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# Updating *Romer v. Evans*: The Implications of the Supreme Court's Denial of Certiorari in *Equality Foundation of Greater Cincinnati v. City of Cincinnati*

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## COMMENT

# UPDATING *ROMER V. EVANS*:<sup>1</sup> THE IMPLICATIONS OF THE SUPREME COURT'S DENIAL OF CERTIORARI IN *EQUALITY FOUNDATION OF GREATER CINCINNATI V. CITY OF CINCINNATI*<sup>2</sup>

### INTRODUCTION

In *Romer v. Evans*,<sup>3</sup> the United States Supreme Court invalidated a Colorado constitutional amendment barring the state or any of its subdivisions from granting homosexuals "any minority status, quota preferences, protected status or claim of discrimination."<sup>4</sup> The decision was celebrated by gay activists as their "first major Supreme Court victory in the history of the republic."<sup>5</sup> However, whether *Romer* becomes the seminal case for the gay rights agenda still remains unclear. The *Romer* majority's brief and elusive opinion is, in the words of one commentator, "as notable for what it did not say as for what it did."<sup>6</sup>

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<sup>1</sup> 517 U.S. 620 (1996).

<sup>2</sup> 128 F.3d 289 (6th Cir. 1997).

<sup>3</sup> 517 U.S. 620 (1996).

<sup>4</sup> COLO. CONST. art. II, § 30b. The amendment as a whole reads:

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.

*Id.*

<sup>5</sup> Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 67-68. Seidman notes that while the Warren Court did extend First Amendment protection to some homosexually-oriented pornography, *Romer* marks the first time the Supreme Court has recognized a discrimination claim brought by homosexuals. *Id.* at 68 n.3 (citing *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962)).

<sup>6</sup> Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 376 (1997).

In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*<sup>7</sup> (*Equality Foundation II*), the Sixth Circuit upheld a city charter amendment,<sup>8</sup> substantially similar to the Colorado initiative, after the case was remanded by the Supreme Court for reconsideration in light of *Romer*. More importantly, the Supreme Court recently declined to rehear the case.<sup>9</sup> Given that *Equality Foundation II* was initially derided as a "renegade ruling" and an "outrage" by both gay activists and legal commentators,<sup>10</sup> the Supreme Court's decision dismayed some but offered new hope to others who will almost certainly seek similar charter amendments in their own communities.<sup>11</sup> As of October 1998, Cincinnati was the only city in the country that outlawed specific protection of homosexuals.<sup>12</sup>

Increasingly, it seems "straight" America is reaching its limits in accepting the gay rights agenda.<sup>13</sup> In recent elections, measures to block same-sex marriages won overwhelmingly in Alaska and Hawaii, and in Fort Collins, Colorado, voters rejected a proposal to grant gays and lesbians special protection from discrimination.<sup>14</sup> What is at stake is the right to legally oppose a movement whose ultimate agenda is to have both the American legal system and the society at

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<sup>7</sup> 128 F.3d 289 (6th Cir. 1997).

<sup>8</sup> The amendment reads:

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 291.

<sup>9</sup> See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 119 S. Ct. 365 (1998).

<sup>10</sup> Mark Hansen, *Distinguishing 2 from 3: 6th Circuit Panel Stands by Rights Initiative Despite Supreme Court Quashing of Similar Measure*, A.B.A. J., Feb. 1998, at 35-36.

<sup>11</sup> See Julie Irwin, *Cincinnati Amendment Now in Effect*, CINCINNATI ENQUIRER, Oct. 14, 1998, at A8.

<sup>12</sup> See *id.*

<sup>13</sup> See Marc Peyser, *Battling Backlash*, NEWSWEEK, Aug. 17, 1998, at 50-51 (citing an accumulation of setbacks for the "gay rights" movement, including the military's "Don't Ask, Don't Tell" policy, Maine becoming the first state to reverse a statewide gay anti-discrimination law, and the negative reaction of parents to the introduction of "gay awareness" curricula in public schools as indicating that straight America may have reached "some kind of tipping point, a limit to its tolerance for gays"); see also Schacter, *supra* note 6, at 369 ("[I]ncreasing gay and lesbian presence in public life has triggered a powerful response from forces determined to reinforce the regime of invisibility.").

<sup>14</sup> See *Four States Deal Gay Rights Setback*, AP ONLINE, Nov. 4, 1998, available in 1998 WL 21783023. According to a Newsweek poll, same-sex marriage is the most unacceptable item on the gay rights agenda, with only 33% of the people polled supporting legal gay marriage. See Peyser, *supra* note 13, at 51.

large accord to homosexuality the same moral and legal status as heterosexuality.<sup>15</sup> Nonetheless, most Americans still consider homosexual behavior morally repugnant.<sup>16</sup>

Part I of this Comment discusses the cases that preceded *Equality Foundation II*, and particularly the change in the Court's tenor towards homosexuality from *Bowers v. Hardwick*<sup>17</sup> to *Romer*. Part II analyzes *Equality Foundation II*'s holding and the reasoning behind it. Part III speculates on what impact the Supreme Court's denial of certiorari has on the gay agenda and to what extent *Romer*'s holding is now more clear.

## I. BACKGROUND

This Part first considers *Bowers v. Hardwick*, the reigning Supreme Court precedent with regard to gays prior to *Romer*. Next, the federal district court ruling on the legality of the Cincinnati charter amendment<sup>18</sup> is contrasted with the subsequent Sixth Circuit decision<sup>19</sup> that reversed the district court (*Equality Foundation I*). Third, *Romer* is discussed, which resulted in *Equality Foundation I*'s remand. Finally, the Sixth Circuit's *Equality Foundation II* opinion is

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<sup>15</sup> See, e.g., Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 NEB. L. REV. 723, 724 (1993) (asserting the task of the gay rights agenda is "to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation"); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 375 (1992) (book review) ("[After gay activists deny the centrality of heterosexuality] the gaylegal agenda then becomes something more than just our struggle for equal rights to engage in sexual intimacy, marriage, and military service. Often in alliance with feminism and critical race theory, gay, lesbian, and bisexual legal studies become one fulcrum for shifting the norms that surround intimacy, marriage, and the military."); see also Jonathan Pickhardt, Note, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 923 (1998) (advocating Thomas Stoddard's theory that "gay rights" must focus in the long term on changes in the law that are "culture-shifting," not merely "rule-shifting").

The gay agenda is not without help from the current powers that be. For example, President Clinton, at a November 8, 1997 Human Rights Campaign dinner, equated today's homosexual movement to the struggle of blacks during the era of *de jure* segregation. William Bennett replied to this assertion that "of course, if the gay-rights movement has, in fact, the status of the civil-rights movement, there is a *moral imperative* to treat it similarly in every relevant regard—school curriculum, adoption, marriage, and the like. President Clinton shies away from these conclusions. But they are inescapable—if gay rights are the moral equivalent of civil rights." William J. Bennett, *Clinton, Gays, and the Truth*, WKLY. STANDARD, Nov. 24, 1997, at 13 (first emphasis added).

<sup>16</sup> Of Americans recently polled by *Newsweek*, 54% believe homosexuality is a "sin." Peyer, *supra* note 13, at 51.

<sup>17</sup> 478 U.S. 186 (1986).

<sup>18</sup> See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994).

<sup>19</sup> See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

discussed in depth, focusing particularly on the court's reasoning in distinguishing its decision from *Romer*.

### A. *Bowers v. Hardwick*<sup>20</sup>

At issue in *Bowers* was whether the Constitution conferred a fundamental substantive due process right upon homosexuals to "engage in sodomy and hence invalidate the laws of the many States that still make such conduct illegal and have done so for a very long time."<sup>21</sup> The plurality opinion, delivered by Justice White, was concise in its reasoning as to why no such fundamental right existed: it was neither "implicit in the concept of ordered liberty,"<sup>22</sup> nor was it "deeply rooted in this Nation's history and tradition."<sup>23</sup> White noted that "[p]roscriptions against [this] conduct have ancient roots."<sup>24</sup> More specifically, sodomy was a criminal offense at common law and in all of the original thirteen states, in all but five of the thirty-seven states when the Union ratified the Fourteenth Amendment, in all fifty states until 1961, and in twenty-four states in 1986 when the case was decided.<sup>25</sup>

*Bowers* is noteworthy also for a broader holding regarding whether "traditional morality" alone could provide a rational constitutional justification for a criminal law.<sup>26</sup> In response to the argument that the mere popular belief that "homosexual sodomy is immoral and unacceptable" was an inadequate rationale to support the criminal sodomy statute, Justice White asserted that the "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."<sup>27</sup>

<sup>20</sup> 478 U.S. 186 (1986).

