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## COMMENT

### IS *EQUALITY FOUNDATION* THE LATEST CHAPTER IN AMERICA'S CULTURE WAR?<sup>1</sup>

#### INTRODUCTION

*It has given me pleasure to sustain the constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the constitution permits.*

Justice Oliver Wendell Holmes<sup>2</sup>

"The culture war is a battle over symbols and social institutions and, perhaps, rages most intensely when advocates of the sexual revolution lock horns with the forces of Orthodox Christianity."<sup>3</sup> Recently, one of the most prominent battlegrounds of the culture war has been over homosexual rights.<sup>4</sup> The "homosexual

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<sup>1</sup> See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

<sup>2</sup> LIVA BAKER, *THE JUSTICE FROM BEACON HILL* 595 (1991) (quoting Justice Oliver Wendell Holmes), cited in Timothy M. Tymkovich et al., *A Tale of Three Theories: Reason and Prejudice in the Battle Over Amendment 2*, 68 U. COLO. L. REV. 287, 287 (1997).

<sup>3</sup> Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393 (1994). See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (finding that the right of privacy includes the right to abortion). The Supreme Court's decision in *Roe* has not settled the issue of abortion. For nearly 200 years the abortion issue was decided by elected legislatures, accountable to the people, with relatively little violence. In the 25 years following *Roe*, the abortion debate has not subsided and still divides the nation. See Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, 80 JUDICATURE 178, 180 (1997).

<sup>4</sup> See Lino A. Graglia, *Romer v. Evans: The People Foiled Again By The Constitu-*

rights movement has become 'a political force to be reckoned with' in recent years and 'gay rights' legislation seems to be on top of the homosexual agenda."<sup>5</sup> When viewed in this context, two important questions concerning gay rights must be answered. First, should the government enact antidiscrimination laws protecting sexual orientation and behavior?<sup>6</sup> Second, if the government chooses to enact such laws, is there a constitutionally permissible means for individuals opposed to that decision to prevent it from doing so? The uncertainty raised by this second question is the primary focus of this Comment.

Over the past few years, two major cases have addressed this issue. In *Romer v. Evans*,<sup>7</sup> the Supreme Court invalidated an amendment to the Colorado State Constitution, which effectively repealed any local ordinances granting preferential status based on sexual orientation and prohibited their reenactment.<sup>8</sup> The Court held that the amendment, known as Amendment 2, violated the Equal Protection clause of the 14th Amendment.<sup>9</sup> This decision and its impact on gay rights legislation will be discussed in detail later in this Comment.

The most recent case to address this issue, and the subject of this Comment, is *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.<sup>10</sup> In *Equality Foundation*, the Sixth Circuit upheld the constitutionality of an amendment to the City Charter of Cincinnati.<sup>11</sup> This Comment will take an in depth look at the *Equality Foundation* case and how it affects the legal landscape of "gay rights" cases. In particular, this Comment takes the position that the Sixth Circuit's opinion is not inconsistent with *Romer* and should be upheld.

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tion, 68 U. COLO. L. REV. 409, 413 (1997) ("In recent years, only the issue of abortion has exceeded the issue of homosexuality in the intensity of feeling and conflict aroused in the American public.").

<sup>5</sup> Duncan, *supra* note 3, at 397. (internal citations omitted).

<sup>6</sup> Clearly, the government does *not* have an affirmative duty to include sexual orientation in the antidiscrimination laws. See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12211(a) (1995) (specifically excluding homosexuality and bisexuality from coverage under the Act).

<sup>7</sup> 116 S. Ct. 1620 (1995).

<sup>8</sup> See *id.* at 1623.

<sup>9</sup> See *id.*

<sup>10</sup> *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, Nos. 94-3855, 94-3973, 94-4280, 1997 WL 656228, at \*1 (6th Cir. Oct. 23, 1997) [hereinafter *Equality III*].

<sup>11</sup> See *id.* at \*10, \*11.

## I. EQUAL PROTECTION: STANDARDS OF REVIEW

A quick overview of the Supreme Court's equal protection jurisprudence is needed to understand both *Romer* and *Equality Foundation*.<sup>12</sup> The Equal Protection Clause is contained in the Fourteenth Amendment to the United States Constitution.<sup>13</sup> It provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>14</sup> The precise meaning of these words and the manner in which they are applied to individual cases has been developed by the Supreme Court over many years. The Court has devised a three-tiered structure to analyze equal protection claims.

### A. Rational Basis Review

"The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."<sup>15</sup> This is known as "rational basis" review and is the most deferential standard of review.<sup>16</sup> It has been said that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."<sup>17</sup> "Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."<sup>18</sup> Under rational basis review, the Court has said that a classification "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."<sup>19</sup> Finally, unlike the other standards, rational basis review does *not* require a perfect fit between the ends of the legislation and the means chosen to achieve them.<sup>20</sup>

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<sup>12</sup> This is particularly important because it is arguable whether the Supreme Court was faithful to their own standard method of analysis in *Romer*.

<sup>13</sup> U.S. CONST. amend. XIV, § 1.

<sup>14</sup> *Id.*

<sup>15</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

<sup>16</sup> *See Heller v. Doe*, 509 U.S. 312, 319-21 (1993).

<sup>17</sup> *Id.* at 319 (Kennedy, J.) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)).

<sup>18</sup> *Id.* (citations omitted).

<sup>19</sup> *Id.* at 320 (citations omitted). Consistent with this, the Supreme Court has held that the state has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.*

<sup>20</sup> *See id.* at 321.

### B. *Strict Scrutiny*

The Court has determined that the deferential standard of rational basis review was not always appropriate. The Court began applying "strict scrutiny" whenever a classification created by a law or statute infringes on a fundamental right<sup>21</sup> or disadvantages a "suspect class."<sup>22</sup> The Supreme Court has been reluctant to grant "suspect class" status. Currently, despite repeated attempts to expand "suspect class" status to other groups, including homosexuals, the Court has applied "suspect class" strict scrutiny only in cases involving race,<sup>23</sup> alienage,<sup>24</sup> and national origin.<sup>25</sup> Under strict scrutiny, the law must be narrowly tailored to achieve a compelling state interest.<sup>26</sup> Strict scrutiny has been called "strict in theory, fatal in fact," because laws rarely survive this searching inquiry.<sup>27</sup>

### C. *Intermediate or Heightened Scrutiny*

The third and final standard of review has been labeled "heightened" or "intermediate" scrutiny.<sup>28</sup> This standard has been applied in cases involving "quasi-suspect" classes, including gender<sup>29</sup> and illegitimacy.<sup>30</sup> Despite the concerted efforts of gay

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<sup>21</sup> See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

<sup>22</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying strict scrutiny to miscegenation statute prohibiting inter-racial marriages).

<sup>23</sup> See *id.*

<sup>24</sup> See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a discrete and insular minority for whom [strict scrutiny] is appropriate.") (internal citations omitted).

<sup>25</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 215-16 (1944) (applying strict scrutiny to statute which curtailed the civil rights of people of Japanese descent).

<sup>26</sup> See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

<sup>27</sup> This phrase was coined by Gerald Gunther in his famous Harvard Law Review Supreme Court Foreword. See 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, 2 (1972).

<sup>28</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (applying an intermediate level of scrutiny to classifications based on gender).

<sup>29</sup> See *id.*; see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) ("Our decisions also hold that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification.") (internal citations omitted).

<sup>30</sup> See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (holding that although illegitimacy does not receive the most rigid scrutiny, it is not afforded "toothless" review).

rights advocates, courts have refused to declare homosexuals a "quasi-suspect" class subject to heightened scrutiny.<sup>31</sup> Under intermediate or heightened scrutiny, a law must be substantially related to a legitimate state interest in order to be declared constitutional.<sup>32</sup>

## II. *ROMER V. EVANS*

### A. *Background*

Before delving into a discussion of the *Equality Foundation* litigation, the Supreme Court's decision in *Romer v. Evans* must be addressed. In *Romer*, the Court declared an amendment to the Colorado State Constitution unconstitutional.<sup>33</sup> Amendment 2, as the initiative was known, was designed, at least in part, to "repeal the growing number of state and local gay rights laws and deny preferred legal status for homosexuals and bisexuals. . . ."<sup>34</sup> Predictably, the campaign was both expensive and bitter.<sup>35</sup> Although opponents of Amendment 2 spent nearly double the amount of its supporters,<sup>36</sup> the "proposal passed by a margin of 813,966 to 710,151 (53.4% to 46.6%)."<sup>37</sup> The amendment never went into

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<sup>31</sup> See, e.g., *Steffan v. Perry*, 41 F.3d 677, 685-86 (D.C. Cir. 1994) (en banc) (applying rational basis review to equal protection challenge made by homosexuals); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (holding that homosexuals are not a suspect or quasi-suspect class); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (holding that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny); *Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (stating that homosexuals do not comprise a suspect or quasi-suspect class).

