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HOMOSEXUAL DISCRIMINATION AND GENDER: WAS *ROMER V. EVANS* REALLY A VICTORY FOR GAY RIGHTS?

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This article argues that while Romer v. Evans *marked a victory for gays, lesbians and bisexuals, its impact was short lived. Lower courts have cited* Romer v. Evans *to uphold laws which discriminate against homosexuals in areas ranging from military service to employment. The argument developed in this article is that discrimination based on sexual orientation is a form of gender discrimination requiring courts to review such laws under intermediate scrutiny. Under this more demanding standard of review, many of the laws lower courts uphold under the rational basis standard would be struck down as a violation of the Equal Protection Clause.*

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I. INTRODUCTION

In *Romer v. Evans* the Supreme Court struck down an amendment to the Colorado Constitution which invalidated preexisting laws prohibiting discrimination based on a person's sexual orientation.[1] The opinion was significant because it marked the first time the Court struck down a law which discriminated against homosexuals. Commentators heralded the opinion as a victory for gay rights and suggested that *Evans* went a long way in overturning the Court's opinion in *Bowers v. Hardwick*.[2]

While *Romer v. Evans* marked a short term victory for gay rights and may show changing attitudes on the Court,[3] it is doubtful the opinion is anything more than a symbolic victory for homosexuals. The Court struck down the Colorado Amendment using only rational basis review.[4] Justice Kennedy's majority opinion refused to scrutinize laws discriminating against homosexuals using some form of heightened scrutiny.[5] Following this lead, federal courts since *Romer v. Evans* have evaluated discriminatory laws using rational basis review.[6] The result is that the majority of lower federal courts have upheld legislation discriminating against homosexuals.

Given this trend in the lower courts one should ask: Was *Romer v. Evans* the victory for gay rights commentators suggested? This article argues it was not. Until the Court uses some form of heightened judicial scrutiny to review laws discriminating against homosexuals, lower courts will continue to validate such laws. Discrimination against homosexuals should be viewed as a form of gender discrimination and evaluated using intermediate scrutiny. Such scrutiny, properly applied, would invalidate laws designed to disadvantage, alienate, or otherwise discriminate against homosexuals.

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1. *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

2. *See, e.g.*, Andrew M. Jacobs, Romer *Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893 (1996); Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203 (1996); Kevin G. Walsh, Comment, *Throwing Stones: Rational Basis Review Triumphs Over Homophobia*, 27 SETON HALL L. REV. 1064 (1997); Katherine M. Hamill, Comment, Romer v. Evans: *Dulling the Equal Protection Gloss On* Bowers v. Hardwick, 77 B.U. L. REV. 655 (1997); Courtney G. Joslin, Recent Development, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick—Romer v. Evans, *116 S. Ct. 1620*, 32 HARV. C.R.-C.L. L. REV. 225 (1996).

3. Justice O'Connor, who voted with the majority of the Court in *Bowers v. Hardwick* to uphold a Georgia law banning homosexual sodomy, voted to overturn Amendment 2.

4. *See Romer*, 517 U.S. at 631-32.

5. *See id.* at 625-26.

6. *See infra* Part III.

II. THE EVOLUTION OF *ROMER V. EVANS*

A. Evans v. Romer *and the Colorado Supreme Court*

1. Evans I *and Strict Scrutiny*

In May 1992, Colorado voters submitted a proposed amendment to the Colorado Constitution.[7] In relevant part, it provided:

> 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.[8]

The proposed amendment passed by a narrow margin on November 3, 1992.[9] Nine days after the election, a group of citizens filed suit in the Denver District Court to enjoin enforcement of what became known as "Amendment 2."[10]

The state district court granted plaintiff's request for a temporary restraining order enjoining enforcement of the newly passed amendment.[11] The district court concluded Amendment 2 was subject to strict scrutiny review because it burdened a fundamental right by giving effect to private biases.[12] The State appealed the district court's temporary restraining order to the Colorado Supreme Court. In an opinion by Chief Justice Rovira, the Colorado court affirmed the issuance of the restraining order.[13] The Colorado court held strict scrutiny should be applied in reviewing the statute because Amendment 2 burdened the fundamental right of all citizens to participate in the political process.[14]

In reaching its decision, the Colorado court relied on a number of U.S. Supreme Court decisions.[15] In *Reynolds v. Sims,* the Court struck down an Alabama vote apportionment scheme for state elections.[16] The apportionment scheme gave residents in certain parts of the state more representatives per

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7. *See* Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) [hereinafter *Evans I*].
8. *See id.*
9. *See id.* The amendment passed 813,966 to 710,151 votes or 53.4% to 46.6%. *See id.*
10. *See id.*
11. *See id.* at 1273.
12. *See id.* at 1273-74.
13. *See id.* at 1286.
14. *Evans I*, 854 P.2d at 1286.
15. *See id.* at 1276.
16. 377 U.S. 533 (1964).

capita than residents in other parts of the state and had the effect of giving white citizens more voting strength than black voters.[17] The Court reasoned such a scheme violated the equal protection clause because some voters had more influence over elections than other voters.[18] According to the *Reynolds* Court, equal protection requires vote apportionment to be based on population, not geographic location.[19] A companion case, *Lucas v. Colorado General Assembly*,[20] established that a vote apportionment scheme similar to the one invalidated in *Reynolds* could not survive an equal protection challenge simply because it was approved by state voters in a referendum.[21]

In a second line of cases, the Court limited the restrictions states could impose on citizens' rights to vote.[22] Between 1966 and 1972, the Court struck down legislation which restricted the vote through imposition of a poll tax,[23] unreasonably long residency requirements,[24] and a restriction that limited voters in a school board election to those who owned or leased property or were parents in the school district.[25]

Finally, the Colorado court cited a line of cases establishing that a majority of the electorate could not change the political process in order to keep certain groups from passing favorable legislation.[26] In *Hunter v. Erickson,* the Court struck down an amendment to the Akron city charter.[27] The amendment provided that any ordinance dealing with racial discrimination in housing had to first be approved by a majority of voters before it became effective.[28] The amendment was passed in response to a fair housing ordinance passed by the Akron City Council prohibiting racial discrimination.[29] Following *Hunter,* the Court invalidated a Seattle law restricting busing to integrate its schools.[30] *Washington v. Seattle School District* invalidated a Washington state law which essentially preempted a Seattle busing plan implemented to undo *de facto* desegregation in the schools.[31] A bare majority of Justices concluded the law could not pass constitutional muster as it changed the normal operation of the political process in order to prevent a particular group from achieving favorable legislation.[32]

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17. *See id.* at 538.
18. *See id.*
19. *See id.*
20. 377 U.S. 713 (1964).
21. *See id.*
22. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1086-91 (2d ed. 1986).
23. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).
24. *See* Dunn v. Blumstein, 405 U.S. 330 (1972).
25. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).
26. *See Evans I*, 854 P.2d at 1279-81.
27. 393 U.S. 385 (1969).
28. *See id.* at 386.
29. *See id.*
30. *See* Washington v. Seattle School Dist., 458 U.S. 457 (1982).
31. *Id.*
32. *See id.*

