrimination on the basis of sexual orientation, rather than adopting a broad-based amendment which denies gays their fundamental right to participate in the political process. *See id.* at *7. As for the compelling interest of family privacy, the defendants failed to show "[t]he tie-in between the interest of protecting the family and denying gays and bisexuals the right to political participation." *Id.* at *8.

The court found that the other proffered interests were not even compelling. Deterring factionalism was not a compelling state interest because this country's history and policies encourage differing opinions on political questions. *See id.* at *3. Furthermore, it stated that preserving the integrity of Colorado's political functions was not compelling because the people's right to amend their state constitution was limited by the United States Constitution. *See id.* at *4-*5. Also, preserving Colorado's ability to remedy discrimination against suspect classes was not compelling because evidence showed that protection for homosexuals would not increase costs or impair the enforcement of other civil rights statutes or ordinances. *See id.* at *5-*6. Moreover, the court found fiscal concerns to be unpersuasive in light of the importance of protecting fundamental rights. *See id.* at *6. Finally, as to the other proffered interests of personal privacy, preventing the government from subsidizing the political objectives of a special interest group, and promoting the physical and psychological well-being of children, the court found that the defendants did not support their existence with sufficient evidence. *See id.* at *8-*9.

68. *See id.* at *10-*12. When the Colorado Supreme Court upheld the trial court's injunction and remanded the case on the fundamental right issue, it "was unaware that plaintiffs were seeking suspect class status." *Id.* at *9. The trial court denied a motion in limine by the defendants to exclude evidence relating to whether homosexuals are a suspect or quasi-suspect class. *See id.* at *10. In its conclusions of law, the trial court outlined the requirements for a suspect or quasi-suspect class, stating that "homosexuals must 1)

fringed upon a fundamental right without narrowly serving a compelling state interest, the trial court found that it violated the Equal Protection Clause and ordered that the preliminary injunction be made permanent.[69] The Colorado Supreme Court affirmed the trial court's order on appeal.[70]

The United States Supreme Court affirmed the Colorado Supreme Court's judgment, "but on a rationale different from that adopted by the State Supreme Court."[71] The Court began its analysis

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have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless." *Id.* (citing Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987)).

The court found that homosexuals constitute no more than 4% of the population but gained the support of 46% of Colorado voters against Amendment 2. *See id.* at *12. Also, the court found that "gays and bisexuals though small in number are skilled at building coalitions which is a key to political power." *Id.* The court consequently held that "[h]omosexuals fail[ed] to meet the element of political powerlessness and therefore fail[ed] to meet the elements to be found to be a suspect class." *Id.* The court also held that plaintiffs failed to distinguish the elements of a quasi-suspect class and that they subsequently failed to carry the burden of establishing that homosexuals are a quasi-suspect class. *See id.* These rulings were not appealed to the Colorado Supreme Court. *See* Evans v, Romer, 882 P.2d 1335, 1341 n.3 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996).

69. *See* Evans v. Romer, No. CIV.A.92-CV-7223, 1993 WL 518586, at *13 (City & County of Denver, Colo. Dist. Ct. Dec. 14, 1993) (unpublished trial court decision), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). Although the plaintiffs requested that the court apply rational review as well, the court declined to do so because the legally appropriate standard, as determined by the Colorado Supreme Court, was strict scrutiny. *See id.* at *12.

70. *See* Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). The Colorado Supreme Court reviewed the "compelling" interests examined by the trial court, with the exception of the "children's well-being" interest, which was not reasserted on appeal. *See id.* at 1339-40 & n.2. The state supreme court essentially came to the same conclusions as the trial court, *see id.* at 1342-49, but the supreme court recognized that "personal privacy" might be a compelling state interest if understood to mean the right of preserving "associational privacy," *id.* at 1344. Nevertheless, it held that Amendment 2 was not narrowly tailored to serve this interest because it "affect[ed] a vast array of affiliations which in no way implicate associational privacy," such as business affiliations. *Id.* The court suggested that a less restrictive way to protect this interest would be to exempt certain intimate associations from the anti-discrimination laws. *See id.* at 1345. It offered as an example allowing landlords "to discriminate against homosexuals in the rental of owner-occupied housing." *Id.*

The court also ruled that the additional interest of public morality was properly before it, *see id.* at 1346 n.11, but that "[a]t the most, this interest is substantial" rather than compelling, *id.* at 1347. Furthermore, the court said that "even recognizing the legitimacy of promoting public morals as a governmental interest, . . . Amendment 2 is not necessary to preserve heterosexual families, marriage, or to express disapproval of gay men, lesbians, and bisexuals." *Id.*

71. *Romer*, 116 S. Ct. at 1624. The Court never explicitly stated that the Colorado Supreme Court was incorrect in its holding "that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed on the fundamental right of

by rejecting the State's principal argument that Amendment 2 merely deprived homosexuals of special rights.[72] It rejected this reading as "implausible" based upon "the authoritative construction of Colorado's Supreme Court" as to the immediate and ultimate effects of the Amendment.[73] The Colorado Supreme Court had found that the immediate effect of Amendment 2 would be to repeal existing local and state statutes, ordinances, policies, and regulations which prohibit discrimination on the basis of sexual orientation[74] and that the ultimate effect would be to prohibit any governmental entity from adopting similar measures in the future without first amending the state constitution.[75] Based on the state court's understanding of Amendment 2's immediate and ultimate effects, the United States Supreme Court found that "[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres."[76] The Court next determined 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."[77] Further-

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gays and lesbians to participate in the political process." *Id.* (citing *Evans*, 854 P.2d at 1282-84). It did not declare, however, that such a right is fundamental, and it applied a rational relation review rather than a strict scrutiny review. *See id.* at 1627-29; *cf. id.* at 1631 n.1 (Scalia, J., dissenting) ("[T]he Court implicitly rejects the Colorado Supreme Court's holding that Amendment 2 infringes upon a 'fundamental right' of 'independently identifiable class[es]' to 'participate equally in the political process.' " (quoting *id.* at 1624 (citation omitted) (second alteration in original))); *infra* notes 205-13 (discussing the majority's equal protection analysis and its failure to address whether Amendment 2 burdened a fundamental right).

72. *See Romer*, 116 S. Ct. at 1624.

73. *Id.*

74. *See Evans*, 854 P.2d at 1284-85 & n.6. These repeals would include the Aspen, Boulder, and Denver anti-discrimination ordinances, an executive order prohibiting discrimination against state employees based upon sexual orientation, a provision of the Colorado Insurance Code prohibiting insurers from discriminating based upon the insured's sexual orientation, and sexual orientation antidiscrimination policies of the Metropolitan State College of Denver and Colorado State University. *See id.*

75. *See id.* at 1285.

76. *Romer*, 116 S. Ct. at 1625.

77. *Id.* In support of this conclusion, the Court examined the Amendment's "far-reaching" change in the legal status of gays "when considered in light of the structure and operation of modern anti-discrimination laws." *Id.* at 1625. The Court illustrated this structure by outlining the history of "contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations." *Id.* At common law, those who served the public could not refuse to serve a customer " 'without good reason.' " *Id.* (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 115 S. Ct. 2338, 2346 (1995)). Because these "rules . . . proved insufficient," and because Congress did not have "a general power to prohibit discrimination in public accommodations" under the *Civil Rights Cases*, 109 U.S. 3, 25 (1883), states responded with "detailed statutory schemes." *Romer*, 116 S. Ct. at 1625. These statutes specify the groups or persons

more, the Court observed that although "[i]t is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of *general* laws and policies that prohibit arbitrary discrimination in governmental and private settings,"[78] the elimination of *specific* laws alone was sufficient to refute the argument that Amendment 2 only involved special rights:[79]

> To the contrary, the amendment imposes a special disability on these persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution . . . .[80]

The Court found "nothing special in the protections Amendment 2 withholds" because such protections are "taken for granted by most people either because they already have them or do not need them."[81]

After determining that Amendment 2 did not merely deprive homosexuals of special rights, the majority began its equal protection analysis.[82] Without mentioning the Colorado Supreme Court's finding that Amendment 2 burdened a fundamental right, the majority simply declared that Amendment 2 "fails, indeed defies, even th[e] conventional [rational basis] inquiry."[83] The majority grounded this

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who are under a duty not to discriminate as well as the groups or persons protected from discrimination. *See id.* Colorado's statutes were typical of these schemes and offered heightened protection against discrimination for traits such as "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability . . . and, in recent times, sexual orientation." *Id.* at 1626. Thus, Amendment 2 had the "severe consequence" of "bar[ring] homosexuals from securing protection against the injuries that these public-accommodations laws address." *Id.* However, the Court noted that the consequences were even more severe because the Amendment would also eliminate "protections for [homosexuals] in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment." *Id.* Furthermore, Amendment 2 would operate in the government sector as well, eliminating protections such as those prohibiting discrimination on the basis of sexual orientation in state government employment and state colleges. *See id.*

78. *Id.* at 1626 (emphasis added).

79. *See id.* at 1626-27.

80. *Id.* at 1627.

81. *Id.*

82. *See id.*

83. *Id.* The Court acknowledged that the constitutional guarantee of equal protection often conflicts with the reality that most legislation classifies individuals or groups to some extent, with resulting disadvantage to some who are thereby affected. *See id.* Thus, throughout its equal protection jurisprudence, the Court has "attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor

conclusion on two related bases:

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and ... invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.[84]

As for enactments which impose a disability on a single group, the Court acknowledged that, under rational relation scrutiny, it had sustained laws which were seemingly unwise or disadvantageous to a particular group, but the Court stated that the laws in those cases "were narrow enough in scope and grounded in a sufficient factual context" to justify a rational relationship.[85] Amendment 2, however, was "at once too narrow and too broad" because "it identifie[d] persons by a single trait and then denie[d] them protection across the board," and as a result, it "confound[ed] this normal process of judicial review.[86] Furthermore, the Court observed that the resulting inability of a class to seek legal redress was unprecedented in its jurisprudence.[87] Thus, the Court concluded: "A law declaring that in

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targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* For a discussion of the Court's three-tiered equal protection analysis, see *supra* notes 17-59 and accompanying text.

84. *Romer*, 116 S. Ct. at 1627. The first basis may more accurately be described as a reason for Amendment 2 being a "per se" violation of the Equal Protection Clause. *See infra* notes 265-76 and accompanying text.

85. *Romer*, 116 S. Ct. at 1627. In support of this point, the Court cited *City of New Orleans v. Dukes*, 427 U.S. 297, 304-05 (1976) (per curiam) (finding that classification allowing pushcart vendors but banning other street vendors was rationally related to city's aim of promoting tourism), *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (finding statute that disadvantaged opticians and favored optometrists was rationally related to legitimate state interest in health and safety), *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110-11 (1949) (upholding legislation which banned advertisements on vehicles but nonetheless allowed vehicle owners to advertise on their own vehicles as rationally related to the aim of traffic safety), and *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 563-64 (1947) (upholding state scheme that allowed issuance of riverboat pilot licenses only to those who had served six-month apprenticeship in Louisiana as rationally related to state aim of safety through a closely knit group of pilots). Under rational relation review, the Court had previously stated that " 'it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.' " Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981) (quoting Ferguson v. Skrupa, 372 U.S. 726, 729 (1963)). Therefore, the classification merely needs to be reasonable. *See id.* at 464.

86. *Romer*, 116 S. Ct. at 1628.

87. *See id.* The Court determined that *Davis v. Beason*, 133 U.S. 333 (1890), did not provide precedent for Amendment 2, as argued by the dissent. *See Romer*, 116 S. Ct. at 1628; *cf. id.* at 1635-36 (Scalia, J., dissenting) (citing *Davis* as authority for an enactment that goes "even further" than Amendment 2). In *Davis*, the Court upheld "an Idaho terri-

general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[88]

As to the breadth of Amendment 2, the Court determined that the Amendment was "too far removed" from the interests offered by the State to survive rational basis review.[89] Moreover, the Court felt that Amendment 2 could be explained only by animosity towards gays, lesbians, and bisexuals.[90] The Court cited precedent from *Department of Agriculture v. Moreno* that " 'a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' "[91] As such, the Court could not discern a rational relationship to any legitimate state interest and held that Amendment 2 violated the Equal Protection Clause.[92]

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, "vigorously" dissented, viewing Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores" by means of a method "specifically approved by the

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torial statute denying [convicted felons, the insane, and] Mormons, polygamists, and advocates of polygamy the right to vote and hold office." *Id.* at 1628 (citing *Davis*, 133 U.S. at 347). The Court in *Romer* determined that "[t]o the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law." *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (holding that a statute violates the First and Fourteenth Amendments when it purports to punish for mere advocacy)). The *Romer* Court also determined that it would be unlikely for *Davis*'s holding—denying voting rights based on status—to survive strict scrutiny. *See id.* (citing Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (holding that a statute which grants the right to vote to some citizens but denies it to others must be necessary to promote a compelling state interest)). Finally, the Court stated that the issue in *Romer* did not implicate *Davis*'s denial of voting rights to convicted felons. *See id.* (citing Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (holding that it is not a violation of equal protection to deny the right to vote to convicted felons who have completed their sentences and paroles)).