<sup>32</sup> See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985).

<sup>33</sup> See *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1995). The amendment read:

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 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.

COLO. CONST. art. II, § 30b, cited in *Romer*, 116 S. Ct. at 1623.

<sup>34</sup> See *Tymkovich et al.*, *supra* note 2, at 292.

<sup>35</sup> See *id.* at 291.

<sup>36</sup> See *id.* at 294. Amendment 2's opponents spent approximately \$750,000 compared with approximately \$375,000 for its supporters. See *id.*

<sup>37</sup> *Id.*

effect, however, as a lawsuit was filed and an injunction granted shortly after the election.<sup>38</sup> The litigation that ensued was long and confusing;<sup>39</sup> each state court invalidated the amendment using a different rationale.<sup>40</sup> The case eventually came before the Colorado Supreme Court, which declared Amendment 2 unconstitutional, claiming it infringed upon a new fundamental right—access to the political process.<sup>41</sup>

The United States Supreme Court affirmed the Colorado Supreme Court's result, but on yet another rationale.<sup>42</sup> The precise meaning of *Romer* and its ultimate impact on future cases is not certain. While some commentators hailed the decision as a landmark for homosexuals,<sup>43</sup> closer inspection reveals that this conclusion is overly optimistic on their part. The decision has been widely criticized by legal commentators, even those who agree with its outcome.<sup>44</sup> Those who disagree with the outcome have been less charitable.<sup>45</sup> This Comment suggests that *Romer* may not have as

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<sup>38</sup> See *id.*

<sup>39</sup> See John Daniel Dailey & Paul Farley, *Colorado's Amendment 2: A Result in Search of a Reason*, 20 HARV. J.L. & PUB. POL'Y 215, 220-41 (1996) (describing the history of Amendment 2 and the litigation leading up to the Supreme Court). Mr. Dailey and Mr. Farley were counsel to Colorado before the U.S. Supreme Court in *Romer v. Evans*. See *id.* at 215.

<sup>40</sup> See *id.* at 216 ("Each court that considered the issue found a different rationale for invalidating the Amendment.")

<sup>41</sup> See *Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994). The Colorado Supreme Court upheld the district court's injunction on the same grounds the first time they heard the case. See *Evans v. Romer*, 854 P.2d 1270, 1286 (Colo. 1993) ("In short, Amendment 2 . . . infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution."); see also Dailey & Farley, *supra* note 39, at 231, 232.

<sup>42</sup> See *Romer v. Evans*, 116 S. Ct. 1620, 1624 (1995).

<sup>43</sup> See, e.g., Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 454 (1997) ("*Romer v. Evans* is a landmark decision.")

<sup>44</sup> See, e.g., Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387 (1997) (stating that although she applauded the outcome in *Romer*, she was "troubled by the opinion"); Caren G. Dubnoff, *Romer v. Evans: A Legal and Political Analysis*, 15 LAW & INEQ. J. 275 (1997) (commenting that *Romer* is "open for future attack" and does not provide homosexuals with a broad array of rights); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996) (stating that among legal scholars, *Romer* "has mostly engendered puzzlement").

<sup>45</sup> See, e.g., Dailey & Farley, *supra* note 39, at 249 (stating that "to reach the result it did, the Court had to disregard entirely not only well-established precepts of equal protection jurisprudence, but also the trial court record . . ."); Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345, 347 (1997) ("If one searches for sophisticated legal reasoning in the Court's decision in *Romer*, he will be disappointed, because 'there is no there there.'"); Graglia, *supra* note 4, at 410 ("Few cases demonstrate better than . . .

much impact as many gay rights activists hope that it does.

### B. The Supreme Court Decision

Justice Kennedy delivered the majority opinion of the Court.<sup>46</sup> He began by quoting Justice Harlan's now-famous admonition from *Plessy v. Ferguson*<sup>47</sup> that the Constitution "neither knows nor tolerates classes among citizens."<sup>48</sup> The Court spent a large portion of its opinion rejecting Colorado's argument that Amendment 2 merely placed homosexuals in the same position as all other persons.<sup>49</sup> Justice Kennedy rejected this reading of the language as "implausible."<sup>50</sup> In support of this bold assertion, Kennedy appeared to rely on his belief that "[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."<sup>51</sup> In reality, this inference is not as "fair" as Kennedy implies. As Justice Scalia pointed out in dissent, Kennedy's "fair, if not necessary inference" was explicitly addressed and rejected by the Colorado Supreme Court.<sup>52</sup>

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*Romer* the first thing one must know to understand American constitutional law — that it has very little to do with the Constitution.”)

<sup>46.</sup> See *Romer*, 116 S. Ct. at 1623.

<sup>47.</sup> 163 U.S. 537 (1896).

<sup>48.</sup> *Romer*, 116 S. Ct. at 1623 (quoting *Plessy*, 163 U.S. at 559) (Harlan, J., dissenting). One law review article has suggested that Justice Kennedy would have been well served by reading all of Justice Harlan's dissent, which states:

There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people. . . . Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must be kept within the limits defined by the Constitution.

Dailey & Farley, *supra* note 39, at 215 (quoting *Plessy*, 163 U.S. at 558) (Harlan, J., dissenting)).

<sup>49.</sup> See *Romer*, 116 S. Ct. at 1624.

<sup>50.</sup> *Id.* at 1624.

<sup>51.</sup> *Id.* at 1626.

<sup>52.</sup> See *id.* at 1630 (Scalia, J., dissenting) (quoting *Evans v. Romer*, 882 P.2d 1335, 1346 & n.9 (Colo. 1994) (“Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the adoption of antidiscrimination laws intended to protect gays, lesbians, and bisexuals.”)). Justice Kennedy's "fair" inference is even more troubling when one recalls that under rational basis review, a classification "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." See *Heller v. Doe*, 509 U.S. 312, 320 (1993). The *Romer* majority appears to have done the exact opposite, i.e. tried to find any reasonably conceivable state of facts that would invalidate the Amendment. This type of selective application of facts and reasoning has led some to describe *Romer* as a



Regardless, the basis upon which the majority declared that Amendment 2 deprived homosexuals of equal protection must be determined in order to evaluate subsequent cases. Although the majority devoted a significant portion of the opinion to the issue of "special" vs. "equal" rights, they did not rely on this distinction to arrive at their decision.<sup>53</sup> It is also clear the Court did not rely on the Colorado Supreme Court's creation of a new fundamental right of participation in the political process to support their decision.<sup>54</sup> Furthermore, the Court did not declare homosexuals either a "suspect" or "quasi-suspect" class.<sup>55</sup> This is perhaps the most important aspect of the *Romer* decision. It bears repeating. The Supreme Court did *not* declare homosexuals to be a suspect class.<sup>56</sup> The Supreme Court did *not* declare homosexuals to be a quasi-suspect class.<sup>57</sup> The Supreme Court did *not* find a violation of a funda-

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result oriented decision. See Dailey & Farley, *supra* note 39, at 268.

<sup>53.</sup> See *Romer*, 116 S. Ct. at 1626. The distinction between "special" and "equal" rights is a significant issue in cases involving gay rights. It is a major point of contention between gay rights advocates and supporters of legislation such as Amendment 2.

In discussing this "special" vs. "equal" rights debate, Professor Richard Duncan has commented that:

[W]hen proponents of homosexual rights legislation argue that they are seeking nothing more than the same civil rights everyone else has, they are wrong for two reasons. First, they already have the same rights everyone else has, i.e. the right to be protected on the basis of their race, gender, religion, and other protected categories. Second, since the general rule continues to be one of free choice in employment and housing matters, homosexuality is merely one of countless activities left unprotected by antidiscrimination laws.