In its ruling, the Colorado court acknowledged that each line of Supreme Court cases was distinguishable from Amendment 2.[33] But it argued the common principle established by these cases was that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest."[34] The court also acknowledged that the group at issue in the lines of cases cited was often a racial minority.[35] It nevertheless contended that this principle, while typically used to strike down legislation burdening racial minorities, was not limited to race.[36] Accordingly, Chief Justice Rovira used strict scrutiny to evaluate the amendment's constitutionality.[37]

In reviewing the district court's issuance of a temporary restraining order, the Colorado court found Amendment 2 was not supported by a compelling state interest and was not narrowly tailored.[38] The court found the immediate purpose of Amendment 2 was to remove homosexuals from the normal political process in order to keep them from participating in that process.[39] Only homosexuals have the burden of amending the state constitution before passing favorable legislation.[40] Such a requirement places a burden on homosexuals which no other group in the state faces.[41] The only real purpose the court was able to decipher from Amendment 2 was a bare desire to discriminate against homosexuals.[42]

In addition to finding that Amendment 2 lacked any legitimate purpose, the court rejected the state's claim that Amendment 2 was narrowly tailored.[43] The language used is sweeping in scope.[44] It repealed existing legislation prohibiting discrimination against homosexuals.[45] Amendment 2 also prohibited the passage of future legislation barring discrimination against homosexuals.[46] Accordingly, the court concluded it was improbable Amendment 2 could survive strict scrutiny review after a full hearing on the merits.[47] It affirmed the district court's temporary restraining order prohibiting enforcement of Amendment 2 until a full hearing on the merits could be concluded.[48]

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33. *See Evans I*, 854 P.2d at 1279.
34. *Id.*
35. *See id.* at 1281.
36. *See id.* at 1281-82.
37. *See id.* at 1279.
38. *See id.* at 1283-84.
39. *See id.* at 1285.
40. *See id.*
41. *See id.*
42. *See id.* at 1285-86.
43. *See id.* at 1284-85.
44. *See id.*
45. *See id.* at 1284.
46. *See id.*
47. *See id.* at 1286.
48. *See id.*

Justice Erickson dissented in *Evans I*.[49] He argued that the three lines of cases relied upon by the majority for its decision were best explained by reference to suspect classifications such as race or clearly articulated rights acknowledged by the Supreme Court.[50] No suspect class was burdened by Amendment 2, and the court had never explicitly articulated the "fundamental right" of political participation that the majority relied upon in reaching its decision.[51] In *Bowers v. Hardwick*,[52] the Court stated that there should be "great resistance" to the expansion of federal rights based on expansive readings of the Due Process or Equal Protection clauses.[53] Justice Erickson argued the court had refused to acknowledge fundamental rights in areas including education, housing, welfare, and government employment.[54] Based on what he saw as a narrow interpretation by the court of fundamental rights, he argued it was improbable the court would recognize the right to political participation as fundamental and deserving of strict scrutiny.[55]

Justice Erickson was also troubled by the fact that the Colorado court had been the first court to articulate such a right.[56] He contended it was not the job of the State Supreme Court to create new fundamental rights even when such rights are fairly inferred from federal case law.[57] Justice Erickson would have evaluated Amendment 2 by the rational basis standard of review and would have reversed the trial court's temporary injunction pending a full trial.[58]

2. Evans II—*Application of Strict Scrutiny*

Following *Evans I*, the case was remanded to the Denver District Court.[59] On remand, the State proffered six interests it claimed were compelling and justified Amendment 2.[60] It argued Amendment 2 was passed (1) to deter factionalism, (2) to preserve the integrity of the State's political functions, (3) to preserve the State's resources to fight discrimination against suspect classes, (4) to prevent government interference with personal, familial, or religious privacy, (5) to prevent government from subsidizing special interest group legislation, and (6) to promote the overall well being of children.[61] The state district court accepted only the claim that protection of

49. *See Evans I*, 854 P.2d at 1286 (Erickson, J., dissenting).
50. *See id.* at 1289-93.
51. *See id.* at 1287.
52. 478 U.S. 186 (1986).
53. *See id.* at 195.
54. *See Evans I*, 854 P.2d at 1291 (Erickson, J., dissenting).
55. *See id.* at 1292.
56. *See id.* at 1301.
57. *See id.*
58. *See id.* at 1302.
59. Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994) [hereinafter *Evans II*].
60. *See id.* at 1339-40.
61. *See id.*

family relationships and religious beliefs were compelling interests.[62] However, it invalidated Amendment 2 because it found the amendment was not narrowly tailored to promote these interests.[63] The state appealed to the Colorado Supreme Court on several grounds.[64]

On appeal, the Colorado court affirmed its initial ruling in *Evans I*, and held Amendment 2 was properly reviewed by the district court under the strict scrutiny standard.[65] To survive strict scrutiny, proponents of a law must show it is necessary to promote a compelling government interest and it is narrowly tailored to promote that interest.[66] The State first contended Amendment 2 promoted the sanctity of religious, familial, and personal privacy.[67] It argued many people were morally and religiously opposed to homosexuals and their lifestyle and that such people should not be forced to accommodate homosexuals by renting property to them or hiring them.[68] The Colorado court found that even if this was the aim of Amendment 2, it was not narrowly tailored.[69] Such objectives could be accomplished through less restrictive amendments to existing legislation, which prohibited discrimination against homosexuals.[70] The court also rejected the State's contention that Amendment 2 was passed to protect family values.[71] Simply because citizens have a right to familial privacy does not give them the right to have the government endorse those values.[72] Finally, the court rejected the claim that Amendment 2 was passed to preserve personal privacy.[73] Writing for the majority, Justice Rovira concluded that even if property owners or employers could not discriminate against homosexuals in renting property or in employment, the invasion of privacy was so limited and narrow that protecting it did not constitute a compelling state interest.[74]

The Colorado court easily dismissed the State's argument that Amendment 2 was designed to preserve financial resources to fight discrimination against suspect classes such as racial minorities.[75] As the court noted, protecting financial resources is not a compelling state interest.[76] Nor was Amendment 2 necessary or narrowly tailored to achieve this goal.[77] The

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62. *See id.*
63. *See id.* at 1340-41.
64. *See id.* at 1341.
65. *See id.*
66. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
67. *See Evans II*, 882 P.2d at 1342.
68. *See id.*
69. *See id.* at 1342-43.
70. *See id.* at 1343.
71. *See id.*
72. *See id.*
73. *See id.* at 1344.
74. *See id.* at 1345.
75. *See id.*
76. *See id.*
77. *See id.* at 1346.

court also rejected the State's claim that Amendment 2 promoted the establishment of public and private norms of acceptable behavior.[78] Such interests had never been recognized as "compelling" state interests, and in the court's view, Amendment 2 was not necessary in promoting such norms of behavior.[79]

The majority in *Evans II* went on to reject the State's claim that Amendment 2 curbed factionalism and government support for special interests.[80] The court held neither purported objective was a compelling state interest.[81] Nor could it be said that Amendment 2 was necessary or narrowly tailored to meet these objectives.[82] The Justices also argued that the State's purported interests in Amendment 2 were insufficient, when combined, to overcome strict scrutiny.[83]