88. *Romer*, 116 S. Ct. at 1628. In making this assertion, the Court relied on the proposition that "[c]entral both to the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* Furthermore, the Court recited that " '[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.' " *Id.* (quoting Sweatt v. Painter, 339 U.S. 629, 635 (1950) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))).

89. *Id.* at 1629. The Court specifically mentioned a few of the interests offered by the state: "The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups." *Id.*

90. *See id.* at 1628.

91. *Id.* (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

92. *See id.* at 1629.

Congress of the United States and by this Court."[93] Justice Scalia presented four related rationales for his dissent: (1) Amendment 2 merely denies special rights;[94] (2) Amendment 2 bears a rational relationship to a legitimate state interest;[95] (3) precedent supports Amendment 2;[96] and (4) the Supreme Court should refrain from making policy decisions in matters of social or cultural controversy.[97]

Justice Scalia first established his premise that Amendment 2 "prohibits *special treatment* of homosexuals, and nothing more."[98] He criticized the majority for failing to appreciate the conclusion of the Colorado Supreme Court that " 'Amendment 2 is not intended to have any effect on [existing anti-discrimination] legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.' "[99] Thus, Justice Scalia extrapolated that general laws prohibiting arbitrary discrimination "would continue to prohibit discrimination on the basis of

93. *Id.* (Scalia, J., dissenting). The congressional approval referenced by Justice Scalia involved Congress's requiring Arizona, New Mexico, Oklahoma, and Utah to include clauses forever prohibiting polygamy in their state constitutions as a precondition for being admitted to statehood. *See id.* at 1635 (Scalia, J., dissenting) (citing Arizona Enabling Act, ch. 310, § 20, 36 Stat. 557, 569 (1910); New Mexico Enabling Act, ch. 310, § 2, 36 Stat. 557, 558 (1910); Oklahoma Enabling Act, ch. 3335, § 3, 34 Stat. 267, 269 (1906); Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894)). "Thus, this 'singling out' of the sexual practices of a single group for statewide, democratic vote—so utterly alien to our constitutional system, the Court would have us believe—has not only happened, but has received the explicit approval of the United States Congress." *Id.* (Scalia, J., dissenting); *see infra* note 123 and accompanying text (noting Justice Scalia's assertion that *Romer* may render these provisions unconstitutional). Justice Scalia cited *Davis v. Beason*, 133 U.S. 333, 347 (1890), as support for his claim that the Court had also given its specific approval to Colorado's attempt to preserve sexual mores. *See Romer*, 116 S. Ct. at 1635 (Scalia, J., dissenting); *infra* note 124 (discussing Justice Scalia's analysis of *Davis*).

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

95. *See id.* at 1631-34 (Scalia, J., dissenting).

96. *See id.* at 1634-36 (Scalia, J., dissenting).

97. *See id.* at 1637 (Scalia, J., dissenting).

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

99. *Id.* (Scalia, J., dissenting) (quoting Evans v. Romer, 882 P.2d 1335, 1346 n.9 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996) (emphasis omitted)). The general anti-discrimination laws that the Colorado Supreme Court stated were beyond the scope of Amendment 2 were laws which "proscribe[] discrimination against persons who are not suspect classes, including discrimination based on age, marital or family status, veterans' status, and for any legal, off-duty conduct such as smoking tobacco." Evans v. Romer, 882 P.2d 1335, 1346 n.9 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). The majority in *Romer* remarked that the Colorado Supreme Court's "limited observation ... does not resolve the issue," *Romer*, 116 S. Ct. at 1626, and that it would still reject the special rights argument even if homosexuals could find protection under general anti-discrimination laws, *see id.* at 1626-27.

homosexual conduct," even under Amendment 2.[100] As such, Justice Scalia concluded that Amendment 2 only prohibited preferential treatment for homosexuals.[101]

Based on this premise, Justice Scalia argued that Amendment 2 did not violate equal protection because the only denial of "equal treatment" would be that homosexuals could gain *"preferential* treatment" only by amending Colorado's constitution.[102] Thus, Justice Scalia reasoned, the majority's opinion stands for the absurd rule that "one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws."[103] Justice Scalia characterized this rule as achieving "terminal silliness."[104] He stated: "The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others."[105] From this interpretation of the majority's holding, he deduced that such reasoning would result in a violation of equal protection any time a higher level of governmental decision-making imposed a disadvantage or prohibited a benefit.[106]

To illustrate his contention that the logical conclusion of the majority's holding was preposterous, Justice Scalia offered the example of a state law prohibiting municipalities from awarding contracts to relatives of mayors or city council members.[107] Justice Scalia observed that under such a law, relatives of municipal officials would have to seek recourse from the state legislature in order to obtain the advantage of a municipal contract, "unlike all other citizens, who need only persuade the municipality."[108] Justice Scalia

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100. *Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting). For example, homosexuals would be protected by the State's insurance laws prohibiting discrimination unrelated to anticipated risk, but the State or a municipality could not require an insurer to ignore any risks which may be distinctly associated with homosexuality. *See id.* (Scalia, J., dissenting).

101. *See id.* (Scalia, J., dissenting).

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

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

104. *Id.* (Scalia, J., dissenting) ("If merely stating this alleged 'equal protection' violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.").

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

106. *See id.* at 1630-31 (Scalia, J., dissenting). Such a higher level may be "the state legislature rather than local government, or . . . the people at large in the state constitution rather than the legislature." *Id.* at 1631 (Scalia, J., dissenting).

107. *See id.* at 1631 (Scalia, J., dissenting).

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

found it "unheard-of" and "ridiculous" that the majority's theory might indeed "consider this a denial of equal protection" because an identifiable group of individuals would have to "resort to a higher decisionmaking level" in order to obtain privileges under the law.[109] To the contrary, he concluded that such a law would be "perfectly reasonable" under rational relation scrutiny and that, similarly, "there [was] no doubt of a rational basis for the substance of the prohibition [Amendment 2] at issue here."[110]

Exploring further the issue of whether Amendment 2 could withstand rational basis review, Justice Scalia cited *Bowers v. Hardwick*,[111] which held that statutes criminalizing homosexual conduct do not violate the Due Process Clause of the Fourteenth Amendment.[112] Justice Scalia reasoned that if a state could criminalize homosexual conduct under the Constitution, then surely it could "merely *disfavor*[]" such conduct.[113] He therefore concluded that "it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct."[114]

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

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

111. 478 U.S. 186 (1986). Justice Scalia criticized the Court for not even mentioning *Bowers*—"[t]he case most relevant to the issue before us today." *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting).

112. *See Bowers*, 478 U.S. at 196; *see also infra* notes 136-57 and accompanying text (reviewing *Bowers*).

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

114. *Id.* at 1631-32 (Scalia, J., dissenting). The respondents argued that *Bowers* would not justify applying Amendment 2 to individuals who merely had a homosexual "orientation" and did not engage in homosexual acts. *See id.* at 1632 (Scalia, J., dissenting). Justice Scalia countered with several arguments. First, he quoted the Colorado Supreme Court's statement that " 'Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices; and relationships.... These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of *persons*.' " *Id.* at 1632 (Scalia, J., dissenting) (emphasis added by dissent) (quoting Evans v. Romer, 882 P.2d 1335, 1349-50 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996)). Thus, Justice Scalia asserted that *Bowers* answers all constitutional objections if orientation indeed does not describe a distinct class, as the Colorado court suggested, but that other justifications would be necessary if orientation is a separate classification. *See id.* at 1633 n.2 (Scalia, J., dissenting).

Justice Scalia argued that even if Amendment 2 applied to homosexual individuals who did not engage in homosexual conduct, it would still survive rational relation review: "If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct." *Id.* at 1632 (Scalia, J., dissenting). Also, "a State 'does not violate the Equal Protection Clause

Justice Scalia then focused on the "eminent reasonableness" of the Amendment and the validity of "animus" towards homosexual conduct, contending that Amendment 2 bears a rational relationship to the legitimate state purpose of preserving traditional moral values.[115] Justice Scalia argued that "one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct," and still remain within the realm of constitutionality.[116] Thus, "the only source of 'animus' at issue . . . [is] moral disapproval of homosexuality, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*."[117]

Justice Scalia then criticized the majority's declaration that Amendment 2 was unprecedented in the Court's constitutional tradition[118] and the majority's statement that " '[c]entral . . . to our own Constitution's guarantee of equal protection is the principle that government and *each of its parts* remain open on impartial terms to all who seek its assistance.' "[119] Justice Scalia offered several examples to counter the above assertions: (1) the Eighteenth Amendment, which "deprived those who drank alcohol not only of the power to alter the policy of prohibition *locally* or through *state legislation*, but even of the power to alter it through *state constitu-*

merely because the classifications made by its laws are imperfect.' " *Id.* (Scalia, J., dissenting) (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

Finally, Justice Scalia contended that the respondents' challenge was a facial challenge, which means that " 'the challenger must establish that no set of circumstances exists under which the Act would be valid.' " *Id.* (Scalia, J., dissenting) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). Justice Scalia maintained that because Amendment 2 was constitutional under *Bowers* as applied to those who engage in homosexual acts, the facial challenge must fail. *See id.* at 1632-33 (Scalia, J., dissenting).

115. *See id.* at 1633-36 (Scalia, J., dissenting).

116. *Id.* at 1633 (Scalia, J., dissenting).

117. *Id.* (Scalia, J., dissenting). Justice Scalia also asserted that homosexuals can enjoy favored status under Amendment 2 because they are senior citizens or members of racial minorities, but not solely for being homosexual. *See id.* (Scalia, J., dissenting). Furthermore, he argued that "the degree of hostility reflected by Amendment 2 is the smallest conceivable," as Colorado is one of 25 states which have repealed their anti-sodomy statutes. *Id.* (Scalia, J., dissenting). However, he contended that Colorado's repeal of its anti-sodomy statute does not mean that the people of Colorado no longer feel that homosexuality is morally wrong or socially harmful; it may simply reflect the belief that enforcement of such laws is unduly intrusive upon citizens' privacy. *See id.* (Scalia, J., dissenting). Hence, according to Justice Scalia, the people of Colorado passed Amendment 2 in order to maintain their moral disapproval of homosexuality despite their repeal of the anti-sodomy statute. *See id.* at 1634, 1637 (Scalia, J., dissenting).

118. *See id.* at 1634 (Scalia, J., dissenting) (citing *id.* at 1627-28).

119. *Id.* (Scalia, J., dissenting) (emphasis added) (quoting *id.* at 1628).

tional amendment or *federal legislation*";[120] (2) the Establishment Clause and the Republican Form of Government Clause, which prevent theocrats or monarchists, respectively, from instituting their desired form of government "at the local, state, or federal statutory level";[121] (3) any state law that "prevents the adversely affected group—whether drug addicts, or smokers, or gun owners, or motorcyclists—from changing the policy thus established in 'each of [the] parts' of the State";[122] (4) the state constitutions of Arizona, Idaho, New Mexico, Oklahoma, and Utah, which still contain provisions forever prohibiting polygamy;[123] and (5) a territorial statute denying polygamists the right to vote, which the Supreme Court upheld as constitutional in *Davis v. Beason.*[124]

In conclusion, Justice Scalia declared that the Court had wrongly "take[n] sides in this culture war.... not only by inventing a novel and extravagant constitutional doctrine, but even by verbally disparaging as bigotry adherence to traditional attitudes."[125] These closing remarks reflect the sentiments in Justice Scalia's opening sentence that "[t]he Court has mistaken a Kulturkampf for a fit of

120. *Id.* at 1634-35 (Scalia, J., dissenting) (citing U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI).

121. *Id.* at 1635 (Scalia, J., dissenting) (citing U.S. CONST. amend. I and U.S. CONST. art. IV, § 4).

122. *Id.* at 1634 (Scalia, J., dissenting) (quoting *id.* at 1628).