Duncan, *supra* note 3, at 400.

Justice Scalia's dissent in *Romer* echoed this sentiment by listing a plethora of reasons an employer may validly use to refuse to hire a person:

The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real animal fur; or even because he hates the Chicago Cubs.

*Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting). A comprehensive discussion of this issue, however, is beyond the scope of this Comment.

<sup>54.</sup> See *Romer*, 116 S. Ct. at 1624.

<sup>55.</sup> *Id.* at 1627. Obviously, the lack of clarity in *Romer* extends to the level of review given to homosexuals as a class. However, it is clear that the Supreme Court had ample opportunity to declare homosexuals either a "suspect" or "quasi-suspect" class and did not do so. In fact, given the nature of the case and the manner in which it came before the Court, the logical inference is that they are either unwilling or unable to change the status of homosexuals under equal protection analysis.

<sup>56.</sup> See *id.*

<sup>57.</sup> See *id.*

mental right.<sup>58</sup> The Supreme Court *did*, however, invalidate the law, purportedly under rational basis review.<sup>59</sup>

According to the Court, "[A]mendment 2 fails, indeed defies, even this conventional inquiry."<sup>60</sup> Justice Kennedy stated two reasons in support of this position.<sup>61</sup> First, he claimed the amendment imposed a broad disability on homosexuals in the form of an invalid form of legislation.<sup>62</sup> One law review article has taken the position that the Court has thus established a new form of *per se* equal protection violation.<sup>63</sup> The article gathers modest support for its contention from language in the opinion declaring 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."<sup>64</sup>

Justice Scalia referred to this judicial creation as "terminal silliness."<sup>65</sup> The central thesis of the majority opinion, according to Scalia, was 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."<sup>66</sup> Although Scalia's view did not succeed on the facts in *Romer*, it is important to remember that the Court never explicitly stated they were creating a new form of equal protection analysis, and it is doubtful they intended

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<sup>58</sup> See *Romer*, 116 S. Ct. 1620 (1995).

<sup>59</sup> See *id.* at 1627.

<sup>60</sup> *Id.* Indeed, it seems that the Court had no choice but to insert this disclaimer. Regardless of one's opinion as to the ultimate wisdom of the Court's decision in *Romer*, it is obvious that they did not review Amendment 2 in a manner consistent with Justice Kennedy's own formulation of rational basis review. See *supra* note 52 and accompanying text. Kennedy's opinion on this point caused one scholar to exclaim: "It is astounding that a law can be found to violate the Constitution not only despite, but apparently because of, the asserted inapplicability of the relevant constitutional doctrine." Graglia, *supra* note 4, at 424.

<sup>61</sup> See *Romer*, 116 S. Ct. at 1627.

<sup>62</sup> See *id.*

<sup>63</sup> See Leading Case, *Discrimination Based on Sexual Orientation*, 110 HARV. L. REV. 155, 158 (1996) ("[T]he Amendment 'defies' the rational basis test by being a *per se* violation of equal protection.").

<sup>64</sup> See *Romer*, 116 S. Ct. at 1628; see also Leading Case, *supra* note 63, at 158. It may be helpful to recall that Amendment 2 had two primary functions. First, it repealed all laws that granted homosexuals protected status. Second, the amendment prohibited the future enactment of such laws without amending the State Constitution. The "per se" portion of the opinion deals only with Amendment 2's second function.

<sup>65</sup> *Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting).

<sup>66</sup> *Id.* (Scalia, J., dissenting).

to do so by implication. In short, assuming this novel justification was appropriate in *Romer*, it must be limited to the facts of that case. The dubious nature of Kennedy's "per se" justification necessitates increased scrutiny on his second purported basis.

Second, Kennedy determined that the "sheer breadth" of the amendment led inexorably to the conclusion that it was the product of "animus towards the class it affects."<sup>67</sup> He went on to say that "a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."<sup>68</sup> Colorado proffered a number of reasons in support of the amendment.<sup>69</sup> Kennedy addressed none of them. Instead, he insisted that the breadth and scope of the amendment made it "impossible to credit them."<sup>70</sup> The majority's brusque dismissal of the state's interests is particularly troubling in light of the fact that both the trial court and the Colorado Supreme Court had found most of these purposes to be legitimate.<sup>71</sup>

Predictably, Justice Scalia found the majority's contention that the amendment is strictly the product of animus, or a bare desire to harm a politically unpopular group, "nothing short of insulting."<sup>72</sup> "No principle set forth in the Constitution, nor any even imagined by this Court in the past 200 years, prohibits what Colorado has done here."<sup>73</sup> Scalia felt that Amendment 2 was "eminently reasonable"<sup>74</sup> and a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts

<sup>67</sup> *Id.* at 1627.

<sup>68</sup> *Id.* at 1628 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>69</sup> *See id.* at 1629. At trial, Colorado argued that a number of legitimate interests supported Amendment 2:

- (1) preventing governmental interference with personal, familial, and religious privacy; (2) expressing a statewide policy against making sexual orientation an additional class or characteristic under antidiscrimination laws at the expense of already protected classes; and (3) restoring the legislative status quo ante by effectively deregulating local and state enactments extending benefits on the basis of sexual orientation.

*Tymkovich et al.*, *supra* note 2, at 300.

<sup>70</sup> *Romer*, 116 S. Ct. at 1629.

<sup>71</sup> *See Tymkovich et al.*, *supra* note 2, at 320. "In fact, between them, the two lower courts recognized that Amendment 2 served—albeit inexactly—three 'compelling' public purposes: (1) the promotion of religious freedom, (2) the promotion of familial privacy, and (3) the preservation of associational privacy." *Id.*

<sup>72</sup> *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

<sup>73</sup> *Id.* at 1632 (Scalia, J., dissenting).

<sup>74</sup> *Id.* (Scalia, J., dissenting).

of a politically powerful minority to revise those mores through the use of laws."<sup>75</sup> In closing, Scalia referred to the Court's opinion as "an act, not of judicial judgment, but of political will."<sup>76</sup>

The majority and dissenting opinions in *Romer* make for interesting reading.<sup>77</sup> The majority opinion has been criticized as short on reasoning and legal precedent and long on emotive utterances.<sup>78</sup> The dissent, on the other hand has been characterized as bitter<sup>79</sup> and inflammatory.<sup>80</sup> When the dust settles, however, *Romer* may not stand for very much.<sup>81</sup> Ultimately, *Romer* stands for several unexceptional principles. First, homosexuals are not a suspect or quasi-suspect class.<sup>82</sup> Second, legislation burdening homosexuals shall be analyzed using rational basis review.<sup>83</sup> Third, legislation which is so broad as to be unexplainable by anything other than animus towards the group affected is not rational.<sup>84</sup>

### III. EQUALITY FOUNDATION

#### A. Background

Much like *Romer*, the *Equality Foundation* litigation has a long and confusing history. The controversy has its genesis in two city ordinances passed by the Cincinnati City Council in 1991 and 1992.<sup>85</sup> These ordinances were designed to prohibit discrimination within the City of Cincinnati.<sup>86</sup> Both ordinances had provisions

<sup>75</sup> *Id.* at 1629 (Scalia, J., dissenting).

<sup>76</sup> *Id.* at 1637 (Scalia, J., dissenting). Of course, the Supreme Court is supposed to "have neither Force nor Will, but merely judgment." See THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Buccaneer Books 1992). This is a principle which appears to have been completely lost on the *Romer* majority.

<sup>77</sup> See Duncan, *supra* note 45, at 362.

<sup>78</sup> See *supra* notes 52, 60 and accompanying text.

<sup>79</sup> See Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 382 (1997).

<sup>80</sup> See *id.* at 386.

<sup>81</sup> See Duncan, *supra* note 45, at 362 ("Viewed as legal precedent, *Romer* . . . does not even register on the landmark meter.").

<sup>82</sup> See *Romer v. Evans*, 116 S. Ct. 1620 (1995).

<sup>83</sup> See *id.* at 1627.

<sup>84</sup> See *id.* at 1628-29.

<sup>85</sup> See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 421 (S.D. Ohio 1994) [hereinafter *Equality I*].