<sup>21</sup> *Id.* at 190. The particular statute at issue was Georgia's criminal sodomy statute. It reads:

(a) A person commits the offense of sodomy when he performs or submits to any sexual activity involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

GA. CODE ANN. § 16-6-2 (1996).

<sup>22</sup> *Bowers*, 478 U.S. at 191 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). The right in question as framed by Justice White was narrower than that asserted by the respondent *Hardwick* in his brief, namely, the right to "sexual intimacy." See Brief for Respondent at 10, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

<sup>23</sup> *Bowers*, 478 U.S. at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

<sup>24</sup> *Id.*

<sup>25</sup> See *id.* at 192-94.

<sup>26</sup> See Mark E. Papadopoulos, Note, *Inkblot Jurisprudence: Romer v. Evans as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL'Y 165, 172 (1997).

<sup>27</sup> *Bowers*, 478 U.S. at 196.

*Bowers* effectively foreclosed gay activists from claiming substantive due process privacy protection arguments in later cases.<sup>28</sup> *Bowers* was cited by several subsequent circuit court decisions for the corollary principle that homosexuals are entitled to no special treatment under the Equal Protection Clause as either a suspect or a quasi-suspect class because the conduct which placed them in that class was not constitutionally protected.<sup>29</sup> *Bowers* firmly entrenched the Supreme Court as the gay activist's "implacable foe—its decisions to be feared, its jurisdiction at all cost to be avoided."<sup>30</sup>

### *B. The Cincinnati City Charter Amendment and the Lower Court Decisions in Equality Foundation I*

In 1991 and 1992, the Cincinnati City Council passed two ordinances prohibiting certain discriminatory practices within the city: the "Equal Employment Opportunity Ordinance"<sup>31</sup> ("EEOO") and the "Human Rights Ordinance"<sup>32</sup> ("HRO"). The EEOO prohibited discrimination based upon sexual discrimination in city employment and in city board and commissions appointments; the HRO did the same for private employment, public accommodations and housing.<sup>33</sup> The HRO prescribed civil and criminal penalties for violators of its provisions.<sup>34</sup>

Largely in response to the enactment of the HRO, a citizens group was organized to place on the ballot an amendment to the Charter of

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<sup>28</sup> See Pickhardt, *supra* note 15, at 925 (calling *Bowers* the "culmination of a failed attempt by gay rights litigators to append the right of 'sexual intimacy' to the laundry list of substantive due process privacy protections that the Court has elaborated since *Griswold v. Connecticut*"); see also Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-role Stereotypes, and Legal Protection For Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 512-13 (1992) (observing that *Bowers* left gay activists scrambling to find new legal theories to protect homosexuals from discrimination).

<sup>29</sup> See, e.g., *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'"); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) ("[B]ecause 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.") (citation omitted); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("[A]fter [*Bowers*] it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.").

<sup>30</sup> Seidman, *supra* note 5, at 68.

<sup>31</sup> See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 421 (S.D. Ohio 1994) (citing Cincinnati City Ordinance No. 79-1991).

<sup>32</sup> See *id.* (citing Cincinnati City Ordinance No. 490-1992).

<sup>33</sup> Both the EEOO and the HRO also prohibited discrimination based race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. See *id.*

<sup>34</sup> See *id.*

the City of Cincinnati.<sup>35</sup> The group succeeded and the proposed charter amendment, Issue 3, was placed on the November, 1993 ballot. Issue 3 read:

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>36</sup>

After a "bitter and often inflammatory campaign," the charter amendment was approved by a vote of approximately sixty-two percent to thirty-eight percent.<sup>37</sup>

After granting a preliminary injunction against implementation of Issue 3 in a suit brought by the Equality Foundation of Greater Cincinnati, Inc.,<sup>38</sup> the federal District Court for the Southern District of Ohio granted a permanent injunction.<sup>39</sup> Judge S. Arthur Spiegel's opinion represented a substantial, and highly controversial, departure from *Bowers* and its progeny. First, Judge Spiegel admitted into the record twenty-three findings of fact testified to at an earlier evidentiary hearing that were largely slanted in the favor of the gay activist Plaintiffs. Among these, the court accepted as fact that "[s]exual orientation is a characteristic which exists separately and independently from sexual conduct or behavior"<sup>40</sup> and, despite inconclusive scientific evidence, that sexual orientation is "not only involuntary, but is unamenable to change."<sup>41</sup> By contrast, most federal courts up to this

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<sup>35</sup> See *id.* at 422.

<sup>36</sup> *Id.*

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

<sup>38</sup> See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993).

<sup>39</sup> See *Equality Foundation*, 860 F. Supp. at 417.

<sup>40</sup> *Id.* at 426.

<sup>41</sup> *Id.* The following excerpt from a recent *Newsweek* article sums up the current scientific thinking on the nature versus nurture debate regarding homosexuality:

In the early 90's, three highly publicized studies seemed to suggest that homosexuality's roots were genetic, traceable to nature rather than nurture. Though the studies were small and the conclusions cautious, many gay groups embraced the news. We're born this way, they announced, don't judge us. More than five years later the data have never been replicated. Moreover, researchers say, the public has misunderstood "behavioral genetics." Unlike eye color, behavior is not strictly inherited; it

time had considered homosexuality to be a behavioral, and not immutable, characteristic.<sup>42</sup>

The district court focused on a purported fundamental right to equal participation in the political process<sup>43</sup> and equal protection.<sup>44</sup> The court first found that Issue 3 did, in fact, bias the political process in a fashion that made it more difficult for an "independently identifiable group of people," in this case homosexuals, to obtain the legislation they favored.<sup>45</sup> As such, Issue 3 had to be narrowly tailored to serve a compelling state interest in order to stand,<sup>46</sup> a threshold that

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needs to be brought into play by a daunting complexity of environmental factors. "People very much want to find simple answers," says Neil Risch, a professor of genetics at Stanford. "A gene for this, a gene for that . . . Human behavior is much more complicated than that." The existence of a genetic pattern among homosexuals doesn't mean people are born gay, any more than the genes for height, presumably common in NBA players, indicate an inborn ability to play basketball.

Mark Miller & John Leland, *Can Gays 'Convert'?*, NEWSWEEK, Aug. 17, 1998, at 49. While many scientists believe that homosexuality results from some combination of genetic and environmental factors, biologist Evan Balaban admits, "I think we're as much in the dark as we ever were." *Id.* For a discussion of the findings and shortcomings of the three scientific studies linking homosexuality to genetics referenced in the excerpt above, see Pickhardt, *supra* note 15, at 936-38, 946-48. See also David Gelman et al., *Born or Bred?*, NEWSWEEK, Feb. 24, 1992, at 46 (discussing the validity of a behavioral genetics study claiming to correlate common homosexual behavior of fraternal twins as proof of possible genetic origin for homosexuality). Jonathan Pickhardt lists at least three reasons why the belief of the immutability of homosexuality is of great personal benefit to gays themselves: it allows gays to abdicate fault for being gay, giving comfort not only to themselves but also to parents, coworkers and the like; it counteracts certain stereotypes about gays, such as that they actively recruit children into the gay lifestyle; and finally, it condemns efforts to reform them. See Pickhardt, *supra* note 15, at 938-40.

As to the proposition that homosexuality is "unamenable to change," see Miller & Leland, *supra*, at 47 (surveying homosexuals' efforts to change sexual orientation through therapy and religious conviction). Certainly, the notion that a homosexual can come out of the gay lifestyle and enter into heterosexual relationships, including marriage, is not popularly embraced by either the mainstream media or gay activists. See, e.g., Focus on the Family, FAM. NEWS FROM DR. JAMES DOBSON (Focus on the Family, Colorado Springs, Colo.), Nov. 1998, at 3 (observing that a formerly homosexual staff member of the ministry who appeared with his wife on cover of a *Newsweek* gay conversion article was "just torn to shreds by the media hounds for going public with his story, as though he didn't have a right to tell his own experience").

<sup>42</sup> See, e.g., *High-Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (finding "homosexuality is primarily behavioral in nature").

<sup>43</sup> See *Equality Foundation*, 860 F. Supp. at 430.

<sup>44</sup> See *id.* at 434.

<sup>45</sup> *Id.* at 430. In finding such a broad right, the court relied on Supreme Court precedent striking down measures that imposed special obstacles for African-Americans seeking legislation on their behalf. See, e.g., *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982) (invalidating a statewide initiative that terminated the use of mandatory busing for the purpose of racial integration); *Hunter v. Erickson*, 393 U.S. 385 (1969) (invalidating an Akron city charter amendment which proscribed the city council from enacting a racial anti-discrimination ordinance without the approval of a majority of the city's voters). The Supreme Court later declined to apply this political process theory in invalidating Amendment 2, a Colorado constitutional amendment similar to Issue 3. See *Romer v. Evans*, 517 U.S. 620, 625-26 (1996).