123. *See id.* (Scalia, J., dissenting); *see also* ARIZ. CONST. art. XX, para. 2 ("Polygamous or plural marriages, or polygamous cohabitation, are forever prohibited within this State."); IDAHO CONST. art. I, § 4 ("Bigamy and polygamy are forever prohibited in this state ...."); N.M. CONST. art. XXI, § 1 ("Polygamous or plural marriages and polygamous cohabitation are forever prohibited."); OKLA. CONST. art. I, § 2 ("Polygamous or plural marriages are forever prohibited."); UTAH CONST. art. III, § 1 ("[P]olygamous or plural marriages are forever prohibited."). Justice Scalia called these examples "a much closer analogy" because they too involved "the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it." *Romer,* 116 S. Ct. at 1635 (Scalia, J., dissenting). Justice Scalia indicated that the Court's decision appears to make these provisions unconstitutional because "[p]olygamists ... have been 'singled out' by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions." *Id.* (Scalia, J., dissenting).

124. *See Romer,* 116 S. Ct. at 1635 (Scalia, J., dissenting) (citing Davis v. Beason, 133 U.S. 333, 346-47 (1890)). Justice Scalia agreed with the majority that *Davis* was no longer good law to the extent that it denied the franchise for mere advocacy of polygamy and was still sound to the extent that it denied the right to vote to convicted felons. *See id.* at 1636 n.3. (Scalia, J., dissenting). As for the Court's assertion that the denial of the right to vote based on status would be subject to strict scrutiny because voting is a fundamental right, Justice Scalia contended that strict scrutiny was not applicable in the instant case because it involved no fundamental right. *See id.* (Scalia, J., dissenting).

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

spite."[126] Justice Scalia argued that the Court imposed the views of an elite class upon the common people when it struck down Amendment 2.[127] As such, he concluded that the majority performed "an act, not of judicial judgment, but of political will."[128]

Prior to *Romer*, the Supreme Court had never examined a classification based on homosexuality under the Equal Protection Clause. In *Rowland v. Mad River Local School District*,[129] the Court denied certiorari to a case concerning this issue. The case involved a school district that suspended a high school guidance counselor, and eventually declined to renew her contract, because of her sexual orientation.[130] A jury determined that the suspension and failure to rehire were due to the counselor's statements regarding her bisexuality.[131] It also found that her bisexuality neither affected her performance as a counselor nor disrupted the school.[132] The magistrate found a violation of equal protection as well as free speech,[133] but the Sixth Circuit held that the plaintiff did not establish either constitutional violation.[134] This case is notable because of Justice Brennan's dissent to the denial of certiorari. He argued that the court should grant certiorari "because determination of the appropriate constitutional analysis to apply in such a case continues to puzzle lower courts and because this Court has never addressed the issues presented."[135]

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126. *Id.* at 1629 (Scalia, J., dissenting). The historical meaning of "Kulturkampf" refers to the nationalist efforts of Otto von Bismarck from 1871 to 1878 to convince the largely Catholic citizenry of the German empire to place their loyalty to the state above their loyalty to the Roman Catholic church. *See* 2 JOHN P. MCKAY ET AL., A HISTORY OF WESTERN SOCIETY 813-14 (3d ed. 1987). In modern usage, the term "Kulturkampf" generally refers to any struggle between civil government and religious authorities over social policy. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1003 (3d ed. 1992).

127. *See Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting). Justice Scalia also contrasted the majority's views with the more "plebeian attitudes" of Congress, which has declined to extend the protections of federal civil rights laws to homosexuals and specifically excluded them from the Americans with Disabilities Act of 1990. *See id.* (Scalia, J., dissenting); *see also* 42 U.S.C. § 12211(a) (1994) ("[H]omosexuality and bisexuality . . . are not disabilities under this chapter.").

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

129. 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

130. *See id.* at 446.

131. *See id.* at 447.

132. *See id.*

133. *See id.*

134. *See id.* at 448.

135. Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting). Justice Brennan suggested that classifications based on sexual preference

Four months after it denied certiorari in *Rowland*, the Supreme Court decided *Bowers v. Hardwick*,[136] in which it held that the substantive component of the Due Process Clause does not extend a fundamental privacy right to homosexuals to engage in consensual sodomy.[137] The respondent was a homosexual man who had been charged under Georgia's sodomy statute for consensually committing a sexual act with another man.[138] The Eleventh Circuit held that the Georgia statute was subject to strict scrutiny because it violated the respondent's fundamental right to engage in homosexual activity, a private and intimate association protected by the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.[139] The Supreme Court reversed.[140]

The Court first stated that its line of cases conferring privacy rights[141] in child rearing and education,[142] family relationships,[143] pro-

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might well target a suspect class or impinge upon a fundamental right, *see id.* at 1014 (Brennan, J., dissenting), and noted several courts which had so held, *see id.* at 1015 & n.9 (Brennan, J., dissenting) (citing Gay Alliance of Students v. Matthews, 544 F.2d 162, 167 (4th Cir. 1976) (finding state university's discrimination against homosexual student organization to violate the First Amendment rights of free expression and association); Ben Shalom v. Secretary of the Army, 489 F. Supp. 964, 969, 973-77 (E.D. Wis. 1980) (finding military policy requiring discharge of homosexuals to violate the First Amendment, Ninth Amendment, and fundamental right to privacy); New York v. Onofre, 415 N.E.2d 936, 940, 942 n.6 (N.Y. 1980) (using strict scrutiny to find state criminal sodomy statute a violation of equal protection)). Because the counselor's bisexuality did not interfere with the school's operation, Justice Brennan doubted that the Sixth Circuit's ruling could be upheld even under the rational basis standard of review. *See id.* at 1017 (Brennan, J., dissenting).

136. 478 U.S. 186 (1986).

137. *See id.* at 191-92. This holding was in contrast to the Court's holding in its landmark case *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), that there is a fundamental right to heterosexual marital privacy.

138. *See Bowers*, 478 U.S. at 187-88.

139. *See* Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

140. *See Bowers*, 478 U.S. at 196. The Supreme Court only addressed the due process claim under the Fourteenth Amendment, as the respondent did "not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment." *Id.* at 196 n.8.

141. Although a right of privacy is not explicitly mentioned in the Constitution, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 113, 152 (1973). This right "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 152-53 (citations omitted).

142. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) ("[T]he Act of 1922 [requiring every parent or guardian to send a child between eight and sixteen years old to a public school] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that a state statute, which would prohibit the teaching of any

creation,[144] marriage,[145] contraception,[146] and abortion[147] did not extend to homosexual sodomy.[148] Thus, the Court found no precedent for a fundamental right.[149]

Next, the Court declined to announce a new fundamental right.[150] It described the nature of fundamental rights as "liberties

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subject in a language other than English and the teaching of any language other than English to a student who had not completed the eighth grade, deprived teachers and parents of liberty without due process of law).

143. The Court built precedent establishing privacy rights in family relationships upon those cases which had established the same for child rearing and education. As the Court stated in *Prince v. Massachusetts*, 321 U.S. 158 (1944):

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions [*Pierce v. Society of Sisters* and *Meyer v. Nebraska*] have respected the private realm of family life which the state cannot enter.

Id. at 166 (citations omitted).

144. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that state legislation providing for the sterilization of habitual criminals violated the Equal Protection Clause, and stating that procreation is "fundamental to the very existence and survival of the race" and that sterilization would "forever deprive[] [the individual] of a basic liberty").

145. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("[The marital] relationship l[ies] within the zone of privacy created by several fundamental constitutional guarantees."). The Court further expanded this right in *Loving v. Virginia*, 388 U.S. 1 (1967):

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes ... is surely to deprive all the State's citizens of liberty without due process of law.

Id. at 12 (quoting *Skinner*, 316 U.S. at 541).

146. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

147. The Court established that the right of a woman to choose an abortion is fundamental in *Roe v. Wade*, 410 U.S. 113 (1973):

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153.

148. *See* Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986). The Court limited its ruling to the constitutionality of the statute as applied to homosexual sodomy only. *See id.* at 188 n.2. A married heterosexual couple was also involved in the action, but the Eleventh Circuit affirmed the district court's ruling that they did not have standing to bring the action because they had not sustained, nor were in danger of sustaining, direct injury from enforcement of the statute. *See id.* This ruling was not appealed to the Supreme Court. *See id.*

149. *See id.* at 191.

150. *See id.* The Court issued a stern warning that there should be "great resistance" to find new fundamental rights because "[o]therwise, the Judiciary necessarily takes to itself

that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed' "[151] or as "liberties that are 'deeply rooted in this Nation's history and tradition.' "[152] Because homosexual sodomy was forbidden at common law, as well as by most states when the Bill of Rights and the Fourteenth Amendment were ratified, the Court found that neither of these formulations established it as a fundamental right.[153]

After declining to find a fundamental right and hence apply strict scrutiny, the Court analyzed whether the sodomy statute had a rational basis.[154] It refuted Hardwick's argument that "majority sentiments about the morality of homosexuality" were an inadequate rationale to support the law.[155] The Court declared that "[t]he law ... is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[156] Thus, the Court upheld the statute.[157]

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further authority to govern the country without express constitutional authority." *Id.* at 195.

151. *Id.* at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

152. *Id.* at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

153. *See id.* at 192-93 & nn.5-6. Each of the original 13 states had laws forbidding sodomy when they ratified the Bill of Rights in 1791. *See id.* at 192 & n.5. In 1868, when the Fourteenth Amendment was ratified, 32 of 37 states had laws forbidding sodomy. *See id.* at 192-93 & n.6. All 50 states outlawed sodomy until 1961, and at the time of the Court's decision in 1986, 24 of the states as well as the District of Columbia imposed criminal sanctions for sodomy between consenting adults. *See id.* at 193-94. Since *Bowers*, three states and the District of Columbia have repealed their sodomy statutes, leaving only twenty-one states with such legislation. *See* Deb Price, *New High Court Ruling Helps Compensate For Past Injustices to Gays*, DET. NEWS, June 28, 1996, at B1.

The fact that the conduct occurred in the privacy of a home did not change the result of the case. *See Bowers*, 478 U.S. at 195. The Court distinguished *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (holding that the First Amendment protected the viewing of obscene materials in the privacy of one's home), as a First Amendment case and stated its reluctance to start down the slippery slope of immunizing otherwise illegal conduct simply because it occurs in the home. *See Bowers*, 478 U.S. at 195.

154. *See Bowers*, 478 U.S. at 196.

155. *Id.*

156. *Id.*

157. *See id.* Justice Powell, who was the swing vote in *Bowers*, concurred in the majority opinion but wrote separately to emphasize that the lengthy prison sentences imposed by many sodomy statutes could present serious Eighth Amendment issues. *See id.* at 197 (Powell, J., concurring). Interestingly, after Justice Powell retired from the Court, he expressed regret about his vote in *Bowers* and believed that the opinion was inconsistent with *Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing that the constitution guarantees certain zones of personal privacy). *See* Anand Agneshwar, *Powell on Sodomy: Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3, 3 (quoting Justice Powell as acknowledging, "My vote was the deciding vote that made the decision 5-4," and as stating, "I think I probably made a mistake in that one," because "I do think it was incon-

Although it arose under the Due Process Clause, *Bowers v. Hardwick* has served as a significant barrier to recognizing classifications based on homosexuality as suspect under the Equal Protection Clause.[158] Prior to *Bowers*, only a few United States Courts of Appeals had examined whether gays constituted a suspect or quasi-suspect class,[159] and all declined to recognize homosexuals as comprising such a class.[160] *Bowers* has only solidified these conclusions—since *Bowers* was decided, "every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected."[161] All of these courts relied on *Bowers*.[162]

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sistent in a general way with *Roe*. . . . When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments"). Professor Laurence Tribe, who represented Hardwick before the Supreme Court, has speculated that Justice Powell's retrospective regret about his vote in *Bowers* casts doubt on the integrity of the *Bowers* holding. *See* Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3 (quoting Professor Tribe as saying, "The fact that a respected jurist who is indispensable to the majority conceded that on sober second thought he was probably wrong certainly will affect the way that future generations look at the decision.").

158. Some legal scholars and judges have criticized this result, asserting that *Bowers* was decided upon substantive due process grounds and therefore should not bear on equal protection analysis. *See, e.g.*, Watkins v. United States Army, 875 F.2d 699, 717 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("*Hardwick* does not foreclose Watkins' claim because *Hardwick* was a *due process*, not an *equal protection* case."); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (theorizing that the Due Process Clause protects traditions whereas the Equal Protection Clause protects *against* traditions). *But see, e.g.*, Philips v. Perry, 106 F.3d 1420, 1427 (9th Cir. 1997) ("[S]ubstantive due process and equal protection doctrine are 'intertwined for purposes of equal protection analyses of *federal* action . . . .' " (quoting High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 n.9 (9th Cir. 1990))).