<sup>86</sup> See *id.* The Equal Employment Opportunity Ordinance ("EEO") prohibited discrimination on the basis of sexual orientation in city employment and in the appointment to city boards and commissions. *Id.* The Human Rights Ordinance ("HRO") prohibited discrimination on the basis of sexual orientation in private employment, public accommoda-

protecting individuals based on sexual orientation.<sup>87</sup> In direct response to the passage of these ordinances, a group of citizens formed an organization called "Take Back Cincinnati," later renamed "Equal Rights, Not Special Rights," for the express purpose of gathering enough signatures to place a proposed amendment to the city charter on the ballot.<sup>88</sup> They succeeded and that proposed amendment, known as Issue 3, 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.<sup>89</sup>

Following a contentious campaign, the citizens of Cincinnati voted overwhelmingly in favor of Issue 3 and amended the City Charter by a vote of 62% to 38%.<sup>90</sup> Almost immediately, the Equality Foundation of Greater Cincinnati,<sup>91</sup> along with several homosexual males and lesbians, filed suit challenging the constitu-

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tions, and housing. *Id.* In addition to sexual orientation, both ordinances prohibited discrimination on the basis of race, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. *Id.*

<sup>87.</sup> *See id.*

<sup>88.</sup> *See id.* at 422.

<sup>89.</sup> *Id.*

<sup>90.</sup> *Id.*

<sup>91.</sup> The Equality Foundation is an Ohio not-for-profit corporation, which was formed in an effort to oppose discrimination and promote antidiscrimination laws which include sexual orientation. *See id.* at 423.

tionality of Issue 3.<sup>92</sup> After a contested evidentiary hearing, the district court issued a preliminary injunction.<sup>93</sup> At trial, the plaintiffs raised a number of challenges to Issue 3, including a charge that it violated their rights to equal protection.<sup>94</sup> The Equality Foundation plaintiffs also asserted that homosexuals comprise either a "suspect" or "quasi-suspect" class, thus triggering strict or heightened scrutiny.<sup>95</sup> In addition, they alleged that Issue 3 violated homosexuals' fundamental right to equal access to the political process.<sup>96</sup> Failing at that, the plaintiffs finally alleged that Issue 3 should not survive rational basis review because it is not rationally related to any legitimate government purpose.<sup>97</sup>

The City of Cincinnati<sup>98</sup> disputed each of these claims.<sup>99</sup> Cincinnati asserted that Issue 3 furthers a number of legitimate government interests.<sup>100</sup> For example, it preserves scarce government resources to use in enforcing the already existing anti-discrimination laws and reduces the level of government regulation on the citizenry.<sup>101</sup> They asserted that Issue 3 promotes diversity of thought on a highly controversial topic by refusing to impose a uniform, government sponsored view concerning the "moral relevance of homosexual behavior."<sup>102</sup> Additionally, Issue 3 gave legal effect to Cincinnati's collective notion of morality and serves to protect and nurture the nuclear family.<sup>103</sup> Issue 3 also advanced democracy and political integrity and served as an effective restriction on the scope of City Council's powers to deal with certain important issues.<sup>104</sup>

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<sup>92</sup> See *id.* at 422.

<sup>93</sup> See *id.* at 423. The court issued a written opinion three days later setting forth its findings of fact. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993).

<sup>94</sup> See *Equality I*, 860 F. Supp. at 422. The plaintiffs also alleged Issue 3 was unconstitutionally vague and violated their rights to free speech, free association and redress of grievances. *Id.* These challenges will not be discussed here.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> Equal Rights Not Special Rights ("ERNSR") intervened as third party defendants as well. See *id.*

<sup>99</sup> See *id.* at 422.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.* at 423.

<sup>102</sup> *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

### B. The District Court: Equality I

The district court accepted nearly every argument raised by the Equality Foundation and rejected every argument raised by the City. The court began by creating a fundamental right of access to the political process, which Issue 3 allegedly infringed upon.<sup>105</sup> The court concluded that under Issue 3, "all citizens, with the exception of gay, lesbian and bisexuals, have the right to appeal directly to the city council for legislation," while homosexuals must amend the City Charter before they can obtain legislation bearing on their sexual orientation.<sup>106</sup> Since the district court felt Issue 3 infringed upon a fundamental right, the court determined that "it must be narrowly tailored to serve a compelling state interest."<sup>107</sup>

The court did not end its analysis there, however, as it went on to discuss the proper classification of homosexuals for the purposes of equal protection analysis.<sup>108</sup> The court, ignoring clear precedent on the issue, purported to elicit factors the Supreme Court has used to determine whether a class is "suspect" or "quasi-suspect."<sup>109</sup> Following this "review," the court listed five factors that it deemed the most important considerations.<sup>110</sup> Based on these considerations, the court declared that "sexual orientation is a quasi-suspect classification."<sup>111</sup>

<sup>105.</sup> See *id.* at 430. The district court's analysis was very similar to that used by the Colorado Supreme Court in *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). Both courts relied heavily on the Supreme Court's race and voting rights cases to establish this new fundamental right. See *Equality I*, 860 F. Supp. at 430-33.

<sup>106.</sup> *Equality I*, 860 F. Supp. at 433.

<sup>107.</sup> *Id.* at 434.

<sup>108.</sup> See *id.*

<sup>109.</sup> *Id.* There can be no doubt why the court purported to engage in this academic exercise. The precedents are clear. Courts considering this issue have consistently come to the same conclusion. Homosexuals do not comprise a suspect or quasi-suspect class. See *supra* note 31. The district court did acknowledge that its position was not in accord with numerous Courts of Appeals. Essentially, the court disagreed with "the fundamental underpinning of those decisions—that homosexuality is status defined by conduct." *Equality I*, 860 F. Supp. at 439.

<sup>110.</sup> The court's five factors were:

- (1) whether an individual's sexual orientation bears any relationship to his or her ability to perform, or to participate in, or to contribute to, society; (2) whether the members of the group have any control over their sexual orientation; (3) whether sexual orientation is an immutable characteristic; (4) whether that group has suffered a history of discrimination based on their sexual orientation; and (5) whether the class is 'politically powerless'.

*Equality I*, 860 F. Supp. at 436.

<sup>111.</sup> *Id.* A complete discussion of this "five factor" test as well as its application to ho-

The court, nevertheless, proceeded to apply rational basis review.<sup>112</sup> Predictably, the court determined that Issue 3 could not withstand even this low-level examination.<sup>113</sup> The court admitted that “[i]t is true that legitimate governmental purposes can, and have been, articulated in support of Issue 3.”<sup>114</sup> However, the court invalidated Issue 3, finding that it was not rationally related to the government interests.<sup>115</sup> The court, foreshadowing *Romer*, then stated that Issue 3 “implies nothing more than a ‘bare desire to harm an unpopular group’.”<sup>116</sup> The court relied on its own speculative interpretation of Issue 3 to arrive at this conclusion.<sup>117</sup> This conclusion runs directly contrary to the court’s own admonition only twenty two pages before, that “nothing in this Order should be construed in any way as impugning the integrity or motives of those who voted in favor of the passage of the Issue 3 Amendment.”<sup>118</sup>

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mosexuals is beyond the scope of this Comment. A cursory examination, however, reveals that this test does not compel the result arrived at by the court. An in-depth analysis of the district court’s findings is unnecessary, however, in light of the fact that they are contrary to the decisions of both the Sixth Circuit and the Supreme Court. *See Romer v. Evans*, 116 S. Ct. 1620 (1995); *Equality III*, 1997 WL 656228, at \*1 (6th Cir. Oct. 23, 1997); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) [hereinafter *Equality II*].

<sup>112.</sup> *See Equality I*, 860 F. Supp. at 440. The court clearly attempted to avoid a reversal by invalidating Issue 3 on every basis imaginable. The court’s valiant effort was unsuccessful.

<sup>113.</sup> *See id.* at 441.

<sup>114.</sup> *Id.* at 443. It should be noted that the government need not “articulate” any legitimate purpose in order to survive rational basis review. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). In fact the classification “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.” *Id.* (citations omitted). For a list of the legitimate purposes asserted by the City, *see supra* text accompanying notes 100-04.

<sup>115.</sup> *See Equality I*, 860 F. Supp. at 441.

<sup>116.</sup> *Id.* at 443 (citations omitted).