<sup>46</sup> See *Equality Foundation*, 860 F. Supp. at 434.



the court decided was not met.<sup>47</sup> The court also found—again, contrary to other courts' conclusion on the matter—that homosexuals constituted a quasi-suspect class.<sup>48</sup> Issue 3 was thereby subjected to “heightened” scrutiny,<sup>49</sup> a test it also failed.<sup>50</sup> Consequently, a permanent injunction was granted.

On appeal,<sup>51</sup> the Sixth Circuit summarily rejected the district court's reasoning:

Assuming arguendo the truth of the scientific theory that sexual orientation is a “characteristic beyond the control of the individual” as found by the trial court, the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual “orientation” simply do not, as such, comprise an identifiable class. Many homosexuals successfully conceal their orientation. Because homosexuals generally are not identifiable “on sight” unless they elect to be so identifiable by conduct . . . they cannot constitute a suspect class or a quasi-suspect class because “they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group [.]”<sup>52</sup>

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<sup>47</sup> Among the arguments raised by the defendants which were rejected by the court were that: (1) the government always has an interest in not imposing regulations upon private citizens; (2) Issue 3 saves scarce public and private resources; (3) Issue 3 serves the purpose of “not imposing a uniform, doctrinaire view concerning homosexual behavior on all segments of the community”; (4) Issue 3 gives legal effect to Cincinnati's collective notion of morality; and (5) Issue 3 protects and nurtures the nuclear family. *Id.* at 441.

<sup>48</sup> As was noted earlier, courts following *Bowers* reasoned that homosexual orientation was defined by conduct, hence classification as either a suspect or quasi-suspect class was unwarranted. *See supra* notes 29, 42 and accompanying text. The district court in *Equality Foundation I*, however, armed with the finding of fact that sexual orientation exists independently of any conduct, concluded that *Bowers* and its progeny were not controlling and “therefore, [did] not preclude a finding that gays, lesbians and bisexuals constitute a quasi-suspect class.” *Equality Foundation*, 860 F. Supp. at 440.

<sup>49</sup> Under such scrutiny, a law must be substantially related to an important governmental purpose. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985).

<sup>50</sup> The court found that Issue 3 was “unconstitutional under even the most deferential standard of review, let alone the most exacting.” *Equality Foundation*, 860 F. Supp. at 444. Thus, in the court's opinion, Issue 3 was not supported by any reasonably conceivable state of facts that could provide a rational basis for the classification. *See supra* note 47.

<sup>51</sup> *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

<sup>52</sup> *Id.* at 267 (citation omitted) (quoting *Bowen v. Gillard*, 483 U.S. 587, 602 (1987)).

As to the district court's finding that Issue 3 violated homosexuals' constitutional right to participate fully in the political process, the circuit court countered that Issue 3 "deprived no one the right to vote, not did it reduce the relative weight of any person's vote."<sup>53</sup> Issue 3 only proscribed the city council from enacting preferential legislation for homosexuals *qua* homosexuals; it did not impair homosexuals from seeking to repeal Issue 3 by another charter amendment, nor did it prevent seeking relief through other political avenues, such as from the Ohio state legislature or the United States Congress.<sup>54</sup> In the court's opinion, the "narrow restriction created by the Amendment . . . clearly [did] not rise to constitutional dimensions."<sup>55</sup>

### C. *Romer v. Evans*<sup>56</sup>

*Romer* was decided soon after the Sixth Circuit issued its opinion in *Equality Foundation I*. At issue in *Romer* was another voter-initiated amendment, Amendment 2 to the Colorado Constitution, prohibiting all legislative, executive or judicial action designed to protect homosexuals from discrimination.<sup>57</sup> The Colorado Supreme Court invalidated Amendment 2 on the basis that it infringed upon the fundamental right of homosexuals to participate equally in the political process.<sup>58</sup> The United States Supreme Court subsequently granted

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<sup>53</sup> *Id.* at 269.

<sup>54</sup> *See id.* .

<sup>55</sup> *Id.* Because the circuit court found that Issue 3 implicated no suspect or quasi-suspect class and burdened no fundamental right, it applied the "rational relationship" test—the legislation must stand if it is rationally related to any legitimate state interest. *See id.* at 270. The court subsequently found that Issue 3 "potentially furthered a litany of valid community interests": it encouraged associational liberty by eliminating exposure to punishment against persons electing to dissociate themselves from homosexuals; it repealed an official municipal policy judgment regarding homosexuality, thus returning the municipal government to a position of neutrality on the subject; and it reduced governmental regulation's intrusion into the private social and economic lives of Cincinnati residents, thereby increasing personal autonomy and reducing enforcement costs. *Id.*

<sup>56</sup> 517 U.S. 620 (1996).

<sup>57</sup> *See id.* at 624. The amendment reads:

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.

<sup>58</sup> *See Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). In support of its political process argument, the Colorado Supreme Court cited the same United States Supreme Court precedent as the district court did in *Equality Foundation I*. *See supra* note 45.

certiorari and affirmed the lower court's ruling, but did so on different grounds than political process theory.<sup>59</sup>

The *Romer* Court based its decision upon equal protection jurisprudence, but declined to engage in the "conventional" suspect/quasi-suspect class inquiry.<sup>60</sup> Instead, the Court took issue with Amendment 2's scope, which it nullified legal protections for homosexuals "in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment."<sup>61</sup> The author of the majority opinion, Justice Kennedy, observed that Amendment 2 "has the peculiar property of imposing a broad and undifferentiated disability on a single named group."<sup>62</sup> A law making it more difficult for this single group of citizens than for all others to seek aid from the government was, in the Court's opinion, "itself a denial of equal protection of the laws in the most literal sense."<sup>63</sup>

Despite the finding that Amendment 2 was a "literal" violation of the plain terms of the Equal Protection Clause, the Court still applied the rational basis test. Responding to Colorado's primary argument that Amendment 2 furthered "other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality,"<sup>64</sup> Justice Kennedy stated that the amendment's "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."<sup>65</sup> In other words, in the Court's opinion, Amendment 2's scope was too expansive to even rationally relate to the policy goal of respect for persons who have objections to homosexuality.<sup>66</sup>

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<sup>59</sup> See *Romer*, 517 U.S. at 626. Why the Court chose not embrace the political process argument was not elaborated upon in the majority opinion. Louis Seidman posits a few potential reasons why. First, the precedent itself was shaky, having been decided by sharply divided courts. See Seidman, *supra* note 5, at 75. Second, the earlier cases never satisfactorily explained the difference "between unfairly *biasing* the political process on the one hand and simply *using* the process on the other." *Id.* at 76. Finally, the political process decisions were not obviously on point, each having risen in a racial context. See *id.*

<sup>60</sup> See *Romer*, 517 U.S. at 631-32. Justice Scalia noted in his dissent that the Colorado trial court hearing this case had rejected the *Romer* Respondent's argument that homosexuals comprise a suspect or quasi-suspect class, and that the Respondents elected not to appeal that ruling to the Supreme Court of Colorado. See *id.* at 640 n.1 (Scalia, J., dissenting).

<sup>61</sup> *Id.* at 629.

<sup>62</sup> *Id.* at 632.

<sup>63</sup> *Id.* at 633.

<sup>64</sup> *Id.* at 635.

<sup>65</sup> *Id.* at 632.

<sup>66</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (finding that "traditional morality" alone was a rational justification for a criminal statute because the "law . . . is constantly based on notions of morality"). Incidentally, the *Romer* majority did not once mention *Bowers*. Jane Schacter notes that "[n]otwithstanding the notoriously forgiving quality of the rational basis standard and the exceedingly rare judicial willingness to find laws wanting under it, the

A related point the Court advanced was that Amendment 2 was a “classification of persons undertaken *for its own sake*, something the Equal Protection Clause does not permit.”<sup>67</sup> Matthew Coles interprets the Court’s statement this way:

A classification can never be justified by saying that it was used to obtain the very discrimination that the classification provides. Put another way, the government is not permitted to say that the legitimate aim it is trying to achieve by treating people differently is to treat these two different groups of people differently.<sup>68</sup>

If true, this notion would undercut the legitimacy of a “mere disapproval of homosexuality” justification, implying that the government must state what it hopes to achieve by a classification and not merely the reasons why the classification was chosen.<sup>69</sup>

*Romer* also weighed in on the issue of whether legislation favoring homosexuals granted homosexuals “special” rights or only “equal” rights—i.e., the same rights enjoyed by all Americans:

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.<sup>70</sup>

Of course, this statement represents a value judgment not shared by all Americans. The counterargument is that homosexuals *already have* the same constitutional rights granted to them as any other American, and, if a homosexual is a senior citizen or racial minority, the same constitutional protections afforded all senior citizens and all racial minorities.<sup>71</sup> Any law conferring upon homosexuals a favored

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Court could find no justification for Amendment 2 other than anti-gay animus, and thus deemed the measure irrational.” Schacter, *supra* note 6, at 379 (footnote omitted).