159. Search of Westlaw, CTA and CTA-OLD databases (Feb. 9, 1997) (search for cases containing "GAY," "HOMOSEX!," "LESB!," or "BISEX!" in the same paragraph as "SUSPECT" or "QUASI").

160. *See* Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) ("Baker has not cited any cases holding, and we refuse to hold, that homosexuals constitute a suspect or quasi-suspect classification."); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) ("A classification based on one's choice of sexual partners is not suspect."); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984) ("We cannot find that a classification based on the choice of sexual partners is suspect."); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979) ("The courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification so as to require more exacting scrutiny of classification involving homosexuals.").

161. Equality Found. v. City of Cincinnati, 54 F.3d 261, 266 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996); *see also id.* at 266 n.2 (collecting cases). *But see* Nabozny v. Podlesney, 92 F.3d 446, 458 (7th Cir. 1996) ("*Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*."). The Supreme Court vacated the lower court's judgment in *Equality Foundation* and ordered the case remanded "for

further consideration in light of *Romer v. Evans*," but the Court left untouched the Sixth Circuit's determination that homosexuals are not a quasi-suspect class because *Romer* did not reach that question. *See Equality Found.*, 116 S. Ct. at 2519; *see also Romer*, 116 S. Ct. at 1627 (stating succinctly that Amendment 2 "fail[ed], indeed defie[d]" rational relation scrutiny); *infra* notes 205-13 and accompanying text (noting the Court's failure to discuss whether homosexuals warrant suspect class status or whether Amendment 2 impinged upon a fundamental right).

162. The United States Court of Appeals for the District of Columbia Circuit was the first federal circuit to rely on *Bowers* in refusing to grant suspect class status to homosexuals, stating that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause." Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987). The *Padula* court further stated:

> If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Id.

All other circuit courts deciding the issue have applied *Bowers* in a similar fashion. *See, e.g., Equality Found.*, 54 F.3d at 268 ("*Bowers v. Hardwick* and its progeny command that, as a matter of law, gays, lesbians, and bisexuals cannot constitute either a 'suspect class' or a 'quasi-suspect class.' "). In *High Tech Gays v. Defense Industry Security Clearance Office*, the Ninth Circuit stated:

> [A]lthough the Court in *Hardwick* analyzed the constitutionality of the sodomy statute on a due process rather than equal protection basis, by the *Hardwick* majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.

High Tech Gays, 895 F.2d at 571; *accord* Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989) (holding that the lower court erred in finding homosexuals to be a suspect class because "homosexual conduct may be constitutionally criminalized" and "an unjustified and indefensible inconsistency [would otherwise] result"); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.").

Additionally, three military cases did not directly cite *Bowers*, but relied on precedent which had relied on *Bowers*. In *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996), involving the discharge of a United States Air Force member under the military's "Don't Ask, Don't Tell" policy, the court refused to grant suspect classification to homosexuals, relying on *Thomasson v. Perry*, 80 F.3d 915, 920 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996). *Thomasson* involved the honorable discharge of a Naval officer, pursuant to the "Don't Ask, Don't Tell" policy, after the officer announced that he was gay. *See Thomasson*, 80 F.3d at 920. Rejecting the officer's arguments urging suspect classification for homosexuals, the Fourth Circuit declared that a "class comprised of service members who engage in or have a propensity or intent to engage in such acts is not inherently suspect." *Id.* at 928 (citing Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc)). *Steffan*, in turn, relied on *Padula*, 822 F.2d at 103-04, for the proposition that a group defined by conduct that may be criminalized is not a suspect class. *See Steffan*, 41 F.3d at 685 n.3. As stated at the beginning of this footnote, *Padula* was the first circuit court case to rely on *Bowers*. *See Padula*, 822 F.2d at 103. Thus, all of these cases ultimately rely on *Bowers*.

For a brief time, the Ninth Circuit considered homosexuals to be a suspect class, but the decision was withdrawn in a rehearing en banc. *See* Watkins v. United States Army,

In addition to simply citing *Bowers*, several of these courts have stated that homosexuality is behavioral and hence does not meet the "immutability" requirement of suspect or quasi-suspect classes.[163] Some courts have also stated that homosexuals do not meet the "politically powerless" requirement for suspect classification.[164] Without the benefit of heightened scrutiny, homosexual litigants often lose their equal protection claims.[165]

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847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc). In the rehearing, the Ninth Circuit never reached the issue of whether classifications based on homosexuality are suspect because it relied on an estoppel theory. *See Watkins*, 875 F.2d at 704-05. The Ninth Circuit has since found that homosexuals do not constitute a suspect class. *See High Tech Gays*, 895 F.2d at 571. For a discussion of the requirements of a suspect or quasi-suspect class, see *supra* notes 34-36, 48-50 and accompanying text. For an argument that the military's policy of excluding gays would survive even strict scrutiny, see David M. Bessho, Note, *The Military Ban on Homosexuals: Suspect, Constitutional, or Both?*, 12 GA. ST. U. L. REV. 845 (1996).

163. *See High Tech Gays*, 895 F.2d at 573-74 ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes. The behavior or conduct of such already recognized classes is irrelevant to their identification.") (citation omitted). The Federal Circuit accepted a nearly identical rationale in *Woodward*, 871 F.2d at 1076:

> Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g. blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature. The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups.

Id. (citations omitted).

Whether homosexuality is immutable has never been scientifically or definitively demonstrated. *See* Alafair S.R. Burke, *A Few Straight Men: Homosexuals in the Military and Equal Protection*, 6 STAN. L. & POL'Y REV. 109, 112 (1994) (citing Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034, 1035 (1991)). However, as one federal district court has observed, the Supreme Court itself does not always list immutability as a necessary characteristic of a suspect class. *See* Jantz v. Muci, 759 F. Supp. 1543, 1548 n.5 (D. Kan. 1991) ("In listing the factors relevant to the determination that a governmental classification is suspect, the Supreme Court has omitted citing immutability as a requirement on several occasions." (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992).

164. *See High Tech Gays*, 895 F.2d at 574 (stating that gays are not without political power because they have achieved anti-discrimination legislation in their favor); *Ben-Shalom*, 881 F.2d at 466 & n.9 (citing the existence of an avowed gay congressman, gay top officials, and support for gays by non-gays).

165. *See Richenberg*, 97 F.3d at 261 (holding that the "Don't Ask, Don't Tell" policy withstood rational basis review because of judicial deference to the military); *Thomasson*, 80 F.3d at 928-29 (holding that the "Don't Ask, Don't Tell" policy was rationally related to the legitimate military purposes of morale, good order, discipline, and unit cohesion); *Steffan*, 41 F.3d at 689 & n.10 (upholding, under rational basis review, a naval academy regulation requiring dismissal of homosexuals on the grounds that a statement of one's

Thus, when the Supreme Court decided *Romer*, there were no disagreements among the federal courts of appeals as to whether homosexuals constituted a suspect or quasi-suspect class, and the courts consistently had held that legislation which classified based on homosexuality withstood rational relation review.[166] However, in *Romer*, the Court granted certiorari[167] to a novel judgment by the Colorado Supreme Court below—that homosexuals have a fundamental right to equal participation in the political process[168] and that, under strict scrutiny, Amendment 2 violated this fundamental

homosexuality serves as a rational proxy for homosexual conduct); *High Tech Gays*, 895 F.2d at 575-76 (holding that the Department of Defense's policy of more expansive background checks into homosexual applicants for top secret security clearances was rationally related to the legitimate government interest of protecting classified material, because counterintelligence efforts particularly targeted gays); *Ben-Shalom*, 881 F.2d at 465 (holding that an army regulation barring a reserve sergeant from reenlistment due to her homosexuality was rationally related to the legitimate government interest of military discipline); *Woodward*, 871 F.2d at 1070 (holding that the Navy's policy of dismissing those who engage in homosexual conduct was rationally related to the legitimate state interests of recruiting and retaining naval service members, preventing breaches of security, and maintaining discipline, order, morale, and mutual trust); *Padula*, 822 F.2d at 104 (holding that the FBI's consideration of homosexual conduct when hiring rationally furthered the legitimate interests of its law enforcement credibility and of national security); *Baker*, 769 F.2d at 292 (holding that a Texas anti-sodomy statute was rationally related to the legitimate state interest of implementing morality); Dronenberg v. Zech, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984) (holding that the Navy's discharge policy for homosexuals rationally furthered the legitimate interests of implementing morality as well as maintaining morale and discipline within the armed forces); *Rich*, 735 F.2d at 1229 (holding that army regulations which resulted in the discharge of a serviceman for misrepresenting his homosexuality in the enlistment process rationally furthered the compelling state interest of maintaining morale and discipline within the armed forces). *But see* Pruitt v. Cheney, 963 F.2d 1160, 1166-67 (9th Cir. 1991) (refusing, under an "active" rational basis review, to uphold the dismissal of an equal protection complaint against the Army when there was nothing in the record to support a rational basis for the Army's regulation requiring dismissal of admitted homosexuals).

Legal scholars have directed much attention to the issue of gays in the military. *See, e.g.*, Diane H. Mazur, *The Unknown Soldier: A Critique of 'Gays in the Military' Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 261-80 (1996) (arguing that scholarship and litigation regarding gays in the military should focus on the personal stories behind controversies rather than legal claims or distinctions); Kelly E. Henriksen, Comment, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273, 1280-85 (examining the role of judicial deference in equal protection analysis of military policies); Alicia Christina Almeida, Note, Thomasson v. Perry: *Has the Fourth Circuit Taken "Don't Ask, Don't Tell" Too Literally?*, 75 N.C. L. REV. 967, 1025 (1997) (predicting that courts will continue to uphold the "Don't Ask, Don't Tell" policy "until the homophobic concerns of the armed forces are put to rest."); Bessho, *supra* note 162, at 871 (suggesting that the military ban on homosexuality would even survive strict scrutiny).

166. *See supra* notes 158-65 and accompanying text (collecting cases).

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

168. *See* Evans v. Romer, 854 P.2d 1270, 1286 (Colo. 1993).

right.[169] After the Court granted certiorari to *Romer*, however, the Sixth Circuit determined in *Equality Foundation v. City of Cincinnati*[170] that there is no such fundamental right to participate equally in the political process.[171]

Equality Foundation involved an amendment to the city charter of Cincinnati, Ohio which sought, like Amendment 2, to disallow protections for homosexuals.[172] The amendment, known as Issue 3, was passed in response to two Cincinnati city ordinances: one prohibited the city from discriminating on the basis of sexual orientation (among other classifications) in its hiring practices, and the other prohibited private discrimination on the basis of sexual orientation (among other bases) in employment, housing, and public accommodation.[173] Issue 3 passed by a vote of 62% to 38% and was challenged in United States District Court on equal protection grounds, among others.[174]

The district court found that Issue 3 was subject to heightened scrutiny because gays both had a fundamental right to equal participation in the political process and were a quasi-suspect class.[175] The

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169. *See* Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996).

170. 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996).

171. *See id.* at 269. Given the conflict between the *Romer* and *Equality Foundation* decisions below, it appeared that the Court would decide whether there is a fundamental right to participate equally in the political process; however, the Court ultimately left this issue unresolved. *See Romer*, 116 S. Ct. at 1624 ("We granted certiorari and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court."); *infra* note 178 (discussing this point further).

172. *See Equality Found.*, 54 F.3d at 263-64. The amendment stated:

> ARTICLE XII
>
> *No Special Class Status May Be Granted Based Upon Sexual Orientation, Conduct Or Relationships.*
>
> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Id. at 264 (quoting CINCINNATI, OHIO, CHARTER art. XII (Nov. 2, 1993)).

173. *See id.* at 263.

174. *See id.* at 264.

175. *See* Equality Found. v. City of Cincinnati, 860 F. Supp. 417, 429, 436 (S.D. Ohio 1994), *aff'd in part and vacated in part*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996).

court also held that Issue 3 was not rationally related to a legitimate state interest.[176] The Sixth Circuit reversed the trial court, finding that gays were not a suspect or quasi-suspect class, that there was no fundamental right to equal participation in the political process, and that Issue 3 furthered the legitimate state interests of promoting freedom of association and ensuring that the municipality remained neutral on the issue of homosexuality.[177]

Equality Foundation and *Romer* set the stage for the Supreme Court to resolve whether there is a fundamental right to equal participation in the political process.[178] The *Romer* Court, however, sidestepped this issue as it subtly broke new ground in equal protection jurisprudence.[179] The resulting decision exhibits some deficiencies and leaves a number of questions unanswered. First, because the Court divided over the precise meaning and effect of Amendment 2, the decision may rest upon an invalid and inaccurate premise.[180] Second, the Court did not take the opportunity to announce whether classifications based on homosexuality deserve heightened scrutiny.[181] Third, although the majority purported to employ rational relation review, it appeared to apply a higher stan-

176. *See id.* at 441.