Finally, the court rejected the State's Tenth Amendment claim.[84] Proponents of Amendment 2 argued the rights at issue in Amendment 2 were uniquely state rights under the Tenth Amendment because they involved the state constitution.[85] Accordingly, they contended federal constitutional law was not applicable.[86] The court did not accept this argument, reasoning that "States have no compelling interest in amending their constitutions in ways that violate fundamental federal rights."[87]

In an odd concurrence, Justice Scott argued Amendment 2 should be held unconstitutional based on the Privileges and Immunities Clause of the Constitution.[88] He contended Amendment 2 burdened the right to "peaceably assemble and petition the government for redress of grievances" and therefore violated the Privileges and Immunities Clause.[89] The Privileges and Immunities Clause has rarely been used to invalidate legislation.[90] Since the Court's initial interpretation of the clause in the *Slaughter House Cases*,[91] it has invalidated only one state law based on the clause.[92] That case involved a state tax law and was overruled five years later.[93] Nevertheless, Justice Scott argued the history of the Privileges and Immunities Clause indicated the Framers' intention that the clause extend to more than the limited rights rec-

78. *See id.* at 1346-47.
79. *See Evans II*, 882 P.2d at 1347.
80. *See id.* at 1348-49.
81. *See id.* at 1348.
82. *See id.* at 1349.
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.* at 1350.
87. *Id.*
88. *See id.* at 1351 (Scott, J., concurring).
89. *See id.*
90. *See* TRIBE, *supra* note 22, §§ 7-2 to 7-4, at 548-59.
91. 83 U.S. 36 (1873).
92. *See* Colgate v. Harvey, 296 U.S. 404 (1935).
93. *See* TRIBE, *supra* note 22, § 7-4, at 556-57.

ognized by the Court in the *Slaughter House Cases*.[94] He failed to explain why, after over a hundred years of settled law, the Privileges and Immunities Clause should be revamped by a state supreme court.[95]

Justice Erickson dissented in *Evans II*.[96] His dissent did not question invalidating Amendment 2 once strict scrutiny was invoked.[97] He questioned invoking strict scrutiny review at all.[98] He argued that the fundamental right of political participation the majority relied upon to ratchet up the standard of judicial review from the ordinary rational basis standard to strict scrutiny had never been acknowledged as a fundamental right by the U.S. Supreme Court or any federal circuit court.[99] Justice Erickson also suggested it was significant that Amendment 2 was passed directly by Colorado voters and not the Colorado legislature.[100] He contended the courts should give more leniency when reviewing popularly enacted laws such as Amendment 2.[101] He would have reviewed Amendment 2 under the rational basis standard.[102] Once properly reviewed under that standard, Justice Erickson claimed Amendment 2 bore a rational relationship to protecting religious freedom, preserving state resources to fight discrimination against protected classes, and promoting uniformity in state law.[103]

B. Romer v. Evans—*More Confusion in Already Muddied Water*

On appeal to the U.S. Supreme Court a number of arguments were made.[104] The State contended the Colorado court improperly reviewed Amendment 2 under the strict scrutiny standard.[105] It argued the Court had never recognized the "fundamental right" of political participation that the Colorado court relied on in justifying strict scrutiny review.[106] In addition, no federal court had ever recognized homosexuals as a "suspect class" requiring

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94. *See Evans II*, 882 P.2d at 1355-56 (Scott, J., concurring).
95. *See id.*
96. *See id.* at 1356 (Erickson, J., dissenting).
97. *See id.* at 1356-66.
98. *See id.* at 1356-57.
99. *See id.* at 1359-60.
100. *See id.* at 1356.
101. *See id.*
102. *See id.* at 1366.
103. *See id.* at 1362-66.
104. *See* Brief of Petitioners, Romer v. Evans, No. 94-1039, 1995 WL 310026; Brief of Respondents, Romer v. Evans, No. 94-1039, 1995 WL 417786; Brief for Respondents, City of Aspen and City Council of Aspen, Romer v. Evans, No. 94-1039, 1995 WL 370335; Amicus Brief of Lamda Legal Defense Fund, Romer v. Evans, No. 94-1039, 1995 WL 782809; Amicus Brief of Professors Tribe, Ely, Gunther, Kurland and Sullivan, Romer v. Evans, No. 94-1039, 1995 WL 862021; Petitioners' Reply Brief, Romer v. Evans, No. 94-1039, 1995 WL 466395 [hereinafter Romer Briefs].
105. *See* Brief of Petitioners, Romer v. Evans, No. 94-1039, 1995 WL 310026, at *10-12.
106. *See id.* at *10-11.

the courts to apply strict scrutiny.[107] The State argued Amendment 2 should have been reviewed under rational basis review.[108] It offered three rationales for the amendment.[109] Amendment 2 protected State resources to fight other types of discrimination, promoted a uniform rule state wide, and allowed landowners and religious institutions freedom to exclude homosexuals because they found their lifestyle offensive.[110]

Opponents to Amendment 2 defended the Colorado court's decision, arguing that Amendment 2 was subject to strict scrutiny because its effect burdened the fundamental rights of all citizens to political participation.[111] They also claimed that if Amendment 2 was subject only to rational basis review, it was unconstitutional.[112] The only real purpose advanced was a desire to undermine homosexual influence in the political process and this was not a legitimate state interest.[113]

An amicus brief submitted by a number of organizations dedicated to gay, lesbian, and bisexual rights argued that the Court should consider homosexuals a suspect class and apply heightened scrutiny to Amendment 2.[114] The brief argued that the Court had never specified what characteristics were necessary for a group to be considered a suspect class.[115] Nevertheless, in various decisions, the Court hinted at characteristics relevant to the inquiry.[116] Citing *Frontiero v. Richardson,* amici argued that when a characteristic bears "no relation to the individual's ability to participate in and contribute to society," strict scrutiny review should be considered.[117] In addition, homosexuals, like minorities and women, had historically suffered discrimination.[118] They further contended homosexuality was an immutable characteristic, and that the group had traditionally been politically powerless.[119] These factors, when combined, were sufficient justifications for the Court to apply heightened scrutiny to Amendment 2 and other laws classifying citizens according to their sexual orientation.[120] The brief also distinguished *Bowers v. Hardwick* on the ground that *Hardwick* applied only to

107. *See id.* at *11.
108. *See id.* at *10.
109. *See id.* at *12-13.
110. *See id.*
111. *See* Brief for Respondents, Romer v. Evans, No. 94-1039, 1995 WL 417786, at *12-13.
112. *See id.*
113. *See id.*
114. *See* Amicus Brief of Lambda Legal Defense Fund, Romer v. Evans, No. 94-1039, 1995 WL 782809, at *5.
115. *See id.*
116. *See id.*
117. *See id.* at *9.
118. *See* Amicus Brief, 1995 WL 782809, at *10.
119. *See id.* at *15-21.
120. *See id.* at *25.