<sup>67</sup> *Romer*, 517 U.S. at 635 (emphasis added).

<sup>68</sup> Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343, 1348–49 (1997). Louis Seidman gives this example of a law which does not discriminate “for its own sake”: a statute which proscribes municipalities from enacting laws recognizing discrimination claims against spousal abusers. This statute discriminates for the purpose of discouraging spouse abuse, not “for its own sake.” Seidman, *supra* note 5, at 101.

<sup>69</sup> See Coles, *supra* note 68, at 1357 (asserting that in enforcing policies disfavoring gays, states are “hard put to find any justification for what is done other than simple disapproval of lesbians and gay men. Up until now, that has been all the state needed. *Romer* should change that.”).

<sup>70</sup> *Romer*, 517 U.S. at 631.

<sup>71</sup> See *id.* at 644. (Scalia, J., dissenting).

status because of their sexual preference is one that grants a "special" right.<sup>72</sup>

*Romer* certainly indicated a shift in the Court's general disposition toward homosexuality when compared to *Bowers*.<sup>73</sup> But, because the majority opinion relied more on "sweeping moral generalities" than precedent and established legal doctrine,<sup>74</sup> where the law now stands is less certain. In particular, issues which remained unresolved after *Romer* were whether a more narrowly tailored statute than Amendment 2 could pass constitutional muster;<sup>75</sup> whether special preferential rights given a more limited statutory scope could be distinguished from general equal rights;<sup>76</sup> and finally, whether the rational basis analysis the Court applied was the historically more-forgiving variety<sup>77</sup> or something more stringent.<sup>78</sup>

These issues were addressed by the Sixth Circuit in *Equality Foundation II*<sup>79</sup> not long after *Romer* was decided. As part of the fallout of *Romer*, the Sixth Circuit's ruling in *Equality Foundation I* was vacated and the case was remanded to the Sixth Circuit for reconsideration in light of *Romer*.<sup>80</sup>

<sup>72</sup> See *id.*

<sup>73</sup> Gay activists certainly held a different opinion of the Court after *Romer*. See, e.g., Coles, *supra* note 68, at 1357-58 (stating that compared to the "contempt," "disdain" and "scorn" shown homosexuals by the Court in *Bowers*, the *Romer* Court "treats lesbians and gay men with respect, and it treats our aspirations to equal treatment as legitimate").

<sup>74</sup> Seidman, *supra* note 5, at 69.

<sup>75</sup> The Court in *Romer* continually spoke of the "sheer breadth" of Amendment 2—that it prohibited all legislative, executive or judicial action at any level of state or local government designed to protect homosexuals—as most objectionable. See *Romer*, 517 U.S. at 632, 635. It appears that Amendment 2's too expansive scope simply extended beyond any legitimate justification.

<sup>76</sup> See *id.* at 631.

<sup>77</sup> The party challenging the rationality of legislation under this test bears the burden of negating every conceivable basis for enacting the legislation, regardless of whether a supporting justification was cited by, or actually relied upon by, the promulgating authority. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-15 (1993); see also *Borman's, Inc. v. Michigan Property & Cas. Guar. Ass'n*, 925 F.2d 160, 162 (6th Cir. 1991) ("The burden upon a party seeking to overturn a legislative enactment for irrationally discriminating between groups under the equal protection clause is an extremely heavy one.").

<sup>78</sup> Consider the Court's application of rational basis review to invalidate a gender classification in *Reed v. Reed*, 404 U.S. 71 (1971). It was later admitted, albeit tacitly, by the Court in *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973), that it had actually applied a heightened scrutiny analysis in *Reed* and would continue to do so in the future with regard to gender classifications.

<sup>79</sup> 128 F.3d 289 (6th Cir. 1997).

<sup>80</sup> See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).

III. *EQUALITY FOUNDATION II*<sup>81</sup>

To uphold the Cincinnati charter amendment, the Sixth Circuit faced the daunting task of distinguishing *Romer*. That it did, finding that the “two cases involved substantially different enactments of entirely distinct scope and impact.”<sup>82</sup> The court noted that where Amendment 2’s broader language could be reasonably construed to exclude homosexuals from the protection of every Colorado state law,<sup>83</sup> Issue 3 had no such “sweeping and conscience-shocking effect.”<sup>84</sup> This was because it (1) applied only at the “lowest (municipal) level of government,”<sup>85</sup> and hence not stripping homosexuals of any rights derived from and enforced by the state, and (2) eliminated only “‘special class status’ and ‘preferential treatment’ for gays as gays under Cincinnati ordinances and policies, leaving untouched the application, to gay citizens, of any and all legal rights generally accorded by the municipal government to all persons as persons.”<sup>86</sup>

The circuit court further distinguished Colorado’s Amendment 2 as particularly damning to homosexuals who lived within majority pro-gay rights jurisdictions and who subsequently might have been able to defeat city-wide anti-gay rights legislation in a local election.<sup>87</sup> Because it was ensconced in the state constitution, Amendment 2 trumped any local political influence homosexuals might enjoy.<sup>88</sup> By contrast, Issue 3 did not hinder Cincinnati’s homosexuals from seeking its repeal through ordinary municipal political processes if they could garner the public support required to do so.<sup>89</sup> Moreover, Issue 3 did not prevent homosexuals from pursuing relief from every higher level of state government “including but not limited Hamilton County, state agencies, the Ohio legislature, or the voters themselves via a statewide initiative.”<sup>90</sup>

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<sup>81</sup> 128 F.3d 289 (6th Cir. 1997).

<sup>82</sup> *Id.* at 295.

<sup>83</sup> The Supreme Court noted in *Romer* that Amendment 2 could fairly be interpreted as not only depriving homosexuals of the protection of laws passed specifically for their benefit, but also as depriving them of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. *See Romer v. Evans*, 517 U.S. 620, 630-31 (1996). Still, despite the fact that homosexuals could find some safe harbor in laws of general application, the Court still found Amendment 2 unconstitutional. *See id.* at 631.

<sup>84</sup> *Equality Foundation*, 128 F.3d at 296.

<sup>85</sup> *Id.* at 296.

<sup>86</sup> *Id.* at 297.

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

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

<sup>89</sup> *See id.* A provision of Cincinnati’s city charter may be repealed by amending the charter. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 428 (S.D. Ohio 1994). To succeed, a charter amendment must receive the support of a majority of voters. *See id.*

<sup>90</sup> *Equality Foundation*, 128 F.3d at 297.

In the Sixth Circuit's opinion, initiatives such as Issue 3 must not be "cavalierly disregarded"<sup>91</sup> by the courts:

Patently, a local measure adopted by direct franchise, designed in part to preserve community values and character, which does not impinge upon any fundamental right or interests of any suspect class or quasi-suspect class, carries a formidable presumption of legitimacy and is thus entitled to the highest degree of deference by the courts.<sup>92</sup>

Construing *Romer* as neither forbidding purely local initiatives of modest scope, nor as supplying any rationale for subjecting Issue 3 to any equal protection assessment other than the traditional rational basis test, the *Equality Foundation II* court then proceeded to determine whether some legitimate public interest was rationally advanced by Issue 3.<sup>93</sup> The court found at least one legitimate interest in both the public and private cost savings by not having to litigate complaints of sexual orientation discrimination.<sup>94</sup> While noting that other public interests such as associational liberty and the expression of community moral disapproval of homosexuality might also serve as rational bases for Issue 3,<sup>95</sup> the court declined to discuss these other interests because the "conserving public and private financial resources" interest alone was sufficient to find Issue 3 constitutionally valid.<sup>96</sup> Consequently, concluding that Issue 3 did not "disempower a group of citizens from attaining special protection at all levels of government, but merely removed municipally enacted special protection from gays and lesbians,"<sup>97</sup> the Sixth Circuit again reversed the district

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* For a discussion of *Romer*'s analysis of whether homosexuals as a group constituted a suspect or quasi-suspect class, see *supra* note 60 and accompanying text.

<sup>93</sup> See *id.* at 300-01.