177. *See Equality Found.*, 54 F.3d at 268-70.

178. The Court granted certiorari to *Romer* prior to the Sixth Circuit's decision in *Equality Foundation. Compare* Evans v. Romer, 882 P.2d 1335 (1994), *cert. granted*, 115 S. Ct. 1092 (U.S. Feb. 21, 1995) (No. 94-1039), *with Equality Found.*, 54 F.3d at 261 (decision filed May 12, 1995). However, the *Supreme Court Rules of Practice* specifically contemplate that the Court should resolve splits between federal courts of appeals and state courts of last resort. *See* SUP. CT. R. 10(b) (providing that if "a state court of last resort has decided an important federal question in a way that conflicts with the decision ... of a United States court of appeals," it may be a compelling reason to grant certiorari). The Court commonly grants certiorari to resolve conflicts among the federal courts of appeals, as well. *See* SUP. CT. R. 10(a) (contemplating as a compelling reason to grant certiorari the fact that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also, e.g.*, Beaulieu v. United States, 497 U.S. 1038, 1039 (1990), *denying cert. to* 893 F.2d 1177 (10th Cir. 1990) (White, J., dissenting) (arguing that the Court should grant certiorari to "conflicts among Courts of Appeals ... if the federal law is to be maintained in any satisfactory, uniform condition"). By resolving conflicting decisions, the Supreme Court prevents "federal law ... [from] being administered in different ways in different parts of the country" and protects "citizens in some circuits [from being] subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to." *Id.* (White, J., dissenting). These purposes would have been furthered in *Romer* had the Court resolved the split between the Colorado Supreme Court and the Sixth Circuit, despite the fact that the conflict arose after the Court granted certiorari in *Romer.*

179. *See infra* notes 205-09, 265-76 and accompanying text.

180. *See infra* notes 184-204 and accompanying text.

181. *See infra* notes 205-13 and accompanying text.

dard, and in addition it failed to distinguish *Bowers v. Hardwick.*[182] Finally, the Court appears to have introduced a "per se" constitutional analysis for equal protection claims, the ultimate implications of which are unclear.[183] Each of these issues will be discussed in turn.

The divisive issue over which the Justices clashed concerned the proper meaning and effect of Amendment 2.[184] The majority and dissent disagreed over whether Amendment 2 would merely deny "special rights" to homosexuals, and it is likely that the case turned on this characterization.[185] This conflict identifies the possibility that *Romer* rests upon an invalid premise. That is, if—as the majority held—Amendment 2 created an impermissible barrier to homosexuals seeking ordinary protection under the law, it violated the Equal Protection Clause.[186] However, if—as the dissent argued—the Amendment only barred homosexuals from seeking preferential treatment under the law, then it did not constitute a violation of equal protection.[187]

Each side rested its argument on the "authoritative construction of Colorado's Supreme Court."[188] Drawing on the Colorado court's language regarding the immediate and ultimate effects of Amendment 2,[189] the majority concluded that the 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."[190] The majority's view, a broad interpreta-

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182. 478 U.S. 186 (1986); *see infra* notes 214-64 and accompanying text.

183. *See infra* notes 265-91 and accompanying text.

184. *Compare Romer*, 116 S. Ct. at 1624 ("[T]he State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible."), *with id.* at 1630 (Scalia, J., dissenting) ("The amendment prohibits *special treatment* of homosexuals, and nothing more.").

185. *See id.* at 1629 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. . . . Amendment 2 violates the Equal Protection Clause.").

186. *See id.*

187. *See id.* at 1631 (Scalia, J., dissenting) ("[As] to whether there was a legitimate rational basis for . . . the prohibition of special protection for homosexuals. . . . the answer is so obviously yes." (footnote omitted)).

188. *See id.* at 1624 ("We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court."); *id.* at 1630 (Scalia, J., dissenting) (asserting that Colorado's Supreme Court "authoritatively declare[d]" and "has resolved . . . for us" that Amendment 2 would not affect general anti-discrimination laws).

189. *See* Evans v. Romer, 854 P.2d 1270, 1284-85 (Colo. 1993).

190. *Romer*, 116 S. Ct. at 1625 (emphasis added). The withdrawn protections guard against discrimination in private transactions in housing, real estate, insurance, health, welfare, private education, and employment, as well as discrimination by every level of the

tion of Amendment 2, can be restated as follows: Amendment 2 withdrew more than special protections from homosexuals because it (1) removed existing specific protections against discrimination, and (2) removed the opportunity, outside of a state constitutional amendment, for homosexuals to seek specific protections in the future via the political process.[191]

Justice Scalia, on the other hand, declared that "[t]he amendment prohibits *special treatment* of homosexuals, and nothing more."[192] He borrowed language from the Colorado Supreme Court which supported his view that laws which prohibit arbitrary discrimination "would continue to prohibit discrimination on the basis of homosexual conduct as well."[193] Justice Scalia's view, a narrow interpretation of Amendment 2, can be restated as follows: Amendment 2 merely withdrew special protections from homosexuals because (1) existing laws prohibiting arbitrary discrimination provided current protection for homosexuals, and (2) the need for homosexuals to seek specific protections in the future via the political process is unnecessary because they have the protection of existing laws.[194]

Thus, adherence to a broad or narrow interpretation of Amendment 2 greatly influenced each side's argument. Yet the majority proclaimed that its reasoning would remain sound *even* under Justice Scalia's narrow interpretation:

> *[E]ven if, as we doubt, homosexuals could find some safe harbor in laws of general application*, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special

state government. *See id.* at 1626.

191. *See id.* at 1627.

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

193. *Id.* (Scalia, J., dissenting). The language of the Colorado Supreme Court was as follows:

> Colorado law currently proscribes discrimination against persons who are not suspect classes, including discrimination based on age, marital or family status, veterans' status, and for any legal, off-duty conduct such as smoking tobacco. Of course Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.

Id. (Scalia, J., dissenting) (emphasis in original omitted) (internal quotation marks omitted) (citations omitted) (quoting Evans v. Romer, 882 P.2d 1335, 1346 n.9 (1994)). The majority, however, suggested that this statement was not definitive, asserting that it was a "limited observation" made "[i]n the course of rejecting the argument that Amendment 2 is intended to conserve resources to fight discrimination against suspect classes." *Id.* at 1626.

194. *See id.* at 1630-31 (Scalia, J., dissenting).

> disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability.[195]

However, the majority failed to demonstrate exactly why Justice Scalia's argument "that 'general laws and policies that prohibit arbitrary discrimination' would continue to" protect homosexuals under Amendment 2[196] was inconsequential. Rather, the majority simply restated the same conclusions it had arrived at prior to considering the dissent's argument[197] and stated Amendment 2 nevertheless withdraws from homosexuals "protections taken for granted by most people either because they already have them or do not need them."[198]

Additionally, the majority's declaration that its analysis remained the same even if general antidiscrimination laws would continue to protect homosexuals under Amendment 2 opened the door to the bulk of Justice Scalia's dissent—if the majority had not made this assertion, then Justice Scalia never could have advanced his claim that "the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws," nor could he have so easily characterized the Court's opinion as "terminal silliness."[199] Moreover, because Justice Scalia premised the greater portion of his dissent on the idea that laws of general application would continue to protect homosexuals under Amendment 2's regime,[200] if the Court

195. *Id.* at 1626-27 (emphasis added).

196. *Id.* at 1630 (Scalia, J., dissenting) (quoting *id.* at 1626).

197. *See id.* at 1625 (stating the majority's original conclusion, based upon the immediate and ultimate effects of Amendment 2, 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's final conclusion also is somewhat internally inconsistent, because it begins with the proposition that "homosexuals could find some safe harbor in laws of general application," and it then contradicts that premise by stating that "*perhaps* [homosexuals could obtain protection against discrimination] by trying to pass helpful laws of general applicability." *See id.* at 1626-27 (emphasis added).

198. *Id.* at 1627.

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

200. *See id.* at 1629-31 (Scalia, J., dissenting).

had not granted him this premise, then his whole "special rights" argument would have fallen.

The *Romer* decision would have been stronger had the Court maintained its position that Amendment 2 would preclude homosexuals from protection under antidiscrimination laws of general applicability.[201] Though Justice Scalia still could have argued that such an interpretation was inconsistent with language from the Colorado Supreme Court's opinion,[202] the majority already dismissed this language as nothing more than a "limited observation."[203] In addition, the majority had already set forth a highly persuasive argument that laws prohibiting arbitrary discrimination would not protect homosexuals:

> At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.[204]

The majority had no need to concede that the laws of general application might continue to protect homosexuals under Amendment 2. By trying to have it both ways, the majority's opinion left inconsistencies to be attacked and capitalized upon by the dissent.

A second ambiguity in the *Romer* decision is the Court's failure to pinpoint the applicable level of scrutiny for classifications based on homosexuality.[205] The Court did not state whether homosexuals constitute a suspect or quasi-suspect class, nor did it state whether Amendment 2 impinged upon a fundamental right.[206] Rather, in ref-

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201. *See id.* at 1626 ("It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.").

202. *See id.* at 1630 (Scalia, J., dissenting); *supra* note 193 (quoting the Colorado Supreme Court's opinion).

203. *Romer*, 116 S. Ct. at 1626.

204. *Id.*

205. Even though the federal circuits appear to be aligned on this issue, *see supra* notes 161-62 and accompanying text, there is still some confusion. For example, the Ninth Circuit at one time held that classifications based on homosexuality were suspect, but that decision was withdrawn in a rehearing en banc. *See* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc); *see also supra* note 162 (discussing the Ninth Circuit's brief recognition of homosexuals as a suspect class).

206. *See Romer*, 116 S. Ct. at 1627 (proceeding to a rational basis analysis without con-

erence to rational relation review, the Court simply stated that "Amendment 2 fails, indeed defies, *even this* conventional inquiry."[207] This ambiguity makes it possible for the Court to hold at a later date, without contradicting *Romer*, that homosexual classifications warrant heightened scrutiny because they are suspect or quasi-suspect.[208] The

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sidering these issues).

207. *Id.* (emphasis added).

208. Although lower courts have refused to declare that homosexuals constitute a suspect or quasi-suspect class, *see supra* note 162 (gathering cases), judges and scholars have made numerous arguments for doing so, *see, e.g.*, Equality Found. v. City of Cincinnati, 860 F. Supp. 417, 434-40 (S.D. Ohio 1994), *aff'd in part and vacated in part*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996); *Watkins*, 847 F.2d at 1345-49; High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368-70 (N.D. Cal. 1987), *rev'd in part and vacated in part*, 895 F.2d 563 (9th Cir. 1990); Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491 (1994); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996); Marion Halliday Lewis, Note, *Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays Based on Current Government Security Clearance Procedures*, 7 J.L. & POL. 133 (1990); Harris M. Miller II, Note, *An Argument For the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

Judge Spiegel's opinion in *Equality Foundation* illustrates the general tenor of these arguments. He outlined five requirements for a quasi-suspect class, as extracted from various cases. *See Equality Found.*, 860 F. Supp. at 436; *see also supra* notes 34-36, 48-50 and accompanying text (discussing the characteristics of suspect and quasi-suspect classes). Applying these requirements to homosexuals, the court declared that homosexuals constitute a quasi-suspect class. *See Equality Found.*, 860 F. Supp. at 436.