sodomy.[121] Homosexuality, amici argued, was not defined by the specific act of homosexual sodomy.[122] The brief pointed to the fact that studies showed many people with homosexual tendencies had never engaged in homosexual sodomy.[123] In addition, practicing homosexuals were lawfully entitled to engage in other types of simple love not involving sodomy.[124] Finally, they distinguished *Hardwick* arguing it was decided based on the Due Process Clause and held only that there was no protected privacy interest recognizing homosexual sodomy under the Due Process Clause.[125]

In large part, the Court's opinion ignored most of these arguments.[126] Justice Kennedy, writing for a six Justice majority, invalidated Amendment 2 based on other grounds.[127] The "fundamental right" of political participation that the Colorado court claimed was "clearly . . . guarantee[ed]" by the Equal Protection Clause[128] was not acknowledged or discussed by the Court.[129] Instead, Justice Kennedy appeared to adopt a position taken by Professors Tribe, Ely, Gunther, Kurland, and Sullivan in an amicus brief.[130] These scholars claimed Amendment 2 was a *per se* violation of the Fourteenth Amendment's guarantee to equal protection under the law.[131] In their view, invalidation of Amendment 2 rested not in the Court's traditional three tiered approach to Equal Protection challenges, but "flow[ed] directly from the plain meaning of the Fourteenth Amendment's text."[132] They argued Amendment 2 singled out a class of persons and rendered them completely ineligible for protection under state law.[133] The brief pointed out that Amendment 2's sweep went beyond repealing past legislation designed to protect homosexuals.[134] It gave homosexuals no protection from discrimination and removed them from protection under the law that all other citizens of the state enjoyed.[135]

The Court's analysis seized on these ideas, and Justice Kennedy's majority opinion gave little discussion of rational basis review.[136] Instead, the Court emphasized the odd nature of Amendment 2 and the hardship it

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121. *See id.* at *25-30.
122. *See id.* at *28.
123. *See id.* at *29.
124. *See id.* at *29-30.
125. *See id.* at *25-28.
126. *See Romer*, 517 U.S. at 623-27.
127. *See id.*
128. *Evans II*, 854 P.2d at 1276.
129. *See Romer*, 517 U.S. at 621-30.
130. *See* Amicus Brief of Professors Tribe, Ely, Gunther, Kurland, and Sullivan, Romer v. Evans, No. 94-1039, 1995 WL 862021, at *1.
131. *See id.*
132. *See id.* at *4.
133. *See id.*
134. *See id.* at *6 n.3.
135. *See id.* at *8-10.
136. *See Romer*, 517 U.S. at 621-30.

worked on homosexuals.[137] Most of the Court's discussion explained the expansive language used in Amendment 2.[138] The Court argued Amendment 2 went far beyond repealing past legislation benefiting gays, lesbians, and bisexuals.[139] It also prevented any future legislation with a similar effect short of a constitutional amendment.[140] What most troubled the Court was its belief that Amendment 2 removed homosexuals from protections of laws preventing arbitrary discrimination.[141] Such laws would include statutes preventing unfair discrimination in insurance, arbitrary and capricious action by state agencies, and discrimination by state employers based on traits other than merit.[142] The Court emphasized that a state had no legitimate purpose in completely removing a select group of citizens from the general protection of discrimination laws.[143]

Justice Kennedy went on to reject Colorado's claim that Amendment 2 did nothing more than prevent homosexuals from receiving special treatment under the law.[144] He reasoned that the expansive nature of Amendment 2 did far more than merely prevent homosexuals from gaining special treatment.[145] Instead, he read Amendment 2 as removing homosexuals from general protection under all statutes passed to prevent arbitrary and capricious discrimination.[146] According to Justice Kennedy, this fact meant Amendment 2 did more than strip homosexuals of "special rights" and prevent them from obtaining special rights through future legislation. Amendment 2 afforded homosexuals less protection under the law than other citizens enjoyed.[147]

By removing homosexuals from the general protection of antidiscrimination laws, Amendment 2 essentially separated homosexuals from the rest of the population, creating two classes of unequal citizens.[148] Quoting Justice Harlan's famous dissent in *Plessy v. Ferguson*, the Court reasoned that the law "neither knows nor tolerates classes among citizens."[149] It argued Amendment 2 was so broad in scope it could be read as nothing more than an attempt to single out a politically and socially unpopular group of citizens and deny that group equal protection under the laws.[150] A bare desire to harm a politically unpopular group was not a legitimate purpose and could not

137. *See id.* at 627-35.
138. *See id.*
139. *See id.* at 624.
140. *See id.* at 631.
141. *See id.* at 630.
142. *See id.*
143. *See id.* at 626-27.
144. *See id.* at 627.
145. *See id.* at 623-31.
146. *See id.*
147. *See id.*
148. *See Romer*, 517 U.S. at 621-30.
149. *See id.* at 622 (citing Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting)).
150. *See id.* at 633-34.

withstand even minimal constitutional scrutiny.[151]

In an angry and bitter dissent, Justice Scalia called the majority opinion "ridiculous," "facially absurd," and "terminal[ly] sill[y]."[152] Justice Scalia accused Justice Kennedy of undermining the democratic process through intellectual elitism, and he called the majority opinion "nothing short of preposterous" and "insulting" to Colorado citizens.[153] Justice Scalia's venomous rhetoric aside, the dissent took Justice Kennedy to task on a number of issues unique to Amendment 2 and homosexual rights.[154]

Justice Scalia contended that the majority's reasoning was anomalous given the Court's prior ruling in *Bowers v. Hardwick*.[155] He noted that the majority did not overrule *Hardwick* and in fact had failed to even cite *Hardwick*.[156] Justice Scalia argued that if a state could pass laws outlawing the very act of homosexual sodomy, surely it could "preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[157]

Justice Scalia also complained that the Court gave an unnecessarily broad reading to Amendment 2.[158] In his eyes the amendment did nothing more than repeal existing legislation and prevent future legislation giving homosexuals "special treatment."[159] According to Justice Scalia's reading of Amendment 2, it did not remove homosexuals from general protections under Colorado law as the Court concluded.[160] Homosexuals, like any other group, would be protected under Colorado laws preventing arbitrary and capricious discrimination.[161] A law requiring pensions to be paid to retiring state employees would apply equally to all citizens regardless of sexual orientation.[162] In short, Justice Scalia claimed the sweeping scope of Amendment 2, which so troubled the majority, was not consistent with how Amendment 2 had been interpreted by the Colorado Supreme Court.[163] At the very least, he believed the majority should evaluate Amendment 2 based on the Colorado court's interpretation, and he claimed the majority reading of Amendment 2 "finds no support in law or logic."[164]

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151. *See id.*
152. *Id.* at 639, 647 (Scalia, J., dissenting).
153. *Id.* at 636, 652.
154. *See id.* at 636-53.
155. *See id.* at 640-44.
156. *See id.* at 636-40 (Scalia, J., dissenting).
157. *See id.* at 636.
158. *See id.* at 636-40.
159. *See id.* at 638.
160. *See id.* at 636.
161. *See id.*
162. *See id.*
163. *See id.* Justice Scalia quoted the majority opinion in the Colorado court. In a footnote, the Colorado Supreme Court stated, "[o]f course Amendment 2 is not intended to have any effect on [general legislation], but seeks only to prevent the adoption of antidiscrimination laws intended to protect gays, lesbians, and bisexuals." *Evans II*, 882 P.2d at 1346 n.9.
164. *See Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