<sup>94</sup> See *id.* at 300. The court referred to the United States Senate's rejection of proposed legislation meant to eliminate sexual orientation discrimination in employment because it would promote a "litigation bonanza." 142 CONG. REC. S9992 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch) (commenting on Employment Nondiscrimination Act of 1995, S. 2056, 104th Cong. (1996)); see also *id.* at S10004 (statement of Sen. Coverdell) ("The bill virtually guarantees an avalanche of costly litigation which could hurt small businesses most of all."); *id.* at S9997 (statement of Sen. Nickles) ("A lot of individuals and a lot of firms would be sued based on sexual orientation claims if this bill becomes law."); *id.* at S9989 (statement of Sen. Kassebaum) ("I do not believe . . . that we will promote greater tolerance in the workplace by relying on more lawsuits and litigation as this bill would require.").

<sup>95</sup> The Sixth Circuit read *Romer* as not explicitly rejecting these proposed community interests as irrational bases for Amendment 2, but instead concluding that, "under the facts and circumstances of *Romer*, the state's argument in support of Colorado Amendment 2 was not credible." *Equality Foundation*, 128 F.3d at 301.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

court's holding in *Equality Foundation I* and permitted the implementation and enforcement of Issue 3.<sup>98</sup>

The Sixth Circuit's decision in *Equality Foundation II* certainly raised the hackles of gay activists and legal commentators. Most claimed that Issue 3 could not be distinguished from Colorado's Amendment 2 that was struck down in *Romer*.<sup>99</sup> The two measures were "virtual clone[s] . . . and every bit as unconstitutional."<sup>100</sup> They charged that "the most conservative panel that could be put together"<sup>101</sup> did an end run around *Romer*'s majority opinion in order to validate again a measure they clearly thought constitutional in the first place. Despite the derision *Equality Foundation II* was subjected to, the Supreme Court let the decision stand.<sup>102</sup>

A brief opinion by Justice Stevens and joined by Justices Souter and Ginsburg explained the Court's reasoning in declining to rehear *Equality Foundation II*: "This Court does not normally make an independent examination of state law questions that have been resolved by a court of appeals. Thus, the confusion over the proper construction of the [Cincinnati] city charter counsels against granting the petition for certiorari."<sup>103</sup> The confusion Justice Stevens spoke of was whether Issue 3 "merely removed municipally enacted special protection from gays and lesbians,"<sup>104</sup> as the Sixth Circuit held in *Equality Foundation II*, or, as the measure's opponents contended, barred legal protections for homosexual citizens.<sup>105</sup> Justice Stevens took care to mention that the Court's action should not be construed as either an "independent construction of the charter" or as an "expression of its views about the underlying issues" upon which the case was based.<sup>106</sup> Thus, while the Court did defer to the Sixth Circuit's finding that Issue 3 did not implicate an equal protection violation, it conceded it might have found differently on an independent examination of Issue 3.

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<sup>98</sup> See *id.*

<sup>99</sup> See, e.g., Hansen, *supra* note 10, at 35; David E. Rovella, *Gay Groups Are Angry at Sexual Preference Ruling*, NAT'L L.J., Nov. 10, 1997, at A9.

<sup>100</sup> Hansen, *supra* note 10, at 35-36 (quoting Suzanne Goldberg, staff lawyer for the Lambda Legal Defense Fund and co-counsel for the Plaintiffs in *Equality Foundation II*).

<sup>101</sup> Rovella, *supra* note 99, at A9 (quoting constitutional law Professor Melvyn R. Durchslag, Case Western Reserve University School of Law). The panel was composed of two Reagan appointees, Judges Robert B. Krupansky and Alan E. Norris, and Carter appointee Cornelia G. Kennedy. See *id.*

<sup>102</sup> See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 119 S. Ct. 365 (1998) (Stevens, J., explaining denial of certiorari).

<sup>103</sup> *Id.* at 366 (citing *Bishop v. Wood*, 426 U.S. 341, 346-47 (1976)).

<sup>104</sup> *Id.* at 365 (quoting *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 301 (6th Cir. 1997)).

<sup>105</sup> See *id.* at 366.

<sup>106</sup> *Id.*



IV. SOME THOUGHTS ON THE SUPREME COURT'S OPINION IN DENYING CERTIORARI TO *EQUALITY FOUNDATION II*, WHERE *ROMER* NOW STANDS, AND "PREVENTING THE PIECEMEAL DETERIORATION OF SEXUAL MORALITY"<sup>107</sup>

While not definitively settling this area of the law as either affirming or reversing the Sixth Circuit would have done, the decision not to review *Equality Foundation II* does suggest some answers to the unresolved questions raised by *Romer*.<sup>108</sup> Most importantly, the Court seems to have recognized that at least for the short term, legislative initiatives narrower in scope than Colorado's Amendment 2 and tied to a legitimate public interest may be found constitutional.<sup>109</sup> Lower courts forced to interpret *Romer*, if and when the situation arises, are free to consider the Sixth Circuit's decision in *Equality Foundation II* and adopt the same reasoning.<sup>110</sup>

A. A More Narrowly Tailored Statute than Colorado's Amendment 2 May Pass Constitutional Muster

Due to the Supreme Court's emphasis in *Romer* of the "sheer breadth" of Amendment 2 in declaring the measure unconstitutional,<sup>111</sup> it can reasonably be inferred from *Romer* alone that a narrower statute may be constitutional. In fact, the Court cited several "rational basis" cases "narrow enough in scope and grounded in a sufficient factual context" to ascertain whether a particular measure advances a legitimate governmental interest.<sup>112</sup> Given the Court's

<sup>107</sup> See *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).

<sup>108</sup> Of course, as Justice Stevens points out, the denial of a writ of certiorari is not a ruling on the merits. See *Equality Foundation*, 119 S. Ct. at 365 n.1 (citing *Brown v. Texas*, 118 S. Ct. 355, 356 (1997); *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995); and *Barber v. Tennessee*, 513 U.S. 1184, 1184 (1995)). But this proposition has not dampened speculation that Issue 3-type legislation may now be passed by municipalities and will be found constitutional. See, e.g., Irwin, *supra* note 11, at A8 ("I think it sends a clear message to other municipalities and cities that they may enact laws like Issue 3.") (quoting Michael Carvin, attorney for the Defendant in *Equality Foundation II*); Editorial, *Gay Rights: Supreme Court Ruling: Cincinnati's Opinion Is Ratified by Courts*, CINCINNATI ENQUIRER, Oct. 18, 1998, at B2 ("What [*Romer* and *Equality Foundation II*] seem to say is that statewide discrimination against gays is illegal; but local communities cannot be compelled to condone homosexual lifestyles by protecting gays with special rights.").

<sup>109</sup> Patrick Norton notes that the Court may have had "various political and personal reasons for leaving these issues open for another day." Patrick J. Norton, Comment, *Is Equality Foundation the Latest Chapter in America's Culture War?*, 48 CASE W. RES. L. REV. 903, 928 (1998). For example, some members of the Court might have believed that the "different circumstances of [*Equality Foundation II*] would weaken the *Romer* precedent." *Id.* at 928 n.205.

<sup>110</sup> *Id.* at 927-28.

<sup>111</sup> See *Romer*, 517 U.S. at 632 (finding "sheer breadth" of Amendment 2 discontinuous with reasons offered in support of it); see also *id.* at 635 (noting "breadth" of amendment was so far removed from justifications that they could not be credited).

<sup>112</sup> *Id.* at 632 (citing *New Orleans v. Dukes*, 427 U.S. 297 (1976) (finding that tourism benefits justified a classification favoring pushcart vendors of certain longevity); *Williamson v. Lee*

recognition that the laws at issue in these cases were sustained even if they seemed “unwise or work[ed] to the disadvantage of a particular group, or if that rationale seem[ed] tenuous,”<sup>113</sup> one can infer that the scope of the measures was more critical in the Court’s analysis of these cases than the justifications offered in support of the measures. Issue 3 is certainly closer in scope than Amendment 2 to the measures at issue in the “rational basis” cases mentioned in *Romer*, at least in the sense that Issue 3 is also a local measure adopted by direct franchise. This “lowest electoral subunit” distinction alone would satisfy Justice Scalia as to the constitutionality of Issue 3-type measures.<sup>114</sup>

Some legal commentators have also contended that *Romer* could permit a more discrete measure than Amendment 2 to stand.<sup>115</sup> But by “discrete” they mean a measure restricted to a classification in a particular area of law or propagated by a single governmental body and not an across-the-board withholding of special legal protections for homosexuals as homosexuals. Matthew Coles opines with regard to *Romer*:

Because [part of the majority opinion] emphasized Amendment 2’s breadth and the fact that it took away the power to protect people from discrimination, it seems most unlikely that the Court will ever use *Romer* to strike down even a constitutionally based but narrow restriction of the legislature’s ability to enact certain legislation—like a reporter’s shield, a prohibition on some types of regulation of banks or insurance

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*Optical of Okla., Inc.*, 348 U.S. 483 (1955) (holding that assumed health concerns justified a law favoring optometrists over opticians); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (finding that potential traffic hazards justified an exemption of vehicles advertising the owner’s products from general advertising ban); *Kotch v. Board of River Port Pilot Comm’rs*, 330 U.S. 552 (1947) (holding that licensing scheme that disfavored persons unrelated to current river boat pilots was justified by the possible efficiency and safety benefits of a closely knit pilotage system).