<sup>117.</sup> *See id.* The court stated that the purpose “not only to permit discrimination, but also to encourage it is inherent in [Issue 3].” *Id.*

<sup>118.</sup> *Id.* at 421. The district court is clearly being disingenuous somewhere in its opinion. The court’s contrasting statements lead to a few observations. First, the court has apparently distinguished between those who voted for Issue 3 and those who drafted, lobbied and campaigned for its passage. The court has denied that it is attributing animus towards the voters, and yet has invalidated the amendment because it is the product of animus. Second, and even more disturbing, is the court’s implicit suggestion that the voters did not know what they were voting for. Even if the court were correct in its assumption (which is dubious), it is not the proper role of the court to invalidate legislation on these grounds. The court’s elitist attitude toward the voters of Cincinnati is completely inappropriate and offensive.



### C. The Court of Appeals: Equality Foundation II

The plaintiff's victory was short-lived, however, when the Sixth Circuit reversed the district court in a unanimous decision.<sup>119</sup> The Sixth Circuit explicitly rejected the district court's determination that homosexuals comprise a quasi-suspect class.<sup>120</sup> Judge Krupansky characterized this finding as "novel."<sup>121</sup> The lower court was also admonished for virtually ignoring the decision of "every circuit court which has addressed the issue."<sup>122</sup> Krupansky found the lower court's efforts to distinguish these cases on the basis of a distinction between status and conduct unpersuasive.<sup>123</sup> The Sixth Circuit stated that people having a "homosexual orientation" do not comprise an identifiable class,<sup>124</sup> and that "[t]hose persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation, but rather by their conduct which identifies them as homosexual, bisexual, or heterosexual."<sup>125</sup>

The court of appeals also rejected the trial court's alternative holding that Issue 3 had deprived homosexuals of a fundamental right to participate in the political process.<sup>126</sup> They referred to this as an "innovative right."<sup>127</sup> The court pointed out that the cases cited by the district court involved racial classifications,<sup>128</sup> which are always suspect, and the fundamental right to vote,<sup>129</sup>

<sup>119.</sup> See *Equality II*, 54 F.3d 261 (6th Cir. 1995). The decision was 3-0, with circuit judge Krupansky writing the opinion. See *id.* at 263.

<sup>120.</sup> See *id.* at 268.

<sup>121.</sup> *Id.* at 266. The court also observed that the lower court misconstrued *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Supreme Court upheld a Georgia statute criminalizing sodomy. *Id.* at 196. In doing so, the Court held that homosexuals possess no fundamental right to engage in homosexual conduct. *Id.* at 194-95.

<sup>122.</sup> *Equality II*, 54 F.3d at 266. See also *supra* note 31 for a brief survey of Circuit holdings on the subject.

<sup>123.</sup> See *Equality II*, 54 F.3d at 267. The trial court had found that homosexuals are not identified by any particular conduct, rather they are distinguished by "sexual orientation," which encompasses an "innate and involuntary state of being and set of drives." *Id.*

<sup>124.</sup> See *id.*

<sup>125.</sup> *Id.* The court concluded that it is virtually impossible to distinguish between persons of a particular orientation and those who actually engage in that particular type of conduct. See *id.* See also *Ben-Shalom v. Marsh*, 881 F.2d 454, 463-64 (7th Cir. 1989) (homosexual orientation is compelling evidence that the plaintiff has engaged in homosexual conduct and likely will do so again).

<sup>126.</sup> See *Equality II*, 54 F.3d at 268.

<sup>127.</sup> *Id.*

<sup>128.</sup> See, e.g., *Washington v. Seattle School District No. 1*, 458 U.S. 457, 471 (1982) ("[D]espite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes.").

<sup>129.</sup> See, e.g., *Gordon v. Lance*, 403 U.S. 1 (1971) (involving the recognized fundamen-

which also independently triggers strict scrutiny, and thus found them inapplicable here.<sup>130</sup> The court concluded that homosexuals had not been deprived of any fundamental right, rather “[t]hose who opposed Issue 3 simply lost one battle in an ongoing political dispute.”<sup>131</sup>

Having determined that Issue 3 should not be analyzed under strict or heightened scrutiny, the court turned to the rational basis test. They held that Issue 3 easily passed rational basis review, stating that it “potentially furthered a litany of valid community interests.”<sup>132</sup> In particular, it enhanced associational liberty, reduced governmental regulation, potentially saved municipal resources, and returned the municipal government “to a position of neutrality on the issue.”<sup>133</sup> As such, Issue 3 was rationally related to a legitimate state objective, did not violate any “constitutionally protected right and may stand as enacted.”<sup>134</sup>

#### D. Equality Foundation: Supreme Court

On June 17, 1996, the United States Supreme Court granted certiorari, vacated the judgment of the Sixth Circuit, and remanded the case for further consideration in light of *Romer*.<sup>135</sup> The Court divided along the same lines as the *Romer* decision with Justices Scalia, Rehnquist, and Thomas again dissenting.<sup>136</sup> Justice Scalia argued that the case was easily distinguishable from *Romer* because it involved the “lowest electoral subunit” as opposed to the entire state.<sup>137</sup> He believed that the consequence of invalidating the Cincinnati provision “would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals.”<sup>138</sup> Scalia argued that the Court should have denied certiorari, “or else set the case for argument to decide for ourselves the ultra-*Romer* issue that it presents.”<sup>139</sup> Despite these protestations, the case went back to the Sixth Circuit for reconsid-

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tal right to vote).

<sup>130.</sup> See *Equality II*, 54 F.3d at 268-69.

<sup>131.</sup> *Id.* at 269.

<sup>132.</sup> *Id.* at 270.

<sup>133.</sup> *Id.*

<sup>134.</sup> *Id.* at 271.

<sup>135.</sup> See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 116 S. Ct. 2519 (1996).

<sup>136.</sup> See *id.*

<sup>137.</sup> *Id.* (Scalia, J., dissenting).

<sup>138.</sup> *Id.* (Scalia, J., dissenting).

<sup>139.</sup> *Id.* (Scalia, J., dissenting).

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### *E. The Remand: Equality Foundation III*

On October 23, 1997, the Sixth Circuit issued its much anticipated decision.<sup>140</sup> On remand, the Sixth Circuit faced the challenge of determining what *Romer* actually meant,<sup>141</sup> as well as how it affected Cincinnati's Issue 3. The court, again speaking through Judge Krupansky, began by discussing what *Romer* did *not* mean. In particular, they noted that although the Colorado Amendment had been struck down, the Court had rejected the "fundamental right to participate in the political process"<sup>142</sup> argument and failed to subject Amendment 2 to either "strict" or "heightened" scrutiny.<sup>143</sup> Essentially, the Sixth Circuit saw *Romer* as (1) reconfirming the traditional tripartite equal protection analysis, and (2) establishing that laws burdening homosexuals should be subjected to rational basis review.<sup>144</sup> The Sixth Circuit emphasized that *Romer* actually confirmed the standard of review and method of analysis used in their earlier decision, albeit with different results.<sup>145</sup> The court felt that "[a]n exacting comparative analysis of *Romer* with the facts and circumstances of this case, disclose that these contrary results were reached because the two cases involved substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures."<sup>146</sup>

The Sixth Circuit began by comparing the language of the two enactments.<sup>147</sup> Upon doing so, they determined that the "more restricted reach of [Issue 3], as compared to the actual and potential sweep of Colorado Amendment 2, [was] noteworthy."<sup>148</sup> Specifically, when read in its full context, the language of Issue 3 "merely prevented homosexuals, as homosexuals, from obtaining special

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<sup>140</sup>. See *Equality III*, 1997 WL 656228, at \*1 (6th Cir. Oct. 23, 1997). The decision was once again unanimous, 3-0. See *id.*

<sup>141</sup>. The virtual flood of law review articles and commentary on the case provide ample evidence that the precise meaning of the *Romer* decision is not clear from the opinion.

<sup>142</sup>. See *Equality III*, 1997 WL 656228, at \*3.

<sup>143</sup>. See *id.*

<sup>144</sup>. See *id.*

<sup>145</sup>. See *id.* at \*4.

<sup>146</sup>. *Id.*

<sup>147</sup>. See *id.* at \*6.