First, the court found that homosexuals had suffered a history of discrimination in the form of stereotypical notions that homosexuals exhibit effeminate characteristics, suffer from mental illness, and engage in deviant sexual behavior. *See id.* at 436-37. As a result of these stereotypes, homosexuals have suffered private and public discrimination in the form of blacklisting, arrest, and censorship. *See id.* Second, the court found that sexual orientation is not indicative of a person's abilities. *See id.* at 437. If homosexuals' abilities were impaired, the court reasoned, then they would be unable to remain "in the Closet." *See id.* Third and fourth, the court determined that homosexuality was immutable and beyond the individual's control, that a person's sexual orientation is fixed by the time he is three to five years old, and that homosexuality is a personal characteristic as opposed to a type of volitional conduct. *See id.* Thus, the court distinguished homosexuality from conduct that is under the individual's control, and accepted as true evidence showing that homosexuality is "unamenable to techniques designed to change it." *Id.* Fifth, the court determined that homosexuals, although not wholly politically powerless, faced impediments to such power. *See id.* Such impediments included the reluctance of other groups to form coalitions with homosexuals, the success of 34 of 38 ballot initiatives nationwide which sought to limit protections for gays, and a lack of homosexuals in "the 'Nation's decisionmaking councils' as were women at the time of the *Frontiero* decision." *Id.* at 438-39 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973)). Finally, the court distinguished cases holding that homosexuals did not constitute a suspect class on the basis

ambiguity also allows the Colorado Supreme Court's finding that homosexuals have a fundamental right to equal participation in the political process to remain a potential argument for strict scrutiny in the future.[209]

The Court could have clarified these issues once and for all, preventing any future "disarray"[210] among the lower courts; instead, it apparently adhered to the "wisdom of allowing difficult issues to mature through full consideration by the courts of appeals."[211] However, the Sixth Circuit and the Colorado Supreme Court came to different conclusions on whether there is a fundamental right to equal participation in the political process,[212] and the Court arguably should have resolved this split.[213]

The third ambiguity in the *Romer* decision is that, although the Court purported to apply rational relation review, in actuality, its review appears to have been much stricter. The rational basis test involves two steps: (1) determining whether a "legitimate" state purpose is involved, and (2) determining whether the classification bears a rational relationship to that legitimate purpose.[214] The ma-

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that those cases defined homosexuality by conduct, as opposed to a trait existing independently of conduct. *See id.* at 439-40.

209. Although the Colorado Supreme Court initially enjoined enforcement of Amendment 2 because it held the Amendment violated a fundamental right to equal participation in the political process, *see* Evans v. Romer, 854 P.2d 1270, 1286 (Colo. 1993), the United States Supreme Court invalidated the Amendment "on a rationale different from that adopted by the State Supreme Court." *Romer*, 116 S. Ct. at 1624. Justice Scalia, dissenting, interpreted the *Romer* majority's opinion to mean that the Court rejected the notion that equal participation in the political process is a fundamental right. *See id.* at 1636 n.3 (Scalia, J., dissenting) ("[T]he Court rejects the Colorado court's view that there exists a fundamental right to participate in the political process."). However, because the Court did not squarely address the question, recognition in the future of such a fundamental right remains an open possibility. For a description of the Colorado Supreme Court's finding of this fundamental right, see *supra* note 64 and accompanying text.

210. Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1016 (1985) (Brennan, J., dissenting) (disagreeing with Court's denial of certiorari to 730 F.2d 444 (6th Cir. 1984)); *see also supra* notes 129-35 and accompanying text (discussing *Rowland*).

211. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977).

212. *Compare* Equality Found. v. City of Cincinnati, 54 F.3d 261, 268-70 (6th Cir. 1995) (holding that homosexuals do not constitute a suspect class, that there is no fundamental right to equal participation in the political process, and that Cincinnati Issue 3 was rationally related to legitimate state interests), *vacated*, 116 S. Ct. 2519 (1996), *with* Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994) (upholding permanent injunction against Amendment 2 under strict scrutiny on the basis that the Amendment violated homosexuals' fundamental right to equal participation in the political process), *aff'd on other grounds*, 116 S. Ct. 1620 (1996).

213. *See supra* notes 171, 178 and accompanying text (noting that *Romer* presented the Court with a compelling and appropriate vehicle to resolve the conflicting judgments).

214. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

jority gave cursory treatment to the first step, considering only two of the interests offered by the appellants: "The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups."[215]

The Court then moved to step two of the analysis, concluding that "[t]he breadth of the Amendment is so far removed from *these particular* justifications that we find it impossible to credit them."[216] Furthermore, the Court stated that "Amendment 2 is [not] directed to *any* identifiable legitimate purpose or discrete objective."[217] This conclusion, however, seems deficient in that the Court completely ignored the other interests offered by the appellants.[218] Perhaps the most blatant omission was the Court's failure to consider the state's interest in preserving morality, which the Colorado Supreme Court found at the very least to be legitimate[219] and which Justice Scalia argued provided a rational basis for Amendment 2.[220]

The Supreme Court has previously stated that rational relation review under

> equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification ...

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

216. *Id.* (emphasis added).

217. *Id.* (emphasis added).

218. In addition to the two interests mentioned by the Court, Colorado submitted several others. The Court did not focus on four other interests which Colorado had asserted at trial. The Colorado Supreme Court listed them as follows: "(1) deterring factionalism; (2) preserving the integrity of the state's political functions; ... (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado children." Evans v. Romer, 882 P.2d 1335, 1339-40 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). The state did not reassert the sixth interest on appeal, however. *See id.* at 1340 n.2.

219. *See id.* at 1346 n.11. The court stated that morality is at most a substantial government interest but not a compelling one. *See id.* at 1347. It also expressed that "Amendment 2 is not necessary to preserve heterosexual families, marriage, or to express disapproval of gay men, lesbians, and bisexuals." *Id.* Therefore, the state's interest in morality was not enough to allow Amendment 2 to survive the state court's strict scrutiny. *See id.* However, because the United States Supreme Court utilized the lower rational basis standard, it could have considered Amendment 2 as rationally related to the state's interest in preserving morality, and such a determination would have been entirely consistent with the state court's ruling. *See Romer*, 116 S. Ct. at 1629 (noting that rational basis review only requires a rational relationship to a legitimate state end).

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

> must be upheld against equal protection challenge if there is *any reasonably conceivable* state of facts that could provide a rational basis for the classification.[221]

A reasonably conceivable state of facts, advanced by the defendants in their argument to the Colorado Supreme Court, was that Amendment 2 implicitly discouraged conduct of which the people of Colorado morally disapprove.[222] As Justice Scalia argued in the dissent, the impetus for Amendment 2 was not animosity towards homosexuals, but animosity towards "homosexual *conduct*, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*."[223]

The Court's failure to examine the morality argument ties into its failure to mention *Bowers v. Hardwick*.[224] This omission was conspicuous because *Bowers* appears to support a rational basis for the Amendment.[225] Although *Bowers* was a due process case, the circuit courts have consistently applied it in the equal protection context.[226] Thus, Justice Scalia argued that if morality provided a rational basis for sodomy laws in *Bowers*, then it should serve as a rational basis for Amendment 2.[227]

If the Court had delved into the morality issue, it would have faced more than *Bowers*. In *Barnes v. Glen Theatre, Inc.*,[228] within the context of First Amendment freedom of expression, a plurality of the Court upheld a public indecency statute in part because it furthered "a substantial government interest in protecting order and morality."[229] In fact, it is difficult to conceive of any law not based

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221. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (emphasis added).

222. *See* Evans v. Romer, 882 P.2d 1335, 1347 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996).

223. *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting) (emphasis added); *see also* Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (holding that a Texas sodomy statute did not violate equal protection because it was rationally related to legitimate state interest in morality).

224. 478 U.S. 186 (1986).

225. The *Bowers* Court upheld Georgia's sodomy statute under a due process challenge, finding that the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is an "[]adequate rationale to support the law." *Id.* at 196.

226. *See supra* notes 158-62 and accompanying text (collecting cases and discussing the application of *Bowers* in equal protection jurisprudence).

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

228. 501 U.S. 560 (1991).

229. *Id.* at 569. Four Justices held that morality was a substantial state interest, but the fifth vote came from Justice Souter, who did not rely on the morality argument. *See id.* at 582 (Souter, J., concurring).

ultimately upon the collective moral judgments of society.[230]

In light of its previous holdings that morality is an acceptable basis for government action, it is surprising that the Court did not mention this interest, even if only to assert that Amendment 2 is not an "appropriate way[] of advancing even valid moral beliefs."[231] The

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230. *See* Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984). In *Dronenberg*, the court stated that "[i]t is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality." *Id.* at 1397. To exemplify this assertion, the court pointed to an instance during oral arguments when the appellant argued that naval regulations and other government action could not be founded upon moral abhorrence. *See id.* at 1397 n.6. When asked by the court about laws against bestiality, the appellant cited cruelty to animals as an appropriate basis for their prohibition. *See id.* The D.C. Circuit noted that "[t]he objection to cruelty to animals is, of course, an objection on grounds of morality." *Id.*

231. Evans v. Romer, 882 P.2d 1335, 1347 (Colo. 1994), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). Legal commentators have asserted that the courts are an inappropriate forum for regulating morality. *See, e.g.*, Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 619 n.45 (1992) (gathering numerous sources regarding the role of the judiciary in enforcing morality); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 230 ("Wooden reliance upon traditional moral values is particularly inappropriate when it comes to state policies governing family life and sexuality because social conceptions of these subjects are so deeply shaped by gender stereotypes."); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1916 n.48 (1996) ("I think *Bowers* provides a convincing argument why . . . [the law playing a moral role] is inappropriate.").

However, many judges would argue that decisions like *Bowers* actually keep the judiciary uninvolved in moral matters, reserving them for the people and the legislatures. *See, e.g.*, *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."); Miller v. Civil City of South Bend, 904 F.2d 1081, 1106 (7th Cir. 1990) (Coffey, J., dissenting) ("I am not one of those who believes that it is the role of the federal courts, through the creation of a 'living constitution,' to, in effect, establish a secular moral view that contributes to the piece-by-piece dismantling of our historic Judaeo-Christian principles and heritage."), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). Similarly, the Fifth Circuit, when denying a rehearing of its decision to uphold a Texas sodomy statute on the basis of morality, declared that "[i]t is not the role or authority of this federal court to decide the morality of sexual conduct for the people of the state of Texas." Baker v. Wade, 774 F.2d 1285, 1286-87 (5th Cir.), *denying reh'g to* 769 F.2d 289 (5th Cir. 1985). Thus, the Fifth Circuit distinguished between serving as "arbiter of the rationality of the moral judgment of the people of Texas" from serving as arbiter of "the actuality of that moral judgment of the Texas public as a rational basis for the statute." *Id.* at 1286. Judge Reavley, writing for the majority, ended *Baker v. Wade* with this admonition:

> Moral issues should be resolved *by the people*, and the laws pertaining thereto should be written or rescinded by the representatives of the people. Were a federal court to decree that the United States Constitution decides the issue and override the opinion of those of the different view, the natural course of the public debate and the developing consensus would be misshapen. . . . Furthermore, the courts could be the biggest losers due to the reaction of the members of the public who regard the court's decision as morally wrong and who see the wisdom on moral issues as properly, and better, residing in the public forums and repre-

Court's failure to broach the morality argument may suggest that the Justices in the *Romer* majority purposefully avoided *Bowers*, perhaps because some members of the Court wish to overturn *Bowers* but have yet to reach the necessary consensus.[232]

Although the Court only mentioned a few of the interests offered by the state, the Court focused its analysis on the second step of rational basis review—whether the Amendment *rationally furthered* any of these interests.[233] Despite the ease with which most legislative classifications withstand rational relation scrutiny,[234] the Court nevertheless held that Amendment 2 was "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests."[235] The Court largely focused on the breadth of the Amendment to come to this

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sentative assemblies rather than in the federal judiciary.

Id. at 1287 (emphasis added).

232. Recall that Justice Powell, who was the "swing vote" in *Bowers*, *see* Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Powell, J., concurring), expressed regret about the decision after he retired from the Court, *see supra* note 157 (providing Justice Powell's sentiments). Commentators have predicted that a reversal of *Bowers* may be quite unlikely. *See, e.g.*, David Helscher, Griswold v. Connecticut *and the Unenumerated Right of Privacy*, 15 N. ILL. U. L. REV. 33, 60 (1994) (analyzing the composition of the Court and predicting how each Justice might vote if the issue in *Bowers* were revisited).

233. *See Romer*, 116 S. Ct. at 1628-29.

234. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) ("[W]hen applied as articulated, [the rational basis test] leaves little doubt about the outcome; the challenged legislation is always upheld."); Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 941 (1991) ("The rational basis test is notoriously weak.").

In contrast to the leniency of rational relation review, strict scrutiny has been described by one influential commentator as " 'strict' in theory, but fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In the years since Professor Gunther coined this phrase, members of the Court have quoted it numerous times. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (quoting Gunther, *supra*, at 8); *id.* at 519 (Marshall, J., concurring in the judgment) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (quoting Gunther, *supra*, at 8)). However, a majority of the Court recently disavowed the " 'strict' in theory, fatal in fact" characterization of strict scrutiny. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in the judgment))). *Adarand* was a five-to-four decision, although Justice Scalia joined only to the extent that the holding was not inconsistent with his view that there could never be a compelling interest for benign racial classifications. *See id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment).