The dissent also contended that the Court's decision undermined the democratic process specifically recognized in the Constitution.[165] Justice Scalia pointed out that Amendment 2 was adopted by a majority of Colorado voters.[166] He argued homosexuals comprised considerably less than 50% of the population, but claimed considerably more influence in the democratic process.[167] He contended homosexuals in Colorado were able to use that process to seek legislation favorable to them.[168] The influence gays and bisexuals exercise in the democratic process is legitimate, and Justice Scalia contended these groups were free to seek favorable legislation.[169] He argued homosexuals, like any other group, "are subject to being countered by lawful, democratic countermeasures as well."[170] Justice Scalia lambasted the majority for undermining democracy when homosexuals had the full right to participate in the process that produced Amendment 2.[171]

C. What was the Court Trying to Say? Interpreting Romer v. Evans

The *Romer v. Evans* litigation evidences considerable confusion among the various courts. While six Justices on the Supreme Court agreed Amendment 2 was unconstitutional based on rational basis review, that view was not shared by any of the lower courts that interpreted Amendment 2.[172] The lower courts themselves agreed the act was unconstitutional, but they could not agree on a common ground for invalidating Amendment 2.[173] At least three independent grounds were offered by state court judges as to why Amendment 2 was unconstitutional.[174] The state district court that initially heard arguments on Amendment 2 entered a temporary restraining order prohibiting enforcement of Amendment 2 based largely on First Amendment grounds.[175] This rationale was abandoned by the State Supreme Court which invalidated Amendment 2 based on the Fourteenth Amendment and strict scrutiny review.[176] Not all the Justices on the court agreed on this approach.[177] Justice Scott's concurring opinion in *Evans II* indicated he would have invalidated the amendment using the Privileges and Immunities Clause.[178] Commentators have also disagreed over exactly why Amendment 2 is un-

165. *See id.* at 644-47.
166. *See id.* at 647.
167. *See id.* at 644-47.
168. *See id.*
169. *See id.* at 646.
170. *See id.*
171. *See id.* at 644-47.
172. *See Evans II*, 882 P.2d 1335; *Evans I*, 854 P.2d 1270.
173. *See id.*
174. *See id.*
175. *See Evans I*, 854 P.2d at 1273.
176. *See Evans II*, 882 P.2d at 1350.
177. *See id.* at 1351 (Scott, J., concurring); *id.* at 1356 (Erickson, J., dissenting).
178. *See id.* at 1351 (Scott, J., concurring).

constitutional.[179] Professor Amar supports Justice Kennedy's analysis but argues the case is better understood as invalidating Amendment 2 based on the Attainder clause of Article I, Section 10 of the Constitution.[180] Even those Justices on the Colorado court that agreed Amendment 2 should be reviewed under the Equal Protection clause could not agree over what standard of review to apply.[181] The only agreement between the Colorado court and the Supreme Court came in the dissenting opinions.[182] The dissenters in each case would have upheld Amendment 2 applying rational basis review.[183] Perhaps what is most perplexing about the litigation is that the dissenting Justices on the Colorado court and six majority Justices of the U.S. Supreme Court purported to apply the same rational basis test but they nevertheless reached opposite conclusions.[184]

The majority decision and its use of rational basis review is odd considered on its own. Justice Kennedy's constitutional analysis left many questions unresolved. The Court's opinion did not address the issue of whether homosexuals were a suspect class.[185] Despite the fact that the issue was briefed, the Court side stepped the question and invalidated Amendment 2 on other grounds.[186] The majority opinion also gave little consideration to the Colorado court's holding that Amendment 2 burdened a fundamental right and was subject to strict scrutiny review.[187] Instead, the Court purported to proceed by applying rational basis review, but the opinion itself departed substantially from the Court's typical rational basis analysis.[188]

In reviewing laws under rational basis review, the Court examines whether there could be a legitimate government interest promoted by the law and whether the law is rationally related to promoting that interest.[189] Typically, the Court has not concerned itself with the actual purpose behind a law.[190] It has reviewed laws with an eye towards legitimacy, upholding laws

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179. *See, e.g.*, Amar, *supra* note 2; Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996); Jacobs, *supra* note 2; Kenji Yoshino, *Suspect Symbols: The Literary Argument For Heightened Scrutiny For Gays*, 96 COLUM. L. REV. 1753 (1996).

180. *See* Amar, *supra* note 2.

181. *See Evans I*, 854 P.2d 1270.

182. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting); *Evans I*, 854 P.2d at 1286 (Erickson, J. dissenting).

183. *See Romer*, 517 U.S. at 636; *Evans I*, 854 P.2d at 1286.

184. *See Romer*, 517 U.S. at 631-33; *Evans II*, 882 P.2d at 1356 (Erickson, J., dissenting).

185. *See Romer*, 517 U.S. at 623-36.

186. *See id.*

187. *See id.* at 625-26.

188. *See id.* at 623-36.

189. *See* TRIBE, *supra* note 22, § 16-3, at 1443-45.

190. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (concluding that statute would be sustained if classification would promote a legitimate state purpose, regardless of the actual purpose of the statute); Allied Stores v. Bowers, 358 U.S. 522 (1959) (holding no denial of equal protection where classification was based on a difference having fair and substantial relation to legislative objective).

when any set of facts support a legitimate purpose.[191] In *Minnesota v. Clover Leaf Creamery,*[192] for example, a Minnesota statute prohibited the sale of milk in plastic containers.[193] The legislative history behind the statute showed quite clearly it was designed to help Minnesota's pulp wood industry by forcing milk producers to use paper milk cartons instead of plastic jugs.[194] The Court upheld the statute on the ground that Minnesota could have believed plastic jugs posed disposal problems because they were not biodegradable.[195]

However, the Court has been less deferential to laws that effect more than economic interests.[196] Most notably, in *City of Cleburne v. Cleburne Living Center,*[197] the Court overturned a city decision not to grant a zoning permit to a group of mentally retarded citizens for a group home.[198] The city defended its action on the ground that if the group home were built the mentally retarded residents might suffer abuse from children at a nearby school.[199] The city also claimed the zoning permit was denied because the lot where the group wanted to build was located on a flood plain.[200] The Court rejected these reasons noting that the neighborhood school had mentally retarded students who attended special classes there, and the flood plain already had a number of residents living there, including group homes similar to the one the plaintiffs wanted to build.[201] Justice White's majority opinion went on to determine that the actual purpose behind the city's action stemmed from "an irrational prejudice against [those] mentally retarded."[202] This, the Court concluded, was not a legitimate state purpose and could not support the city's action even under the normally deferential rational basis standard.[203]

In *Romer v. Evans*, the Court was presented with evidence showing Amendment 2 was passed based on the same type of "irrational prejudice" present in *Cleburne.*[204] Like the mentally retarded, homosexuals have suffered a history of discrimination and prejudice against them.[205] Amendment

191. *See* TRIBE, *supra* note 22, § 16-3, at 1444.
192. 449 U.S. 456 (1981).
193. *See id.* at 458.
194. *See id.* at 460.
195. *See id.* at 474.
196. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Department of Agriculture v. Moreno, 413 U.S. 528 (1973).
197. 473 U.S. 432 (1985).
198. *See id.* at 435.
199. *See id.* at 448-50.
200. *See id.*
201. *See id.* at 450.
202. *See id.*
203. *See id.*
204. 517 U.S. 620, 633 (1996).
205. *See* Amicus Brief of Lamda Legal Defense Fund, Romer v. Evans, No. 94-1039, 1995 WL 782809, at *3.