<sup>148</sup>. *Id.* at \*5.

privileges and preferences (such as affirmative action preferences or the legally sanctioned power to force employers, landlords, and merchants to transact business with them) from the City."<sup>149</sup> In contrast, Colorado's Amendment 2 "could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans. . . ."<sup>150</sup> The Supreme Court in *Romer* feared that Amendment 2 would have the effect of making homosexuals virtual non-citizens, in essence deeming a "class of persons a stranger to its laws."<sup>151</sup> The Court declared this a "denial of equal protection . . . in the most literal sense."<sup>152</sup>

The court of appeals did not find this concern applicable in this case. Issue 3, by contrast, "had no such sweeping and conscious-shocking effect."<sup>153</sup> First, since the amendment applied only at the lowest (municipal) level, it could not remove any rights homosexuals received from any higher level of government.<sup>154</sup> Second, the narrow restrictive language of Issue 3 "could not be construed to deprive homosexuals of all legal protections even under municipal law, but instead eliminated only 'special class status' and 'preferential treatment' for gays as gays under Cincinnati ordinances and policies. . . ."<sup>155</sup>

The court felt that the "low level of government at which [Issue 3] becomes operative is significant. . . ."<sup>156</sup> Homosexuals in Colorado would have been forced to amend the State constitution in order to obtain relief, whereas homosexuals in Cincinnati

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<sup>149.</sup> *Id.* at \*6.

<sup>150.</sup> *Id.* The Sixth Circuit relied on Justice Kennedy's reading of Amendment 2 for this distinction. See *Romer v. Evans*, 116 S. Ct. 1620, 1626 (1995) ("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 the general laws. . . .").

<sup>151.</sup> *Equality III*, 1997 WL 656228, at \*6 & n.7 (quoting *Romer*, 116 S. Ct. at 1629).

<sup>152.</sup> See *Romer*, 116 S. Ct. at 1628.

<sup>153.</sup> *Equality III*, 1997 WL 656228, at \*6.

<sup>154.</sup> See *id.* This is *not* a distinction without a difference. It is important to remember that the alleged constitutional infirmity of Issue 3 is not the decision excluding homosexuals from the antidiscrimination provisions. Nor is it the decision to repeal the existing city ordinances which included sexual orientation. "It is always legitimate public policy for voters or legislatures to repeal disfavored laws. No law, including civil rights legislation, can be seen as a one-way street." Tymkovich et al., *supra* note 2, at 301. Rather, the alleged violation of equal protection is that Issue 3 unfairly makes it too difficult to alter the existing laws. In this situation it seems obvious that the difference between a city and a state is quite relevant.

<sup>155.</sup> *Equality III*, 1997 WL 656228, at \*6.

<sup>156.</sup> *Id.* at \*7.

would need not undertake such a monumental political task.<sup>157</sup> In particular, they may “seek local repeal of the subject amendment through ordinary political processes, or pursue relief from every higher level of Ohio government including, but not limited to Hamilton County, state agencies, the Ohio legislature, or the voters themselves via a statewide initiative.”<sup>158</sup> The court declared that a reading of *Romer* which would prohibit enactments such as Issue 3 would “disenfranchise the voters of their most fundamental right which is the very foundation of the democratic form of government. . . .”<sup>159</sup>

Next, the court of appeals addressed the Supreme Court’s second proffered justification in *Romer*, the Amendment’s “sheer breadth.” The Sixth Circuit concluded that the majority’s inability to find a rational basis in *Romer* “hinged upon the wide breadth of Colorado Amendment 2. . . .”<sup>160</sup> In *Romer*, the Supreme Court stated that the massive scope and effect of Amendment 2 raised the inference that the “disadvantage imposed is born of animosity toward the class of persons affected.”<sup>161</sup> Consequently, the Court found the state’s justifications “impossible to credit.”<sup>162</sup>

Issue 3, by contrast, “constituted local legislation of a purely local scope.”<sup>163</sup> Since the enactment was purely local, the voters “had clear, actual, and direct individual and collective interests in [the] measure. . . .”<sup>164</sup> Issue 3 lacks the breadth that was fatal to Colorado Amendment 2. The Sixth Circuit also addressed and explicitly rejected any suggestion that the amendment was motivat-

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<sup>157.</sup> *See id.*

<sup>158.</sup> *Id.* at \*7. Furthermore, the court noted that, “unlike Colorado Amendment 2, which interfered with the expression of local community preferences in that state, the Cincinnati Charter Amendment [Issue 3] constituted a direct expression of the local community will on a subject of direct consequence to the voters.” *Id.* This point is not insignificant. In Colorado, Amendment 2 had the effect of overriding the local community preferences of voters in communities such as Aspen and Boulder. *See Romer v. Evans*, 116 S. Ct. 1620, 1623 (1995) (explaining that “[w]hat gave rise to the statewide controversy was the protection the ordinances [in cities, such as Aspen and Boulder] afforded to persons discriminated against by reason of their sexual orientation”). In Cincinnati, Issue 3 had the effect of preserving local community will rather than overriding it. The two situations are different in this respect as well.

<sup>159.</sup> *Equality III*, 1997 WL 656228, at \*8.

<sup>160.</sup> *Id.* at \*9.

<sup>161.</sup> *Romer*, 116 S. Ct. at 1628.

<sup>162.</sup> *Id.* at 1628-29.

<sup>163.</sup> *Equality III*, 1997 WL 656228, at \*10.

<sup>164.</sup> *Id.*

ed by animus.<sup>165</sup> They stated that, "[b]eyond contradiction, passage of [Issue 3] was not facially animated solely by an impermissible naked desire of a majority to injure an unpopular group of citizens. . . ." <sup>166</sup> Therefore, the court proceeded to apply rational basis review to the enactment.<sup>167</sup>

The court further determined that Issue 3 implicated "at least one issue of direct, actual, and practical importance to those who voted it into law. . . ." <sup>168</sup> In particular, it implicated whether or not the voters would be "legally compelled by municipal ordinances to expend their own public and private resources to guarantee and enforce nondiscrimination against gays in local commercial transactions and social intercourse." <sup>169</sup> The court held that this

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<sup>165.</sup> See *id.*

<sup>166.</sup> *Id.* (emphasis added). There is simply no way to know for certain why an individual voted in a particular manner. In the typical case, each voter will base his or her decision on a multitude of considerations, each weighted differently. It is arrogant for a court to presume that it possesses the ability to accurately determine the sole motive of the voters in an election.

Judge Boggs of the Sixth Circuit posited several hypothetical examples illustrating the diversity of considerations that may have played a role in the passage of Issue 3. Fred is a small business owner. Fred is homosexual and has many homosexual employees. He is concerned that he will be more vulnerable to lawsuits than other business owners if Issue 3 fails because he has so many homosexual employees. Fred votes for Issue 3. Sally is a lesbian as well as a libertarian. Although she feels it is morally wrong and stupid to discriminate against homosexuals, she does not believe the government has a right to interfere with other people's market choices. Therefore Sally votes in favor of Issue 3. A third example illuminates the point further. Irving is a homosexual as well. He believes that if Issue 3 fails, employers will actually increase covert discrimination in initial hiring to protect against the possibility of later lawsuits. He believes that once he is hired, he will not be discriminated against because of his skills. Irving also votes in favor of Issue 3. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, No. 94-3855, 94-3973, 94-4280, 1998 WL101701 at \*2, \*3 (6th Cir. Feb. 5, 1998) (Boggs, J., concurring) (stating that each of the hypothetical voters described above could not justly be deemed irrational).

The Sixth Circuit has *not* attempted to determine the motives underlying the passage of Issue 3. The court has *not* attempted to determine the motives of the electorate. Rather, the court has merely pointed out the impossibility of doing so. Consistent with this position, the court rejected the contention that Issue 3 was motivated "solely" by animus towards homosexuals. This is quite distinct from a court boldly claiming to know the motives of over 800,000 voters in Colorado.

<sup>167.</sup> See *Equality III*, 1997 WL 656228, at \*10. It should be recalled that the Supreme Court in *Romer* did not seriously address Colorado's proffered interests. Justice Kennedy dismissed them almost without mention, stating that "the breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." *Romer*, 116 S. Ct. at 1629.

<sup>168.</sup> *Equality III*, 1997 WL 656228, at \*10.