<sup>113</sup> *Id.*

<sup>114</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996) (Scalia, J., dissenting). In dissenting to the Court’s decision in remanding *Equality Foundation I* back to the Sixth Circuit for reconsideration in light of *Romer*, Justice Scalia asserted that in contrast to *Romer*, *Equality Foundation I*

involves a determination by what appears to be the lowest electoral subunit that it does not wish to accord homosexuals special protection. It can make that determination effective, of course, only by instructing its departments and agencies to obey it—which is what the Cincinnati Charter Amendment does. Thus, the consequence of holding this provision unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals.

*Id.*

<sup>115</sup> See, e.g., Coles, *supra* note 68, at 1346; see also Seidman, *supra* note 5, at 83 (“The Court [in *Romer*] implies that more discrete measures disadvantaging gay people, having a more obvious connection to some legitimate government purpose, might survive rational basis review.”).

companies, or even a prohibition on legislation recognizing same sex domestic partnership.

This part of the opinion is unlikely to be applied to anything much narrower than a selective anti-civil rights initiative like Amendment 2.<sup>116</sup>

Of course, Coles would probably categorize Issue 3 as a “selective anti-civil rights initiative like Amendment 2” because of its broad proscription on any ordinances, regulations, rules or policies which favor homosexuals because of their sexual preference. While *Romer* does contain language to the effect that initiatives as broadly worded as Amendment 2 are unconstitutional regardless of whether enacted at the statewide or local level,<sup>117</sup> the fact remains that the Court did not rehear *Equality Foundation II* to resolve the matter.

Moreover, the Court in *Romer* also took issue with that fact Amendment 2 foreclosed homosexuals from obtaining specific protection against discrimination in any manner other than “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.”<sup>118</sup> The Sixth Circuit was careful to distinguish Issue 3 on this matter by noting that the measure only applied at the lowest level of government and “thus could not dispossess gay Cincinnatians of any rights derived from any higher level of state law and enforced by a superior apparatus of state government.”<sup>119</sup> With this said, it is conceivable that a less conservative court interpreting *Romer* could hold simply that any laws similarly worded to Colorado’s Amendment 2 are unconstitutional regardless of the level of government they apply to and would strike down Issue 3. But as long as the Supreme Court remains silent on the matter, these initiatives may pass constitutional muster *if* the initiative’s proponents find a court as friendly to their cause as the Sixth Circuit was in *Equality Foundation II*.

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<sup>116</sup> Coles, *supra* note 68, at 1346.

<sup>117</sup> Perhaps most persuasive is 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.” *Romer*, 517 U.S. at 633.

<sup>118</sup> *Id.* at 631.

<sup>119</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296-97 (6th Cir. 1997).

*B. Resolving the Unresolved Issue of "Equal Rights" or "Special Rights": Why Creating a New Protected Class Should Be Resisted*

The Supreme Court's reasoning in declining to rehear *Equality Foundation II* was that the Court does not "normally make an independent examination of state law questions that have been resolved by a court of appeals."<sup>120</sup> The question at issue was whether Issue 3 simply proscribed a municipal government from granting special protections to homosexuals or if it removed from homosexuals essential legal protections available to the society at large.<sup>121</sup> While it deferred to the Sixth Circuit's finding on this issue in *Equality II*, the Court reserved the right to find differently in subsequent cases it might hear.<sup>122</sup>

The Sixth Circuit based its holding, in part, on interpreting Issue 3 to eliminate only "'special class status' and 'preferential treatment' for gays as gays under Cincinnati ordinances and policies, leaving untouched the application, to gay citizens, of any and all legal rights generally accorded by the municipal government to all persons as persons."<sup>123</sup> By contrast, the Supreme Court in *Romer* found "nothing special" in the protections that Amendment 2 withheld.<sup>124</sup> Because Issue 3 and Amendment 2 are only truly distinguishable in the levels of government they apply to, the different conclusions appear merely to reflect a difference of opinion—acts "not of judicial judgment, but of political will."<sup>125</sup> Thus, how future cases will decide this issue is uncertain. Another court might reasonably construe *Romer* to find even a "lowest electoral subunit" measure like Issue 3 prevents homosexuals from exercising the same equal rights protections enjoyed by the heterosexual majority.<sup>126</sup>

There is growing sentiment in the United States that government should refrain from creating special protections for homosexuals.

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<sup>120</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 119 S. Ct. 365, 366 (1998) (citing *Bishop v. Wood*, 426 U.S. 341, 346-47 (1976)).

<sup>121</sup> *See id.* at 365-66.

<sup>122</sup> *See id.* at 366.

<sup>123</sup> *Equality Foundation*, 128 F.3d at 297. For a critical analysis of the "special rights" argument, see Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994) (arguing that the "discourse of equivalents" is misleading with respect to civil rights law).

<sup>124</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>125</sup> *Id.* at 653 (Scalia, J., dissenting).

<sup>126</sup> Given that *Romer* did not explicitly place homosexuals in a suspect or quasi-suspect class, such a finding would likely be based on a civil rights violation that would outweigh any legitimate justification offered in support of the measure, even under a rational basis test.

Some base this view on their moral convictions. Others, who “simply sa[y] ‘Stop’ to the seemingly endless proliferation of protected categories that divide people into favored and disfavored classes,” increasingly represent the swing vote in defeating these measures.<sup>127</sup> This is so, according to one commentator, because the voters understand that creating these categories has its consequences:

This path, taken for blacks, a truly victimized group, isn't necessarily appropriate for other groups. And we are not sure where it would lead. Could it provide the legal scaffolding for gay affirmative action and quotas, or attempts to establish same-sex marriages? No one knows. . . .

. . . Few of us want gays, or anybody else, to be second-class citizens. But when gay-rights bills come up, there's a nagging feeling that “something cultural is going on” and that something more than neutrality is being set in motion.<sup>128</sup>

At issue is the right of citizens to make their own individual moral judgment on this controversial issue and to act upon that judgment without incurring legal penalties. Certainly Americans feel gays should have the same rights as heterosexuals to jobs and housing, but this alone is insufficient justification for governments to legislate on the matter.

The problem with broad gay-rights legislation is its likelihood to intrude into areas where Americans are not so adamant about equal rights regardless of overt sexual preference—say, the classroom or the local Boy Scout pack.<sup>129</sup> Moreover, it is reasonable to believe that most homosexuals' employment and housing needs are already being accommodated given public sentiment and increased private inter-

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<sup>127</sup> John Leo, *Gay Tolerance, Not Approval*, U.S. NEWS & WORLD REP., May 3, 1993, at 20; see also *Four States Deal Gay Rights Setback*, *supra* note 14 (quoting opponent to the Fort Collins, Colorado gay-rights ordinance as saying he thought voting down the measure “showed most people here don't want the government to take a side in a controversial moral debate”).

<sup>128</sup> Leo, *supra* note 127, at 20.

<sup>129</sup> See, e.g., Peyser, *supra* note 13, at 51-52. Once enacted, these laws often take on a life of their own in the hands of zealous administrators intent on ferreting out “discrimination” in the most private of citizens' decisions. Consider, for example, Wisconsin's “lesbian roommate case.” Katherine Dalton, *Privacy and the ‘Lesbian Roommate’ Case*, WALL ST. J., July 20, 1992, at A14. In that case, two young women, Ms. Ready and Ms. Rowe, placed an ad in the local newspaper looking for a new roommate for the house they were renting. The women accepted the security deposit check of another woman, Ms. Sprague, replying to the ad, but then turned her down when the woman explicitly told them she was a lesbian. Consequently, Sprague filed a complaint with the municipal equal opportunity commission alleging a violation of a city fair housing ordinance. Finding that Ready had the authority to sublease, effectively making her the lessor, the EOC examiner hearing the case initially found for Sprague and ordered Ready and Rowe to pay Sprague \$3,000 in damages for Sprague's emotional distress over the incident, \$300 to make up for a security deposit lost on another apartment, and Sprague's legal fees as well. This decision was overturned on appeal by the full eleven-member EOC board, but it was three years after the complaint was first filed. See *id.*

vention.<sup>130</sup> Instead, efforts to enact gay-rights legislation seems more bent on garnering society's acceptance of the gay lifestyle<sup>131</sup> than on addressing critical civil rights gaps that only legal intervention alone can fill.