2's history is also disturbing.[206] It was first initiated by a conservative political group known as Coloradans for Family Values.[207] Tony Marco, the group's founder, explained that Amendment 2 was adopted to "fend off 'militant gay aggression.'" [208] The group defended the proposed amendment to voters on the ground that homosexuals were morally "depraved persons" undermining traditional family values.[209] This group claimed Amendment 2 would "close the lid" forever on gay rights in Colorado.[210] Based on Amendment 2's history, the Colorado court invalidated it on the ground that it "sought to deny an independently identifiable group's right to participate equally in the political process."[211]

Nevertheless, the Court did not evaluate the specific purposes behind Amendment 2 postulated by the State.[212] The State's primary argument was that Amendment 2 protected its financial resources and ensured the autonomy of individuals who found homosexuals as a group offensive and wanted to exclude them from private business and property.[213] In the past, the Court has readily accepted similar reasons as legitimate and has probed no deeper to look at a state's actual purpose.[214] The Court did hint that Amendment 2's actual purpose was not to promote the interests claimed by the State.[215] But the Court grounded its decision squarely on what Amendment 2 did to homosexuals, not why the amendment was passed by voters.[216] Justice Kennedy was wise to avoid such an analysis. Commentators have been critical of the *Cleburne* approach and the Court's occasional practice of looking at actual purpose.[217] Moreover, given the fact that Amendment 2 was popularly passed by state voters, determining actual purpose would have proved an impossible task.[218]

Instead, Justice Kennedy's majority opinion concentrated on the peculiar aspects of Amendment 2.[219] In his words, Amendment 2 was a "[s]weeping and comprehensive" change in the law.[220] In oral arguments, the

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206. *See* Brief of Respondents, City of Aspen and City Council of Aspen, Romer v. Evans, No. 94-1039, 1995 WL 370335, at *8.

207. *See id.*

208. *See id.*

209. *See id.*

210. *See id.*

211. *Evans II*, 882 P.2d at 1349.

212. *See Romer*, 517 U.S. at 623-36.

213. *See* Brief of Petitioner, Romer v. Evans, No. 94-1039, 1995 WL 310026.

214. *See* TRIBE, *supra* note 22, § 16-2, at 1439-54.

215. *See Romer*, 517 U.S. at 635.

216. *See id.* at 1623-29.

217. *See, e.g.*, TRIBE, *supra* note 22, § 16-3, at 1445. "The lack of openly acknowledged criteria for heightened scrutiny permits arbitrary use of the type of inquiry undertaken in Cleburne, for which courts will remain essentially unaccountable." *Id.*

218. *See id.*

219. *See Romer*, 517 U.S. at 623-36.

220. *Id.* at 627.

Justices expressed the same concern over Amendment 2.[221] According to the Court, the real problem with Amendment 2 stemmed from the fact that it is "too narrow and too broad."[222] The Court's opinion makes clear that Amendment 2 removes an entire class of citizens from a particular type of protection under the laws.[223] In the Court's eyes, it is both over inclusive and under inclusive.[224] The Court did not explain why this was fatal to Amendment 2.[225] Under the Court's traditional rational basis analysis, simply because a law is under inclusive or over inclusive does make it unconstitutional.[226] For example, in *Williamson v. Lee Optical,*[227] the Court reviewed an Oklahoma statute which permitted only optometrists to fit lenses in eye glasses.[228] Those challenging the statute argued that it was under inclusive and failed to prevent all the harms it was addressed at combating.[229] The Court rejected this argument stating that a law aimed at reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute."[230] The Court has also been unwilling to invalidate laws because they are over inclusive.[231] In *New York Transit Authority v. Beazer,*[232] the Court upheld a New York City Transit Authority regulation that barred recovering narcotic addicts from employment for safety reasons.[233] The Court noted that the majority of recovering addicts were safe, but rejected the argument that over inclusiveness violated the Equal Protection Clause.[234] In short, all the Court has required is that a statute have some relationship to promoting a legitimate state interest.[235] The Court has generally not concerned itself with whether a law is under or over inclusive.[236]

Romer v. Evans departed from this approach.[237] The Court invalidated Amendment 2 precisely because it was so sweeping in scope.[238] What troubled the Court was not simply the fact that Amendment 2 was over and under inclusive.[239] Rather, it was the degree of over and under inclusiveness

221. *See* Transcript of Oral Arguments, Romer v. Evans, No. 94-1039, 1995 WL 605822, at *4-8.
222. *See Romer*, 517 U.S. at 633.
223. *See id.*
224. *See id.*
225. *See id.* at 1623-29.
226. *See* TRIBE, *supra* note 22, § 16-4, at 1446-50.
227. 348 U.S. 483 (1955).
228. *See id.*
229. *See id.* at 486.
230. *Id.* at 489.
231. *See* TRIBE, *supra* note 22, § 16-4, at 1446-50.
232. 440 U.S. 568 (1979).
233. *See id.*
234. *See id.* at 575, 592.
235. *See* TRIBE, *supra* note 22, § 16-4, at 1446-50.
236. *See id.*
237. *See Romer*, 517 U.S. at 623-36.
238. *See id.* at 633.
239. *See id.*

which most concerned the Justices.[240] Never in the Court's history had it been faced with a law that had such far reaching effects.[241] At oral arguments, the first question asked by the Justices concerned the all inclusive nature of Amendment 2. "I've never seen a case like this. Is there any precedent that you can cite to the Court where we've upheld a law such as this?"[242] Later in oral arguments, a Justice inquired: "[I]n all of U.S. history there has never been any legislation like this that earmarks a group and says, you will not be able to appeal to your State legislatures to improve your status. You will need a constitutional change to do that."[243] Justice Kennedy's opinion outlines in detail just how many statutory laws were invalidated or changed by Amendment 2.[244] The effect is so great that Amendment 2 could not be saved under even the most deferential standard of Equal Protection review.[245]

The sweeping scope of Amendment 2 gave the Court the toe hold it needed to invalidate the amendment using rational basis review. Despite Justice Scalia's dissent, the majority decision was not unprecedented, even if it was somewhat unusual. The Court has invalidated other laws less sweeping in scope that burdened more than mere economic interests.[246] But the Court's preoccupation with the sweeping scope of Amendment 2 is precisely the problem with the opinion. The Court clearly means to invalidate laws like Amendment 2 which remove an entire group of citizens from the general protection of state laws. The Court did not make it clear or even suggest what other types of laws might also be invalid using the same rational. The majority opinion provides little guidance as to what laws fall within the scope of *Romer v. Evans* and which laws are valid and fall outside its scope. Exactly how sweeping a law must be before it falls within the parameters of *Romer v. Evans* is left unanswered by the majority. Moreover, the Court's departure from standard rational basis review has left courts and commentators with little precedent to turn to for answers. This has resulted in considerable confusion, especially given the fact that the Court has not ruled on any other laws similar to Amendment 2. While Justice Kennedy and the majority took a brave step by invalidating Amendment 2, they left lower courts with unbridled discretion to interpret *Romer v. Evans*.