<sup>169.</sup> *Id.* The court noted that the city would be forced to bear these costs alone "because no coextensive protection exists under federal or state law." *Id.*

interest alone was sufficient to uphold the constitutionality of the amendment under rational basis review.<sup>170</sup> The court concluded by stating that the Cincinnati amendment "cannot be characterized as an irrational measure fashioned only to harm an unpopular segment of the population in a sweeping and unjustifiable manner."<sup>171</sup>

#### IV. WHERE DO WE GO FROM HERE?

The future for *Equality Foundation* is not certain. The case appears destined for the United States Supreme Court.<sup>172</sup> On February 5, 1998, a majority of the Sixth Circuit denied en banc review of the earlier three—judge decision.<sup>173</sup> The plaintiff's lead attorney, Alphonse Gerhardstein, has indicated that he will appeal the decision to the Supreme Court.<sup>174</sup> At that point, the Court will have several options. They may deny certiorari and allow the decision to stand. They may grant certiorari, hear the case, and affirm. Or they may grant certiorari, hear the case, and reverse. Which course the Court chooses to pursue will answer, in some fashion, many of the questions left unanswered in *Romer*. Was *Romer* a landmark case in gay rights litigation?<sup>175</sup> Was it merely a weak case limited to its facts?<sup>176</sup> *Equality Foundation* may provide the answers.

The Supreme Court should grant certiorari, hear the case, and affirm. There are a number of reasons why the Court should proceed in this manner. One major reason is the patent inadequacy of *Romer*. The decision has left people on both sides of the issue dissatisfied and disappointed.<sup>177</sup> It does not provide lower courts with a clear holding or even a structure within which to evaluate cases involving similar issues. One commentator has written that

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<sup>170.</sup> See *id.* The court went on to say that "discussion of equally justifiable community interests, including the application of the associational liberty and community moral disapproval of homosexuality, is unnecessary to sustain [Issue 3's] viability." *Id.*

<sup>171.</sup> *Id.*

<sup>172.</sup> See Kelly McMurry, *Cincinnati antigay measure upheld by Sixth Circuit*, TRIAL, Apr. 1998, at 105.

<sup>173.</sup> See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, No. 94-3855, 94-3973, 94-4282, 1998 WL 101701 at \*1 (6th Cir. Feb. 5, 1998); see also McMurry, *supra* note 172, at 105.

<sup>174.</sup> See McMurry, *supra* note 172, at 105.

<sup>175.</sup> See *supra* text accompanying note 43.

<sup>176.</sup> See *supra* text accompanying note 66.

<sup>177.</sup> See *supra* notes 44-45.

"the shallowness of Justice Kennedy's opinion rivals that of the Platte River in a drought year."<sup>178</sup> The Court needs to provide adequate guidance both to local governments and the lower courts so that they can properly handle issues involving homosexuals and sexual orientation.

Another reason the Court should affirm the Sixth Circuit's decision is more basic. *Equality Foundation* was correctly decided. The decision may offend those in legal academia, for whom "gaining full approval of homosexuality is the cause celebre of the day,"<sup>179</sup> but it is still correct. With all of the heated rhetoric surrounding homosexual issues<sup>180</sup> it can be easy to lose sight of the facts. The facts are these: Issue 3 does not declare that homosexuality is bad or evil. Issue 3 does not say that homosexuality should be punished. Issue 3 does not say that homosexuals should be discriminated against. Issue 3 merely reflects a judgment, made by an overwhelming majority of the citizens of Cincinnati, that they do not want to include sexual orientation in the list of protected characteristics under their antidiscrimination laws.

The Sixth Circuit's decision is correct because that judgment, and the means chosen to effectuate it, do not violate the Constitution. Furthermore, the Sixth Circuit's decision does not conflict with the Supreme Court's opinion in *Romer*. Simply put, homosexuals do not comprise a suspect class.<sup>181</sup> Homosexuals do not comprise a quasi-suspect class.<sup>182</sup> Laws burdening homosexuals should be analyzed under rational basis review.<sup>183</sup> This is precisely what the Sixth Circuit did. The difference in outcome is due to the fact that Issue 3 was rationally related to a number of legitimate government objectives,<sup>184</sup> whereas the breadth of Colorado Amendment 2 made the state's proffered objectives "impossible to credit."<sup>185</sup>

General policy considerations also support the Sixth Circuit's

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<sup>178.</sup> Duncan, *supra* note 45, at 353.

<sup>179.</sup> Graglia, *supra* note 4, at 427.

<sup>180.</sup> See, e.g., Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a Homophobe?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587, 607 (1996) (arguing that the "gay political agenda is not a tolerant agenda . . . and those who stand in way of this effort to transform human community . . . will be (must be) delegitimized, marginalized, and even demonized . . .").

<sup>181.</sup> See *supra* text accompanying note 57.

<sup>182.</sup> See *supra* text accompanying note 56.

<sup>183.</sup> See *supra* text accompanying note 31.

<sup>184.</sup> See *Equality III*, 1997 WL 656228, at \*10 (6th Cir. Oct. 23, 1997).

<sup>185.</sup> See *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1995).



decision in *Equality III*. Far too often, today's Court has forgotten the principle embodied in Justice Holmes' statement.<sup>186</sup> The Court needs to remember that there is a difference between what they "would forbid and what the constitution permits."<sup>187</sup> The Court should refrain from result oriented decisions that "invent[], rather than interpret[], constitutional law."<sup>188</sup> Despite protestations to the contrary, decisions like *Romer* place "the prestige of [the Supreme Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."<sup>189</sup> This is a course upon which the Court should not embark.

On this issue, there are two points worth mentioning. First, it is undisputed that there is no affirmative duty to include sexual orientation in the set of classes protected by antidiscrimination laws.<sup>190</sup> Second, this country is a free society, and "the general principle is one of free choice."<sup>191</sup> There are, of course, exceptions to this principle of free choice.<sup>192</sup> It is important to remember, however, that these are exceptions and not the rule.<sup>193</sup> A common strategy utilized by gay activists to justify their inclusion in antidiscrimination statutes and marginalize the beliefs of those who oppose them is to compare homosexuals to African-Americans.<sup>194</sup> Such a comparison is laughable. Equating homosexuals with those who have suffered racial persecution is completely inappropriate<sup>195</sup> and does a tremendous disservice to racial minorities.<sup>196</sup> An individual's race tells us nothing about that

<sup>186.</sup> See *supra* text accompanying note 2.

<sup>187.</sup> *Id.*

<sup>188.</sup> Steven A. Delchin, Comment, *Scalia 18:22: Thou Shalt Not Lie With The Academic Elite; It Is An Abomination—Romer v. Evans and America's Culture War*, 47 CASE W. RES. L. REV. 207, 252 (1996).

<sup>189.</sup> *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting). As a point of clarification, opposition to homosexuality as expressed in this Comment means moral disapproval of homosexual conduct and a homosexual lifestyle. "Moral objection to homosexual practices is not the same thing as animus, unless all disapprovals based on morality are to be disallowed as mere animus." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 113 (1996).

<sup>190.</sup> See *supra* note 6.

<sup>191.</sup> Duncan, *supra* note 3, at 399. Generally speaking, this means that an individual may manage his business without interference from the government. In the context of employment, this individual may hire and fire whomever he or she desires. See *id.*

<sup>192.</sup> See *id.* at 400; see also, e.g., 42 U.S.C. § 2000e-2(a) (1995) (prohibiting discrimination in employment on the basis of race, color, religion, sex, and national origin).

<sup>193.</sup> See Duncan, *supra* note 3, at 400.

<sup>194.</sup> *Id.*

<sup>195.</sup> See *id.* at 401-15.