The natural consequences of creating a new protected class in homosexuals for the purposes of eliminating discrimination are twofold. First, it opens the door for further legislation to protect still other lifestyles or behavior. One can only speculate who might be next to receive protected class status—smokers, alcoholics or shoplifters perhaps.<sup>132</sup> Second, it provides the “legal scaffolding” that gay activists need to advance their ultimate agenda: the complete legal and social acceptance of homosexuality as a normal lifestyle. Efforts for gay affirmative action and quotas and same-sex marriage appear more credible with existing gay-rights legislation already on the books. Skeptics of how far gay “equal rights” can intrude upon a nation's collective culture and legal system need only consider the example of our Northern neighbor, Canada, where it is becoming illegal to oppose or even criticize the gay rights agenda.<sup>133</sup>

### *C. Dealing with the Issue of Animus: Moral Disapproval of Homosexuality As Not Per Se Irrational*

In *Romer*, the Court stated that Amendment 2's breadth was so discontinuous with the reasons offered in support of it that the “amendment seems inexplicable by anything but animus toward the class that it effects.”<sup>134</sup> One of the reasons offered in support of Amendment 2 was “respect for other citizens' freedom of association,

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<sup>130</sup> See, e.g., Schacter, *supra* note 6, at 409 (noting that an “increasing number of corporate employers are adopting antidiscrimination policies in the absence of laws, and IBM recently joined a growing list of companies offering domestic partnership benefits (like health insurance coverage) to gay employees and their partners”).

<sup>131</sup> See, e.g., *id.* (asserting that political process must play a role in “eradicating the coerced invisibility and continuing subordination of gay men and lesbians”); see also note 15 and accompanying text.

<sup>132</sup> See *Gay Rights: Supreme Court Ruling; Cincinnati's Opinion Is Ratified By Courts*, *supra* note 108, at B2.

<sup>133</sup> Dr. James Dobson of Focus on the Family reports that several Canadian provinces have laws that prohibit publication of statements deemed “discriminatory” towards homosexuality. Focus on the Family, FAM. NEWS FROM DR. JAMES DOBSON (Focus on the Family, Colorado Springs, Colo.), June 1998, at 4. Additionally, the Canadian equivalent of the United States' FCC monitors programming that portrays homosexuality negatively. See *id.* As a consequence, religious broadcasters expounding upon *Romans* 1, for example, or other Bible passages condemning homosexuality can be charged with unethical practices by Canadian officials interpreting their message as hateful. Focus on the Family could not even air certain medical information related to AIDS on a recent broadcast because it might be found offensive to Canadian homosexuals. See Focus on the Family, *supra* note 41, at 4.

<sup>134</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."<sup>135</sup> Consequently, some authors commenting on *Romer* have posited that because of the Court's "animus" statement, it recharacterized mere moral disapproval of homosexuality as "irrational animosity."<sup>136</sup> If this interpretation is accurate, then initiatives of a type like Issue 3 are invalid under *Romer* because they are often defended in the name of traditional moral values.<sup>137</sup>

The Court in *Romer* held that the breadth of Amendment 2 was "so far removed from these particular justifications that we find it impossible to credit them."<sup>138</sup> The Court did not, however, say that any justification—including mere moral disapproval—was per se irrational.<sup>139</sup> Thus, an initiative of a more discrete scope might still pass the rational basis test employed in *Romer* based on the same justifications.<sup>140</sup> Supporting this interpretation, the court in *Equality Foundation II* found the expression of the community's moral disapproval of homosexuality to be an "equally justifiable" community interest on par with associational liberty and conserving scarce resources.<sup>141</sup> Justice Stevens's opinion with respect to the denial of certiorari did not speak to this issue, leaving the Sixth Circuit's interpretation viable.

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<sup>135</sup> *Id.* at 635.

<sup>136</sup> Seidman, *supra* note 5, at 85, 101; *see also* Coles, *supra* note 68, at 1352 (asserting that "[s]aying that dislike of a group is based in morality or religion does not transform disliking the group into a legitimate explanation for discrimination"). Other authors are less convinced about the Court's drastic recharacterization of motives. *See, e.g.,* Schacter, *supra* note 6, at 381 ("After *Romer*, it appears that something more than bare condemnation of homosexuality must be marshalled in defense of anti-gay measures challenged on equal protection grounds, but the opinion does not delineate exactly what that something is.").

<sup>137</sup> A defense in the name of traditional moral values holds that an initiative may legitimately be based upon "broader respect for, and agreement with, persons who have generalized 'personal or religious objections to homosexuality' and, therefore, object to the recognition or encouragement of the practice in any context." Seidman, *supra* note 5, at 101.

<sup>138</sup> *Romer*, 517 U.S. at 635.

<sup>139</sup> The Sixth Circuit in *Equality Foundation II* observed that "[a]lthough the *Romer* Court never rejected associational liberty and the expression of community moral disapproval of homosexuality as rational bases supporting an enactment denying privileged treatment to homosexuals, it concluded that under the facts and circumstances of *Romer*, the state's argument in support of Colorado Amendment 2 was not credible." *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300-01 (1997).

<sup>140</sup> *See* discussion *supra* Part III(A).

<sup>141</sup> *Equality Foundation*, 128 F.3d at 301. The Sixth Circuit further noted that the *Romer* Court "resolved that the deferential 'rational relationship' test, that declared the constitutional validity of a statute or ordinance if it rationally furthered any conceivable valid public interest, was the correct point of departure for the evaluation of laws which uniquely burdened the interests of homosexuals." *Id.* at 294. Mark Papadopoulos opines that *Romer* "did influence [*Equality Foundation II*] but rather than compelling the invalidation of Issue 3 by force of logic, *Romer* directly led to a second upholding of the amendment by cementing rational basis review as the appropriate standard of review for [*Equality Foundation II*] and many homosexual rights cases to come." Papadopoulos, *supra* note 26, at 200.

Conceivably, as Justice Scalia suggested in his dissent to *Romer*, the Court took sides with the “knights” in the culture war over the gay agenda rather than with the “villeins.”<sup>142</sup> Gay activists often paint moral conservatives as “homophobic,” “hateful,” and “bigoted.”<sup>143</sup> The proponents of Issue 3 were not immune from such characterization.<sup>144</sup> Nonetheless, disapproval of homosexual practices is not rooted in either hate or animus. It is instead rooted on sound theological doctrine<sup>145</sup> and, as Justice Scalia noted, the same sort of disap-

<sup>142</sup> *Romer*, 517 U.S. at 652 (Scalia, J., dissenting).

<sup>143</sup> Focus on the Family, *supra* note 133, at 3. Not surprisingly, where moral conservatives are excoriated by gay activists and the popular media for their beliefs, pro-gay-rights commentators may engage in much more scornful discourse without fearing backlash. Consider the comments of Elizabeth Birch of the Human Rights Campaign made at a fundraising dinner with respect to a stroke suffered by Focus on the Family’s Dr. Dobson, a vocal critic of the gay agenda. Birch said:

I don’t know how much I believe in acts of God, and I don’t think we’ve seen the meteorites or hurricanes that were predicted, but it is true that within 24 hours of [Senator Trent Lott’s] anti-gay comment, the head of Focus on the Family suffered a stroke that hit his speech center and silenced him for 12 hours. I think if ever I was looking for a sign from God, that would be it.

Focus on the Family, *supra* note 41, at 6. Dr. Dobson queries in response to this statement, “Can you imagine any of us at [Focus on the Family] making a statement like this gloating over someone being stricken with a stroke and being unable to speak?” *Id.* Given the gay movement’s claim to oppose hate, this statement by Birch is the height of hypocrisy.

<sup>144</sup> *See, e.g.*, Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 422 (S.D. Ohio 1994) (citing the most notorious aspect of the plaintiff gays’ campaign against Issue 3 as “their ubiquitous ‘Hitler-KKK-McCarthy’ billboards appearing around the City”); Irwin, *supra* note 11, at A1, A8 (quoting a gay as asserting that Cincinnati is “an island of intolerance” and an Issue 3 proponent as observing “[the gays] lost Issue 3 and continued to fight, and we’re still the mean-spirited ones”); *see also Four States Deal Gay Rights Setback*, *supra* note 14 (quoting a same-sex marriage proponent as stating that after such a measure was voted down in their state, “[i]t’s the first time in my civil rights career that I have encountered so much deep-rooted prejudice and discrimination against a group of people”).