III. HOMOSEXUAL RIGHTS AFTER *ROMER V. EVANS*

Unfortunately for gay, lesbian and bisexual litigants, lower courts have

240. *See id.*

241. *See* Transcript of Oral Arguments, Romer v. Evans, No. 94-1039, 1995 WL 605822, at *4-8.

242. *Id.* at *4.

243. *Id.* at *8.

244. *See Romer*, 517 U.S. at 629-30.

245. *See id.* at 635.

246. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

seized upon the ambiguity in *Romer v. Evans* and have continued to uphold laws which discriminate against homosexuals. What appeared to be a major victory for gays and lesbians is at best a symbolic victory. In many cases, the Court's reasoning has been used by lower courts to defeat homosexual litigants. In the district and circuit courts, numerous claims have been brought by homosexuals challenging various laws discriminating against gays, lesbians, and bisexuals. Federal courts have almost unanimously cited *Romer v. Evans* to uphold legislation discriminating against homosexuals. Cases have included challenges to laws similar to Amendment 2, challenges to the military's Don't Ask Don't Tell policy, and employment discrimination cases. In all but one district court case, lower courts have validated every law discriminating against homosexuals despite *Romer v. Evans*.

A. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati: Romer v. Evans *Revisited*

In *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati,*[247] the Sixth Circuit reviewed an amendment to the Cincinnati city charter.[248] The amendment had much the same effect as Amendment 2.[249] It provided:

> 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 homosexuals, 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.[250]

Before the Court's ruling in *Romer v. Evans*, the Sixth Circuit upheld the Cincinnati amendment.[251] Following *Romer v. Evans,* the Supreme Court summarily vacated the decision and remanded the case for further consideration in light of *Romer v. Evans.*[252] As in *Romer v. Evans,* Justice Scalia authored a dissent that was joined by Chief Justice Rehnquist and Justice Thomas.[253] His argument contended *Romer v. Evans* was not applicable to

247. 54 F.3d 261 (6th Cir.), *vacated*, 518 U.S. 1001 (1996) [hereinafter *Equality Foundation I*].

248. *See id.* at 271.

249. *See id.* at 263-64.

250. Article XII of City Charter of Cincinnati, *quoted in Equality Foundation I*, 54 F.3d at 264.

251. *See Equality Foundation I*, 54 F.3d at 271.

252. *See* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996).

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

the Cincinnati amendment, and he suggested the Court's holding in *Romer v. Evans* was limited to its facts.[254]

On remand, the Sixth Circuit affirmed its initial ruling holding the Cincinnati amendment was constitutional.[255] The court took a narrow reading of *Romer v. Evans* and distinguished it on three grounds.[256] First, the Sixth Circuit held that the scope of the Cincinnati amendment was far less sweeping than Amendment 2.[257] The Cincinnati amendment went no further than to repeal existing legislation and prevent future legislation favoring homosexuals.[258] Unlike Amendment 2, the court argued homosexuals were not removed from the general protection of laws.[259] Instead, the Cincinnati amendment prevented special treatment based on sexual orientation and prevented homosexuals from receiving protected status under antidiscrimination laws.[260]

The court drew from Justice Scalia's dissent in *Equality Foundation I* and argued the Cincinnati amendment effected only Cincinnati and was more narrow in scope than Amendment 2.[261] The circuit court held that the Cincinnati amendment passed constitutional muster because it was passed through the normal legislative process and could be repealed or changed in the same manner.[262] Unlike Amendment 2, which required another amendment to the Colorado constitution to be repealed, the Cincinnati amendment could be changed by the City Council in the normal political process.[263] The court also found no impermissible purpose to harm homosexuals.[264] Instead, they believed the careful wording of the amendment was passed to prevent homosexuals from gaining special advantages and protections under the law.[265]

To reach its decision, the Sixth Circuit relied primarily on Justice Kennedy's discussion of the political process.[266] He emphasized that the scope of Amendment 2 was so broad it would require a state constitutional amendment to change the law.[267] The circuit court suggested that because the Cincinnati amendment did not go as far as altering the Ohio constitution, the

254. *See id.*

255. *See* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 301 (1997) [hereinafter *Equality Foundation II*].

256. *See id.* at 295.

257. *See id.*

258. *See id.* at 295-96.

259. *See id.*

260. *See id.*

261. *See id.* at 297.

262. *See id.*

263. *See id.*

264. *See id.* at 300.

265. *See id.* at 295.

266. *See id.* at 294-98.

267. *See Romer*, 517 U.S. at 632-33.

case fell outside the scope of the Court's decision in *Romer v. Evans*.[268] The effect of Cincinnati's law was much the same as Amendment 2.[269] Like Amendment 2, the Cincinnati amendment denied gays, lesbians, and bisexuals the political victories they had already achieved and likely prevented them from achieving future legislation.[270] Despite language in *Romer v. Evans* suggesting discrimination against homosexuals was akin to racial discrimination,[271] the Sixth Circuit narrowed its focus to the Court's analysis of the sweeping scope of Amendment 2.[272] Because the court found the Cincinnati Amendment's scope was somewhat more narrow, it distinguished *Romer v. Evans* and validated the amendment using the normal rational basis standard.[273]

The Sixth Circuit's analysis is not unusual. In other contexts, federal courts have read *Romer v. Evans* as narrowly as possible.[274] Given the unusual nature of Amendment 2 it has been easy for courts to distinguish *Romer v. Evans* and proceed into ordinary rational basis analysis as the Sixth Circuit did. The effect on gays, lesbians, and bisexuals has been devastating as courts have continued to validate laws which discriminate on the basis of sexual orientation using *Bowers v. Hardwick* and its progeny. While the sweeping scope of Amendment 2 gave the Court a relatively easy way to invalidate Amendment 2, it has also provided lower courts with an easy out. Courts such as the Sixth Circuit have seized this opportunity and have continued to validate laws which discriminate against gays, lesbians, and bisexuals even after *Romer v. Evans*.