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

conclusion[236] and surmised that animosity was the only impetus for Amendment 2's passage.[237] These conclusions, however, are not consistent with the deference courts historically accord to ordinary legislative classifications under rational relation review.[238]

Thus, the inevitable inference arises that the Court actually applied an "active" or "second order" rational basis review—heightened scrutiny in the guise of rational basis review—even though the Court has never acknowledged that such a standard exists.[239] The notion of this "active" standard arose in *City of Cleburne v. Cleburne Living Center*,[240] wherein the Court invalidated, purportedly under rational basis review, a city zoning ordinance which required a special permit for a group home for the mentally retarded.[241] Justice Marshall, in a separate opinion, argued that the Court was applying heightened scrutiny because it looked to the record for support and appeared to put the burden on the defendants rather than the plaintiffs.[242]

Romer and *Cleburne* contain parallels that reinforce the inference that the Court applied an active rational basis review in *Romer*. First, both the *Romer* and *Cleburne* Courts cited *Department of Agriculture v. Moreno*[243] for the proposition that the classification's only

236. *See id.* at 1627.

237. *See id.* at 1628.

238. Rational relation review grants the governmental classification "a strong presumption of validity," Heller v. Doe, 509 U.S. 312, 319 (1993), as any reasonably conceivable state of facts is sufficient to uphold it, *see* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). The party challenging the classification bears the burden of negating any possible basis of its support. *See Heller*, 509 U.S. at 320-21. Furthermore, "judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted." Vance v. Bradley, 440 U.S. 93, 97 (1979). *See also supra* notes 52-59 and accompanying text (describing rational basis review).

239. Indeed, the Court has expressly disavowed the existence of a "second order" rational basis review. *See Heller*, 509 U.S. at 321; *see also supra* note 52 (discussing "active" rational basis review and the Court's repudiation of it).

240. 473 U.S. 432 (1985).

241. *See id.* at 435.

242. *See id.* at 458-59 (Marshall, J., concurring in the judgment in part and dissenting in part); *supra* note 52 (discussing the genesis and evolution of active rational basis review).

243. 413 U.S. 528 (1973). In *Moreno*, an amendment to the Food Stamp Act redefined "household" to only include related individuals. *See id.* at 530. The Court held that a congressional desire to prevent "hippies" from participating in the food stamp program was not a legitimate state purpose because it amounted to nothing more than a desire to harm a politically unpopular group. *See id.* at 534. Justice Marshall later criticized the *Moreno* Court for engaging in "second order" rational basis review. *See Cleburne*, 473 U.S. at 460 n.4 (Marshall, J., concurring in the judgment in part and dissenting in part) ("[*Moreno*] must be and generally ha[s] been viewed as [an] intermediate review decision[] masquerading in rational basis language." (citing LAURENCE H. TRIBE, AMERICAN

purpose was a bare desire to harm a politically unpopular class.[244] Also, both *Romer* and *Cleburne* mentioned the imprecise lines drawn by the classifications.[245]

"Active" rational basis review gives rise to two problems: (1) it creates precedent for applying heightened review to subsequent cases that only warrant ordinary rational basis review, and (2) "by failing to articulate the factors that justify ... 'second order' rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked."[246] These problems likely were the impetus for the Court to declare, in *Heller v. Doe*, that *Cleburne* did not involve anything beyond the traditional rational basis test.[247] However, by resurrecting language used in *Moreno* and *Cleburne* regarding a "bare ... desire to harm a politically unpopular group,"[248] the *Romer* Court inadvertently may have loaned *more* credence to a standard of review that it specifically disavowed in *Heller*. Such a result would be unfortunate in light of the two problems identified above.[249]

CONSTITUTIONAL LAW § 16-31, at 1090 n.10 (1st ed. 1978))).

244. *See Romer*, 116 S. Ct. at 1628; *Cleburne*, 473 U.S. at 446-47.

245. *See Romer*, 116 S. Ct. at 1622, 1625, 1627, 1629 (repeatedly referring to the "breadth" of the Amendment as problematic); *Cleburne*, 473 U.S. at 449 (criticizing the municipality's imprecise reasons for refusing to issue a zoning permit to a group home for mentally retarded as insufficient to justify the refusal).

246. *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in the judgment in part and dissenting in part).

247. *See* Heller v. Doe, 509 U.S. 312, 320-21 (1993) (describing the rational relation test as placing the burden on the classification's challenger to negate every conceivable basis for the law and stating that *Cleburne* applied the standard as thus described).

248. *See Romer*, 116 S. Ct. at 1628 (" '[I]f the 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.' " (quoting *Moreno*, 413 U.S. at 534)); *see also Cleburne*, 473 U.S. at 447 (quoting the same language from *Moreno*). The Court had not quoted this language since *Lyng v. UAW*, 485 U.S. 360, 370 n.8 (1988). Search of Westlaw, SCT database (Feb. 16, 1997) (search for cases containing "DESIRE," "HARM," and "UNPOPULAR" in the same sentence). Interestingly, the Court in *Lyng* stressed that "[t]his statement is merely an application of the usual rational-basis test." *Lyng*, 485 U.S. at 370 n.8.

249. These problems are somewhat mitigated by the Court limiting this level of review to classifications involving politically unpopular classes such as hippies, the mentally retarded, or gays. *See Romer*, 116 S. Ct. at 1628 (homosexuals); *Cleburne*, 473 U.S. at 446-47 (mentally retarded); *Moreno*, 413 U.S. at 534 (hippies). The problem is determining what a politically unpopular group might be, a determination about which reasonable minds certainly can differ. For example, consider Justice Scalia's argument in *Romer* that homosexuals cannot be considered a politically unpopular group:

> It is also nothing short of preposterous to call "politically unpopular" a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.

The *Romer* Court's analysis clearly departed from the traditional standard of rational basis review that mandates a "strong *presumption* of validity."[250] Instead, the Court declared that "laws of the kind now before us raise the inevitable *inference* that the disadvantage imposed is born of animosity toward the class of persons affected."[251] Thus, the Court characterized its own determination of animosity as a presumption, in direct contradiction with the requirements of its own precedent.[252] The Court did try to justify this presumption by quoting *Moreno*'s " 'bare . . . desire to harm a politically unpopular group' " language.[253] This reliance was misplaced, however, because in *Moreno*, the Court relied on legislative history demonstrating animosity toward "hippies."[254] The *Romer* Court, however, drew upon no similar record demonstrating animosity toward homosexuals. In fact, Colorado voters "repeatedly told pollsters that they were principally concerned about unwarranted expansion of group rights and *harbor no animus* toward individual homosexuals."[255]

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

250. *Heller*, 509 U.S. at 319 (emphasis added).

251. *Romer*, 116 S. Ct. at 1628 (emphasis added).

252. *See Heller*, 509 U.S. at 319 (granting a presumption of validity to classifications examined under the rational basis test).

253. *Romer*, 116 S. Ct. at 1628 (quoting *Moreno*, 413 U.S. at 534).

254. *See Moreno*, 413 U.S. at 534 ("The legislative history . . . indicates that that amendment was intended to prevent socalled [sic] 'hippies' and 'hippie communes' from participating in the food stamp program." (citing 116 CONG. REC. 44,439 (1970) (statement of Sen. Holland) ("[T]he term 'household' was further defined so as to exclude households consisting of unrelated individuals under the age of 60, such as 'hippy' communes, which I think is a good provision in this bill."))). Similarly, the *Cleburne* Court relied on evidence of animosity toward the mentally retarded:

> The District Court found that the City Council's insistence on the permit [which would be required in order to operate a home for the mentally retarded in a particular land zone] rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the [home for mentally retarded persons], as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.

Cleburne, 473 U.S. at 448.

255. Al Knight, *When Did 800,000 Colorado Voters Become Irrational?*, DENV. POST, June 9, 1996, at D5 (emphasis added). Along this line, Justice Scalia argued in *Romer* that "[t]he Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled 'gay-bashing' is so false as to be comical." *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting). He pointed to Colorado being one of the first states to repeal sodomy laws, although he stressed that such abolition does not necessarily translate into a moral approval of homosexuality. *See id.* (Scalia, J., dissenting).

The Court's analysis also departed from the traditional standard of rational basis review prohibiting the invalidation of a law that simply classifies imprecisely or results in some inequality.[256] Though the Court repeatedly referred to the breadth of the Amendment as rendering it too far removed from the state's interests,[257] Justice Marshall's observations in *Cleburne* are still applicable in the context of *Romer*: "I share the Court's criticisms of the overly broad lines that Cleburne's zoning ordinance has drawn. But if the ordinance is to be invalidated for its imprecise classifications, it must be pursuant to more powerful scrutiny than the minimal rational-basis test . . . ."[258]

Because the *Romer* Court did not expressly hold that rational relation scrutiny is the exclusive level of review for classifications involving homosexuality,[259] and because the Court appeared to apply a stricter than usual rational basis test,[260] it may have done exactly what Justice Marshall suggested in *Cleburne*—"employ[ed] . . . particularly searching scrutiny," thereby laying the groundwork for granting suspect or quasi-suspect status to classifications based on homosexuality.[261] One legal commentator has observed that *Romer* "calls to mind the Court's opinion in *Reed v. Reed*," which was the first Supreme Court case to invalidate under the Equal Protection Clause a classification based on sex.[262] Of course, "*Reed* is now recognized as the case that ushered in the era of heightened scrutiny for gender discrimination."[263] This analogy suggests that the Court may very well determine that homosexuals constitute a suspect or quasi-suspect class in the future, but it will have a number of existing barriers to overcome before doing so.[264]

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256. *See* Heller v. Doe, 509 U.S. 312, 321 (1993).

257. *See Romer*, 116 S. Ct. at 1622, 1625, 1627, 1629.

258. *Cleburne*, 473 U.S. at 459 (Marshall, J., concurring in the judgment in part and dissenting in part).

259. *See Romer*, 116 S. Ct. at 1627; *see also supra notes* 205-13 and accompanying text (discussing the Court's failure to specify the proper level of scrutiny for classifications based on homosexuality).

260. *See Romer*, 116 S. Ct. at 1627-29; *see also supra notes* 214-58 and accompanying text (implying that the Court applied heightened rational basis review in *Romer*).

261. *Cleburne*, 473 U.S. at 459 (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing that the Court should have explicitly acknowledged that it applied heightened scrutiny to classification involving the mentally retarded).

262. Tobias Barrington Wolff, Note, *Principled Silence*, 106 YALE L.J. 247, 250 (1996) (citing Reed v. Reed, 404 U.S. 71, 76 (1971)).

263. *Id.* at 250 (citing Craig v. Boren, 429 U.S. 190, 197-98 (1976) (characterizing *Reed* as laying the groundwork for the Court's subsequent declaration that gender classifications are quasi-suspect)).

264. For a discussion of the requirements of suspect and quasi-suspect classes, see *su-*

Finally, the fourth ambiguity in the *Romer* opinion stems from the Court's introduction of a novel "per se" standard for equal protection claims.[265] The Court stated that Amendment 2 failed rational relation review on two distinct bases:

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus towards the class it affects; it lacks a rational relationship to legitimate state interests.[266]

The second basis is the traditional rational relation test, as previously discussed.[267] The first basis, however, is unconventional and has no direct support in prior case law.

The essence of the first basis is captured in the Court's statement that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws *in the most literal sense*."[268] The Court further stated that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[269] The Court focused on the lack of precedent for an amendment like Amendment 2 that "identifies a person by a single trait and then denies them protection across the board."[270]

In this portion of the opinion, the Court borrowed from an amici curiae brief headed by Laurence Tribe, arguing that

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pra notes 34-36, 48-50 and accompanying text. For a discussion of arguments regarding whether homosexuals as a group may be considered a suspect or quasi-suspect class, see *supra* note 208. For a discussion of the existing barriers to finding that gays are a suspect or quasi-suspect class, see *supra* notes 158-64 and accompanying text.

265. *See Romer*, 116 S. Ct. at 1627-28.

266. *Id.* at 1627.

267. *See supra* notes 214-58 and accompanying text.

268. *Romer*, 116 S. Ct. at 1628 (emphasis added). The Court drew this proposition from language in its precedents to the effect that " '[t]he guaranty of "equal protection of the laws is a pledge of the protection of equal laws." ' " *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886))).

269. *Id.* For support, the Court cited the proposition that " ' "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." ' " *Id.* (quoting Sweatt v. Painter, 339 U.S. 629, 635 (1950) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))).