<sup>145</sup> In addition to specific references to homosexuality in Scripture, the standard for human sexuality relied on throughout the Bible is set forth in *Genesis 2:24* (New International): “For this reason a man will leave his father and his mother and be united to his wife, and they will become one flesh.” Dr. Dobson has this to say about homosexuality and the biblical text:

Try as we might, we cannot make any other behaviors—premarital intercourse, adultery, prostitution, male and female homosexuality—conform with what God has decreed from the beginning. The book of Leviticus issues this decree about homosexual behavior: “Thou shalt not lie with mankind as with womankind; it is abomination.” Why is the wording so emphatic? Theologians tell us it is because sexual deviancy distorts God’s original intention and corrupts the relationship between men, women and their Creator. When God looked at His arrangement in the Garden, he called it “good.” There is nothing in Scripture that provides a basis for making this pronouncement on any other form of sexual expression.

Focus on the Family, *supra* note 133, at 1-2 (citation omitted). Contrary to the scornful characterization by many gay activists of the theological motivations of many Christian groups, their message is not one of hate. Rather, from the perspective of most evangelical Christians, the hope for the homosexual that is found in Jesus Christ is first, forgiveness, *see 1 John 1:9*, and second, the opportunity to change their behavior, *see, e.g., 2 Corinthians 5:17* (New International) (“[I]f anyone is in Christ, he is a new creation; the old has gone, the new has come!”). Even in the early Christian church, it was recognized that forgiveness and change is available as much to the homosexual as any other person. *See, e.g., 1 Corinthians 6:9-11* (New International)



proval that “produced the centuries-old criminal laws [the Supreme Court] held constitutional in *Bowers*.”<sup>146</sup> Moral conservatives who oppose laws that favor gays do so out of moral principle and strongly-held religious convictions, not out of hate for those who practice homosexuality. Their goal is the preservation of the traditional family structure.<sup>147</sup> It may seem an outdated concept to some and unpopular to others, such as the powers that be in Washington, D.C., the popular media and Hollywood, but it is a stance that increasingly is being embraced by middle America in turning away gay-rights legislation.<sup>148</sup>

The disparagement of moral conservatives by pro-gay forces continues to reach new and ever more preposterous heights. Now, some gay activists and media and print personalities are suggesting that certain conservative religious and political groups should share the blame for violent acts committed against homosexuals because they create an “anti-homosexual climate” that incite violence.<sup>149</sup> John Leo

(“Do not be deceived: Neither the sexually immoral nor idolaters nor male prostitutes nor homosexual offenders nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God. *And that is what some of you were.* But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God.”) (emphasis added).

It should be clear that the position taken above is grounded on a literalist interpretation of the Bible. Certainly, there are some in the “religious community” who would debate whether the Judeo-Christian tradition requires the moral condemnation of homosexual practices. See, e.g., J.F. Walsh, Jr., *First Amendment Protection of Homosexual Conduct*, 48 CASE W. RES. L. REV. 381, 402 n.104 (1998).

<sup>146</sup> *Romer*, 517 U.S. at 644 (Scalia, J., dissenting). Furthermore, Robert Bork writes that “[m]oral 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>147</sup> See Focus on the Family, *supra* note 133, at 4.

<sup>148</sup> Opponents of a Maine gay-rights initiative obtained its repeal by focusing on a morality argument as contrasted with an “equal rights, not special rights” argument. “Technically, it does have to do with special rights . . . but if you scratch the surface, it’s a moral concern,” said the president of a group that opposed the law. Peyser, *supra* note 13, at 51.

<sup>149</sup> Headlining the group is Katie Couric of NBC’s *Today* show. With respect to the beating death of gay college student Matthew Shepard, Couric asked Wyoming Governor Jim Geringer whether he believed, as some gay activists did, that the

Christian Coalition, the Family Research Council, and Focus on Family [sic] are contributing to this anti-homosexual atmosphere by having an ad campaign saying, “If you are a homosexual, you can change your orientation.” That prompts people to say, “If I meet someone who’s a homosexual, I’m going to take action and try to convince them and try to harm them.” Do you believe such groups are contributing to this climate?

Focus on the Family, *supra* note 41, at 1-2. Couric later returned to this topic and addressed it at greater length the next day with Elizabeth Birch of the Human Rights Campaign. See *id.* at 2. Couric neither quoted the “offending” groups nor documented the charges against them. *Id.* at 4; see also Jonathan Alter, *Trickle-Down Hate*, NEWSWEEK, Oct. 26, 1998, at 44 (“But just as the white racists created a climate for lynching blacks, just as hate radio created a climate for militias, so the constant degrading of homosexuals is exacting a toll in blood.”).

Incidentally, the media campaign referenced by Couric made the point that it is possible for some homosexuals to come out of the gay lifestyle and into healthy heterosexual relationships. See Focus on the Family, *supra* note 41, at 3. Some homosexuals are unhappy with the life they

observes that using the “climate” argument, a familiar political device once commonly used *against* the left, but now used almost exclusively *by* the left,<sup>150</sup> has certain political advantages.

[Y]ou can discredit principled opposition without bothering to engage it. All you have to do is connect the pope, your local rabbi, or any other adversary to a gruesome murder, and your work is done. Seen through the lens of “bias” (often no more than disagreement with the value system of the cultural left), the pope and the shooters start to merge in the minds of rational people.<sup>151</sup>

Leo continues: “Beware of arguments based on climates or atmospheres. Most of them are simply attempts to disparage opponents and squelch legitimate debate.”<sup>152</sup>

If a court agreed that opposing the gay rights agenda is merely spite and creates a “climate” that incites violence, the popular will of the American people would be undermined. Legislators can not be relied upon to oppose the gay agenda. Because of the political clout of homosexual activists, few leaders from either political party, or anyone else of visibility or influence for that matter, will speak out in fear of being branded “politically incorrect”<sup>153</sup> or, even worse, “intolerant.”<sup>154</sup> Citizens with the moral courage to oppose the gay rights agenda should not be foreclosed from doing so because some judges do not share their views.<sup>155</sup> While not explicitly adopting the “disapproval is hate” or “climate” arguments, the Court in *Romer* leaves the door open for future cases to do so.

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are leading and sincerely do want to change. Religious conviction is widely recognized as a means to such change. As psychologist Patricia Hannigan said in *Newsweek*: “If the foremost priority in one’s life is religious faith, then personal happiness might come from conforming to faith rather than from pursuing sexual orientation.” Miller & Leland, *supra* note 41, at 50.

<sup>150</sup> See John Leo, *Avoid ‘Climate’ Control*, U.S. NEWS & WORLD REP., Nov. 9, 1998, at 20.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Focus on the Family, *supra* note 133, at 3.

<sup>154</sup> Jonathan Alter remarks that in today’s America, “the only true way to be ostracized by society . . . is to be too close-minded. The intolerant aren’t tolerated.” Jonathan Alter, *In the Time of Tolerance: When It Comes To Sex in This Nonjudgmental Age, Nobody Wants to Start Casting Stones*, NEWSWEEK, Mar. 30, 1998, at 29.

<sup>155</sup> Patrick Norton also asserts that

[t]he 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 legislature that disfavors a group based entirely on the Court’s assessment of the motives for enacting it.

Norton, *supra* note 109, at 929; see also *James v. Valtierra*, 402 U.S. 137, 142 (1971) (“[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.”).

## V. CONCLUSION

Whether *Romer v. Evans* ushers in a new era of gay equality or is merely a pyrrhic victory for gay activists remains to be determined. Because of the Supreme Court's vagueness in *Romer*, future courts hearing gay-rights suits are free to read the case either broadly or narrowly. *Equality Foundation II* construed *Romer* narrowly as only striking down broad statewide initiatives like Colorado's Amendment 2, leaving more narrow local initiatives like Issue 3 standing. Furthermore, *Equality Foundation II* read *Romer* as solidifying rational basis review as the proper measure of the constitutionality for initiatives like Issue 3. What is now certain after the Supreme Court declined to review the Sixth Circuit's decision in *Equality Foundation II* is that measures similar to Issue 3 may pass constitutional muster, at least until the Court rules determinatively on the issue of the allowable scope of such measures. But courts are free to decide otherwise as well. Notwithstanding *Equality Foundation II*, the Court's tenor towards homosexuals changed substantially with *Romer*, so that a liberal judiciary at odds with a public less willing to make homosexuals the legal and social equals of heterosexuals will likely be commonplace from now on.

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