<sup>196.</sup> See Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initia-*

individual's character and therefore is a "morally neutral characteristic"<sup>197</sup> Sexual orientation, on the other hand, is not a morally neutral characteristic.<sup>198</sup> It tells a great deal about an individual's character because it "tells us what a person does (or what he [or she] is inclined to do)."<sup>199</sup>

Aside from the obvious differences between race and homosexuality, there is yet another important reason the comparison is not justified. Simply put, there is no need to depart from the general principle of free choice with respect to homosexuals. "The primary purpose of our Nation's civil rights laws prohibiting racial discrimination was to remedy the severe economic deprivation caused by pervasive discrimination against blacks and other racial minorities."<sup>200</sup> Furthermore, it is undeniable that the civil rights laws were enacted against a "background of devastating and widespread discrimination."<sup>201</sup> This is simply not the case with homosexuals. In fact, the economic plight of homosexuals is directly opposite that of African-Americans.<sup>202</sup> A number of studies, including the 1990 U.S. Census, reveal that male homosexual households are the most affluent group in society.<sup>203</sup> African-Americans are no doubt waiting for this kind of discrimination to start affecting them.

If the Court is not prepared to affirm the Sixth Circuit's decision, they should deny certiorari and allow the decision to stand. This is not preferred because it would leave unanswered many questions left open by *Romer*. Under this scenario, lower courts would be forced to interpret *Romer* if, and when, the situation arose. Each circuit would, of course, be free to consider the Sixth

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*tives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 101 (1995). Gen. Colin Powell, the former Chairman of the Joint Chiefs of Staff, and an African-American has commented that "Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument." *Id.* at n.49 (quoting Elmo Zumwalt, Jr., *Guidance from Gen. Powell*, WASH. TIMES, June 4, 1992, at G3).

<sup>197.</sup> See Duncan, *supra* note 3, at 403. Professor Duncan states that "Dr. Martin Luther King had a seminal insight when he taught us that racial discrimination is anathema because people should be judged by the content of their character, not by the color of their skin." *Id.* at 402.

<sup>198.</sup> See *id.* "Sexual conduct and preferences are fraught with moral and religious significance." *Id.* at 403-04. This is true regardless of what significance different individuals choose to give homosexual conduct. See *id.* at 404-05.

<sup>199.</sup> *Id.* at 403.

<sup>200.</sup> *Id.* at 406.

<sup>201.</sup> *Id.*

<sup>202.</sup> See *id.* at 407-08.

<sup>203.</sup> See *id.* at 408-09.

Circuit's decision in *Equality Foundation*.<sup>204</sup> A decision not to hear the case would leave this area of law somewhat unsettled and the contours of what is permissible and what is not would remain unclear. However, the Court may have various political and personal reasons for leaving these issues open for another day.<sup>205</sup>

The least acceptable option mentioned in this Comment would be for the Court to reverse the Sixth Circuit. This would require an unwarranted extension of *Romer*. In order to explain why such an extension would be unwarranted, a few comments bear repeating. First, although *Romer* purported to apply rational basis review, the manner in which the Court did so was not consistent with traditional equal protection analysis.<sup>206</sup> The Court should not depart any further from the traditional method of analysis. For better or worse, the traditional three tiered analysis provides structure and consistency.<sup>207</sup> When the Court goes beyond this structure, there is often little principled basis for their decisions.<sup>208</sup> Similarly, the Court's vague assertion that Amendment 2 constituted some form of per se violation of equal protection is not supported by precedent and is not a sound basis for making a decision of this import.<sup>209</sup>

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<sup>204.</sup> Outside of the Sixth Circuit, the decision would obviously not be controlling authority. Furthermore, the denial of certiorari itself has no precedential value. See *Agoston v. Commonwealth of Pennsylvania*, 340 U.S. 844 (1950) ("Such a denial, it has been repeatedly stated, imports no expression of opinion upon the merits of a case."). The denial of certiorari merely means that "fewer than four members of the Court deemed it desirable to review a decision of a lower court." *Id.*

<sup>205.</sup> For example, some members of the Court may be hesitant to hear the case if they believe that the different circumstances of this case would weaken the *Romer* decision.

<sup>206.</sup> See *supra* notes 45, 60 and accompanying text.

<sup>207.</sup> Obviously, this is only true when the Court actually adheres to it when analyzing cases.

<sup>208.</sup> See *Graglia*, *supra* note 4, at 411 (arguing that in equal protection cases, the Justices reach their decisions "on no other basis than their personal disapproval of the choices and their willingness to have their own views prevail").

<sup>209.</sup> See *Romer v. Evans*, 116 S. Ct. 1620, 1633 (1995) (Scalia, J., dissenting) ("No principle set forth in the Constitution, nor even imagined by this Court in the past 200 years, prohibits what Colorado has done here."). It has been suggested that *Romer* demonstrates that the Supreme Court is often more concerned with the opinions of elite law professors and constitutional scholars than the actual Constitution. See *Graglia*, *supra* note 4, at 409-10 ("What more shattering curse could one hurl at an enemy than 'May your suit in the Supreme Court be opposed by Professors Tribe, Ely, Gunther, Kurland, and Sullivan'."). The theory of a "per se" violation was proposed to the Court as an alternative justification for invalidating Amendment 2 in an amicus brief filed by the aforementioned constitutional law scholars. See *id.* at 417-20; see also Tymkovich et al., *supra* note 2, at 322 ("Tribe argued that Amendment 2 was "per se" unconstitutional. . .").

Second, the *Romer* majority relied on the sheer breadth of the Amendment to conclude that it was motivated by animus or a bare desire to harm homosexuals.<sup>210</sup> This was a bold assertion in *Romer* and there is no reason to extend it beyond that case. An inquiry into the motives of the voters is an impossible task. The Court in *Romer*, apparently undaunted by this fact, purported to do it anyway. Regardless of the propriety of that determination in *Romer*, it is inexcusable to make it a standard practice.<sup>211</sup> Absent further mental gymnastics by the Court, this portion of *Romer* should be limited to the facts of that case.

The implication that the Supreme Court can and should "determine" the "motives" behind the enactment of legislation, particularly voter referendums such as Issue 3, is frightening. This would allow the Court to invalidate almost any legislation that disfavors a group based entirely on the Court's assessment of the motives for enacting it.<sup>212</sup> Several common sense considerations counsel against this. First of all, this is not the proper function of the courts. The courts are supposed to make judgments based on the law. Second, there is no reason to believe the courts are even moderately skilled at performing the task. Third, the practical concerns raised by this type of inquiry are overwhelming. Ascertaining legislative intent is difficult enough when the enactment is passed by the legislature. It is ludicrous to think that a court will be able to ascertain the "true" motive or intent of the voters on this or any other issue.<sup>213</sup> Furthermore, even if some individual voters are motivated by considerations the Court deems unacceptable, this does not invalidate the law.<sup>214</sup> In short, reversing the Sixth Circuit would be a mistake.

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<sup>210</sup> See *supra* note 67 and accompanying text.

<sup>211</sup> The difficulty of determining the "motives" of the voters has been discussed *supra* note 166.

<sup>212</sup> "[A] lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject . . . because they would always disadvantage some group." *James v. Valtierra*, 402 U.S. 137, 142 (1971).

<sup>213</sup> See *supra* note 166.

<sup>214</sup> Even Justice Stevens acknowledges this fact. See *Mobile v. Bolden*, 446 U.S. 55, 91 (1980) (Stevens, J., concurring) ("I am also persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment or retention."); *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("A law conscripting clerics should not be invalidated because an atheist voted for it.").

## V. CONCLUSION

The decision in *Equality Foundation* is correct. It returns the government to its proper position of neutrality in the latest battle in the culture war.<sup>215</sup> In decisions such as *Romer*, the Court is dangerously overstepping its bounds. The Supreme Court should accept the fact that the federal courts, with unelected and unaccountable federal judges, are not the appropriate forum to decide complex issues of morality such as homosexuality. Furthermore, judicial activism is especially dangerous when it allows the Court to override the will of the people.<sup>216</sup> It is even more offensive when the issue is intensely controversial and involves profound social and moral considerations. When the Court endeavors to impose its own view of homosexuality on the people, they are not performing the task they were assigned. The Sixth Circuit has refused to take sides on a controversial issue and its decision should stand.

PATRICK J. NORTON

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<sup>215</sup> For an excellent discussion of how the gay rights movement attempts to impose its view of morality on society, while at the same time stigmatizing and marginalizing the thoughts and beliefs of those who oppose them, see Duncan, *supra* note 180.

<sup>216</sup> The Supreme Court's "influence is . . . diminished when its opinions are weakly argued or ambiguous [and the] Court weakens its position when it fails to address those objections most likely to resonate in the public debate." Dubnoff, *supra* note 44, at 277.