270. *Id.*

"Amendment 2 is a rare example of a *per se* violation of the Equal Protection Clause."[271] The brief stated:

> To decree that some identifying feature or characteristic of a person or group may not be invoked as the basis of any claim of discrimination under any law or regulation enacted, previously or in the future, by the state, its agencies, or its localities—when persons and groups not sharing this characteristic are not similarly handicapped—is, *by definition*, to deny the "equal protection of the laws" to persons having that characteristic.[272]

As such, there is no need to inquire "into the nature of the rights that Amendment 2 might be thought to restrict, or of the class it might be said to target."[273] Professor Tribe further observed:

> Amendment 2 is quite literally unprecedented: Between the adoption of the Fourteenth Amendment and the enactment of Amendment 2, [the Supreme] Court has never been presented with a decision by any state explicitly to deny selected persons access to the protection of its laws from a whole category of wrongful conduct.[274]

If the Supreme Court intended this "per se" analysis to be a new way to evaluate a legislative enactment or state constitutional amendment, it did not expressly articulate it. Nevertheless, because of the similarity between the language in *Romer* and that in Professor Tribe's brief, the Court appears to have adopted this "per se" test as an alternative to the traditional three-tiered scrutiny.[275] This new

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271. Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as Amici Curiae in Support of Respondents at 3, *Romer* (No. 94-1039) [hereinafter Brief of Tribe et al.]. The amici, a group of constitutional law professors, submitted the brief "to present to the Court an argument in support of the judgment below that is quite different from and more basic than the one relied upon by the Colorado Supreme Court." *Id.* at 1.

272. *Id.* at 3-4. Furthermore, it stated:

> Had Colorado explicitly declared some people within its jurisdiction completely ineligible for the protection of its laws from some other form of mistreatment—from robbery, for example, or blackmail, or any other wrongful infliction of harm—no one would doubt that such discriminatory state action would "deny [such persons] the equal protection of the laws," regardless of the rationale the state might offer to defend it. Exactly the same holds true when some "person or class of persons" is denied all access to legal protection from mistreatment in which the wrong charged takes the form of *discrimination* as such.

Id. at 4 (alteration in original) (quoting U.S. CONST. amend. XIV, § 1 and COLO. CONST. art. II, § 30b).

273. *Id.* at 3.

274. *Id.* at 13.

275. The Court found that Amendment 2 "defie[d]," *see Romer*, 116 S. Ct. at 1627, and

inquiry essentially asks whether a classification makes it "more difficult for any one group of citizens than for all others to seek aid from the government."[276]

Although this argument for the invalidity of Amendment 2 is powerful, Justice Scalia noted some of its deficiencies. The majority claimed that "[t]he resulting disqualification of a class of persons from the right to seek protection from the law is unprecedented in our jurisprudence,"[277] and that "[c]entral . . . to our own Constitution's guarantee of equal protection is the principle that government *and each of its parts* remain open on impartial terms to all who seek its assistance."[278] Justice Scalia, however, offered as precedent the Eighteenth Amendment to the Constitution, which prohibited the manufacture or sale of alcohol.[279] Justice Scalia argued that those who wished to drink or manufacture alcohol during Prohibition could not alter the policy via local, state, or federal legislation or even state constitutional amendment.[280] In fact, he continued, while the Eighteenth Amendment was in effect, no "part" of the government was "open on impartial terms" to assist those who desired alcohol, unless they could gain an amendment to the United States Constitution.[281] Justice Scalia found further examples in the state constitutions of Arizona, Idaho, New Mexico, Oklahoma, and Utah, which contain absolute prohibitions on polygamy.[282] According to Justice Scalia, "[p]olygamists, and those who have a polygamous 'orientation,' have been 'singled out' by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions."[283]

"confound[ed]" the traditional process of equal protection review, *see id.* at 1628, hence suggesting the necessity of an alternative inquiry, *cf. id.* at 1637 (Scalia, J., dissenting) (claiming that the Court "invent[ed] a novel and extravagant constitutional doctrine").

276. *Id.* at 1628.

277. *Id.*

278. *Id.* (emphasis added).

279. *See id.* at 1634-35 (Scalia, J., dissenting); U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

280. *See Romer*, 116 S. Ct. at 1634-35. (Scalia, J., dissenting). Justice Scalia implied that the Eighteenth Amendment surely did not deny such individuals equal protection. *See id.* (Scalia, J., dissenting). Justice Scalia also pointed to the plight of monarchists who are forced to live under a republican form of government which they could not overcome except by constitutional amendment. *See id.* at 1635 (Scalia, J., dissenting). Again, he implied that this was not a violation of equal protection. *See id.* (Scalia, J., dissenting).

281. *See id.* (Scalia, J., dissenting).

282. *See id.* (Scalia, J., dissenting); *see also supra* note 123 (providing excerpts from the relevant portions of the state constitutions).

283. *Romer*, 116 S. Ct. at 1635 (Scalia, J., dissenting).

Justice Scalia's arguments offered an effective challenge to the Court's declaration that no historical precedent for Amendment 2 existed, and hence the dissenting Justice somewhat minimized the force of the Court's proposition that "[t]he absence of precedent for Amendment 2 is itself instructive."[284] Although the Court did distinguish *Davis v. Beason*, which upheld a statute denying polygamists the right to vote or hold office,[285] the majority's failure to address the other examples offered by the dissent left certain inconsistencies in the *Romer* decision unchecked.[286]

Despite Justice Scalia's objections, the "per se" analysis does appear to obviate the concern that the Court mistook "adherence to traditional attitudes" for prejudice against homosexuals,[287] because the "per se" analysis "requires no benign or even neutral view of" homosexuality.[288] In addition, the "per se" analysis avoids the difficult issue of whether special rights are involved and operates irrespective of the class that the legislation targets.[289] It does have other weaknesses, however, due to "the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[290] The whole rationale behind three-tiered scrutiny is to balance these inherent disadvantages against the Fourteenth Amendment's principle that the laws will be applied equally.[291] Thus, because the "per se" standard involves no balancing, the question remains whether it is repugnant to years of equal protection jurisprudence.

Even so, the impact of this "per se" test on constitutional jurisprudence is likely to be limited due to the "unprecedented" nature of Amendment 2. If, as Laurence Tribe asserted, "[n]ever since the enactment of the Fourteenth Amendment has [the] Court confronted a measure quite like Amendment 2—a measure that, by its express terms, flatly excludes some of a state's people from eligibility for le-

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284. *Id.* at 1628.

285. *See* Davis v. Beason, 133 U.S. 333, 347 (1890).

286. *See Romer*, 116 S. Ct. at 1628 (distinguishing *Beason* only).

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

288. Brief of Tribe et al., *supra* note 271, at 2 (acknowledging that "*any* characteristic ... can sometimes become the basis for deprivations that are prejudiced rather than justified," but explaining that the "per se" analysis requires no assessment of whether the classification is based on prejudice).

289. *See id.* at 3 (noting that there is no need to inquire "into the nature of the rights that Amendment 2 might be thought to restrict, or of the class it might be said to target").

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

291. *See id.*

gal protection from a category of wrongs,"[292] then the opportunities in the future to draw upon *Romer* for its "per se" test would appear to be rare.[293] The impact of *Romer*'s rational relation analysis will also likely be limited because of the Court's focus on the "sheer breadth" of Amendment 2.[294] Thus, for example, the *Romer* analysis should have little effect on the military's "Don't Ask, Don't Tell" policy, because that policy's breadth does not extend to "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[295]

The legacy of *Romer* likely will be (1) the inability to make it more difficult for a particular group to seek specific protections from the government;[296] (2) the employment of a highly subjective and unsubstantiated tool to knock down state legislation: "the inevitable inference that the disadvantage imposed is born of animosity";[297] (3) the introduction of an unprecedented "per se" test into equal protection jurisprudence;[298] (4) the continued existence of specious "active" rational basis review;[299] and (5) the possible foreshadowing of homosexuals being declared a suspect or quasi-suspect class.[300]

Unfortunately, however, *Romer* also resulted in the Court substituting its judgment for that of the people of Colorado, ignoring its own precedent admonishing that "even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted."[301] If the Court had adopted Justice Scalia's narrow interpretation of Amendment 2—that the Amendment only prevented homosexuals from seeking preferential treatment under the law[302]—then it would have been

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292. Brief of Tribe et al., *supra* note 271, at 3.

293. The Supreme Court, however, has already remanded a case to the Sixth Circuit "for further consideration in light of *Romer v. Evans*." Equality Found. v. City of Cincinnati, 116 S. Ct. 2519, 2519 (1996).

294. *See Romer*, 116 S. Ct. at 1627.

295. *Id.*; *see* 10 U.S.C. § 654(a)(1)-(15) (1994) (outlining specific findings in support of the "Don't Ask, Don't Tell" policy within the context of military needs). *See generally* Almeida, *supra* note 165, at 1013-15 (discussing the ease with which courts hold valid the rationales of the "Don't Ask, Don't Tell" policy).

296. *See Romer*, 116 S. Ct. at 1627.

297. *Id.* at 1628; *see supra* notes 250-55 and accompanying text.

298. *See supra* notes 265-91 and accompanying text.

299. *See supra* notes 239-58 and accompanying text.

300. *See supra* notes 259-64 and accompanying text.

301. Vance v. Bradley, 440 U.S. 93, 97 (1979) (footnote omitted).

302. *See Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting); *see also supra* notes 192-94 and accompanying text (summarizing Justice Scalia's "narrow" interpretation of Amend-

easier for the Court to adhere to the advice that moral judgments should be reserved to the people.[303] However, under the majority's broad interpretation of Amendment 2—that homosexuals could only seek protection from discrimination by amending the state constitution[304]—the Court had no choice but to become involved.

Romer may yet prove to be a landmark case for gay rights, much in the same way that *Reed v. Reed*[305] has been for women's rights.[306] Such an expansion of *Romer*, however, is not an outcome that the decision logically requires. Unlike *Reed*, which involved the application of a state statute in a specific context,[307] the broad classification at issue in *Romer* had a widespread, unprecedented impact on its targeted class.[308] These unusual factors might result in *Romer* being inapplicable in narrower contexts. If so, then *Romer* could eventually be seen as the high-water mark of judicial protection of homosexuals under the Equal Protection Clause. On the other hand, the Court's initial quote from *Plessy v. Ferguson*,[309] its silence regarding *Bowers v. Hardwick*,[310] and its arguable use of "active" rational basis review[311] suggest that the Court may be willing to grant

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ment 2).

303. *See Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting); Baker v. Wade, 774 F.2d 1285, 1286-87 (5th Cir.), *denying reh'g to* 769 F.2d 289 (5th Cir. 1985); *see also supra* note 231 (discussing the view that courts should always reserve moral judgments to the people).

304. *See Romer*, 116 S. Ct. at 1626-27; *see also supra* notes 189-91 and accompanying text (summarizing the majority's "broad" interpretation of Amendment 2).

305. 404 U.S. 71 (1971).

306. *See* Craig v. Boren, 429 U.S. 190, 197-98 (1976) (declaring that classifications based on sex are quasi-suspect under the Equal Protection Clause, and recognizing *Reed* as establishing the foundation for this declaration); *see also supra* notes 259-64 and accompanying text (drawing an analogy between *Romer* and *Reed*).

307. *See Reed*, 404 U.S. at 72-73 (involving a state statute that gave preference to men over women in appointing administrators of intestate estates).

308. The *Romer* Court repeatedly emphasized the "breadth" of Amendment 2. *See Romer*, 116 S. Ct. at 1622, 1625, 1627, 1629; *see also supra* notes 245, 257 and accompanying text (noting the Court's repeated references).

309. "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' " *Romer*, 116 S. Ct. at 1623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The fact that the Court began its opinion with this quote from *Plessy v. Ferguson* may suggest that the Court perceives homosexuals to be in the same position that African-Americans were in one hundred years ago.

310. 478 U.S. 186, 196 (1986) (declining to recognize a fundamental right to privacy for consensual homosexual conduct, and upholding state sodomy law as rationally related to majoritarian sentiments about the morality of homosexuality); *see also supra* notes 224-32 (discussing the *Romer* Court's failure to mention *Bowers*).

311. *See Romer*, 116 S. Ct. at 1628 (finding that Amendment 2 raised an "inevitable inference" of animosity toward homosexuals, but failing to cite any empirical evidence supporting the inference); *see also supra* notes 250-55 and accompanying text (arguing

suspect or quasi-suspect status to classifications based on homosexuality if and when the need arises. If this result occurs, then *Romer*, like *Reed*, surely will be seen as the turning point for the expansion of gay rights under the Equal Protection Clause.

Regardless of the *Romer* opinion's ultimate significance, many will view it as the product of an enlightened Court, while others will see it merely as "terminal silliness."[312] Although this debate is certain to continue for many years, one thing is for certain: Amendment 2, by "deem[ing] a class of persons a stranger to its laws," violated the Equal Protection Clause.[313] "This Colorado cannot do."[314]

WILLIAM M. WILSON III

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that, by drawing this inference, the Court deviated from traditional rational relation review).

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

313. *Id.* at 1629.

314. *Id.*