B. Does Romer v. Evans *Help Gays in the Military?*

Prior to 1993, military regulations prevented any person "who engages in, desires to engage in, or intends to engage in homosexual acts" from serving in the armed forces.[275] Each federal court that reviewed the constitutionality of the regulation upheld it.[276] In 1993, the Secretary of Defense issued a new policy that is currently in effect.[277] The regulation became known as the "Don't Ask Don't Tell" policy, and no longer required applicants to the armed forces to disclose their sexual orientation.[278] The new regulation

268. *See Equality Foundation II*, 128 F.3d at 297.
269. *See id.* at 296.
270. *See id.*
271. *See Romer*, 517 U.S. at 623.
272. *See Equality Foundation II*, 128 F.3d at 295.
273. *See id.* at 295-300.
274. *See supra* Part III.A and *infra* Part III.B.
275. *See* Dept. of Defense Dir. No. 1332.14 (1981); 32 C.F.R. Part 41, App. A (1992).
276. *See* Ben-Shalom v. Marsh, 881 F.2d 454, 456 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).
277. *See* 1 PUB. PAPERS 1111 (July 19, 1993); 10 U.S.C. § 654 (1994).
278. *See* 10 U.S.C. § 654 (1994).

provided that when a service member stated he/she was a homosexual it created a rebuttable presumption that the person making the statement was engaged in homosexual acts in violation of the regulation.[279] The regulation had the effect of requiring a service person who had stated previously that he/she was a homosexual to prove otherwise.[280] Congress adopted this regulation in late 1993.[281]

Between the time the Don't Ask Don't Tell policy went into effect and *Romer v. Evans* was decided by the Supreme Court, federal courts unanimously upheld the law as constitutional.[282] The primary challenge by homosexual military personal was that the Don't Ask Don't Tell policy violated the First Amendment.[283] Before *Romer v. Evans*, courts had little trouble rejecting these claims, arguing that the Don't Ask Don't Tell policy was geared at restricting conduct, not personal expression, and that it was rationally related to promoting cohesion within the military.[284]

Romer v. Evans did little to lower court analysis of the Don't Ask Don't Tell policy.[285] Less than two months after the Court handed down its decision, lower courts began hearing constitutional challenges to the Don't Ask Don't Tell policy based on *Romer v. Evans*.[286] In *Hrynda v. U.S.*, a naval reserve officer brought suit challenging the policy.[287] Her primary claim rested on Equal Protection grounds.[288] The plaintiff argued that the Don't Ask Don't Tell Policy failed rational basis review because it was grounded in nothing more than the "presumed prejudices of heterosexual service members."[289] In evaluating these claims, the district court noted that rational basis review was the correct standard of review and it held the policy met this standard.[290] The court's opinion provides little independent analysis.[291] The Court relied on a Ninth Circuit case written before *Romer v. Evans,* which upheld the Don't Ask Don't Tell policy.[292] Apparently, the district court judge believed *Romer v. Evans* did nothing to change the analysis governing laws based on sexual orientation.[293] The court's only cite to *Romer v. Evans*

279. *See id.*
280. *See id.*
281. *See id.*
282. *See* Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 358 (1996); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc).
283. *See Thomasson*, 80 F.3d at 931-33; *Steffan*, 41 F.3d at 697-99.
284. *See Thomasson*, 80 F.3d at 931-33; *Steffan*, 41 F.3d at 697-99.
285. *See* Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996).
286. *See Hrynda*, 933 F. Supp. at 1047.
287. 933 F. Supp. 1047 (M.D. Fla. 1996).
288. *See id.* at 1050.
289. *See id.* at 1052.
290. *See id.* at 1053.
291. *See id.* at 1051-54.
292. *See id.* at 1052-53 (citing Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994)).
293. *See id.*

is for the general proposition "that no person shall be denied the equal protection of the law co-exists with the realization that most legislation classifies for one reason or another, resulting in disadvantage to various groups or persons."[294]

Following *Hrynda,* Circuit courts addressed the Don't Ask Don't Tell policy.[295] In *Richenberg v. Perry,* the Eighth Circuit upheld the Don't Ask Don't Tell policy.[296] Like the district court in *Hrynda,* the Eighth Circuit ignored *Romer v. Evans,* and did not even mention the opinion in its analysis.[297]The court felt *Romer v. Evans* did not apply because the Supreme Court grounded its holdings in the Equal Protection clause. In contrast, the Eighth Circuit reached its decision based largely on First Amendment and Due Process arguments.[298] The court based its decision in large part on what six other circuits had decided prior to *Romer v. Evans.*[299] In the court's eyes, each of the decisions upholding the Don't Ask Don't Tell policy remained unchanged by *Romer v. Evans.*[300]

In 1997, the Ninth Circuit reviewed the Don't Ask Don't Tell policy nearly a year after the Court handed down *Romer v. Evans.*[301] Judge Rymer's majority opinion upheld the policy, arguing that the military might reasonably believe open homosexuality would disrupt normal military operations, and that the policy furthered the military's objective of insuring uniformity and orderly operation among units.[302] The court's failure to mention *Romer v. Evans* is surprising considering that a dissent by Judge Fletcher emphasized the court should have invalidated the Don't Ask Don't Tell policy based precisely on the Court's reasoning in *Romer v. Evans.*[303] He believed that in light of *Romer v. Evans,* the majority could not plausibly hold the military policy was rationally related to any legitimate interest.[304]

Following *Philips,* the Ninth Circuit had another occasion to review the Don't Ask Don't Tell Policy.[305] In *Holmes v. California Army National Guard,* two National Guard soldiers challenged their discharge from the Army National Guard.[306] Both had outstanding military records and there were no disciplinary charges against them as a result of any homosexual behavior.[307] In fact, one of the discharged officers specifically wrote that he had

294. *Id.* (citing *Romer,* 517 U.S. at 631).
295. 97 F.3d 256 (8th Cir. 1996).
296. *See id.* at 261.
297. *See id.* at 258-64.
298. *See id.* at 262-63.
299. *See id.* at 260-61.
300. *See id.* at 258-64.
301. *See* Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997).
302. *See id.* at 1425-30.
303. *See id.* at 1432-41 (Fletcher, J., dissenting).
304. *See id.*
305. *See* Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997).
306. *See id.*
307. *See id.* at 1129-31.

never engaged in homosexual conduct with another military person and had no desire to.[308] Nevertheless, both soldiers were discharged.[309] The Ninth Circuit rejected their claims that the Don't Ask Don't Tell Policy was unconstitutional.[310] The court relied heavily on the *Philips* case and precedent of other circuit courts.[311] It found these cases dispositive of the issue and held that the Don't Ask Don't Tell Policy did not violate any provision of the Constitution.[312]

Justice Reinhardt dissented.[313] He agreed with the majority who relied on the precedent established in *Philips*.[314] However, Justice Reinhardt argued that *Philips* was distinguishable.[315] He noted that neither plaintiff in the case now before the court had ever been found to engage in homosexual conduct and that both had stated they would not engage in such conduct with military personnel.[316] In Justice Reinhardt's view, conduct was not being punished; instead the military was punishing the plaintiffs because of mere statements concerning sexual orientation.[317]

Justice Reinhardt also criticized discrimination against homosexuals.[318] He characterized the Don't Ask Don't Tell Policy as a product of a "fickle public," and argued it was loaded with "[h]ypocrisy and deception."[319] He compared *Bowers v. Hardwick* to *Plessy v. Ferguson* and wrote, "I remain confident that someday a Supreme Court with a sense of fairness and an adequate vision of the Constitution will repudiate *Bowers* in the same way that a wise and fair-minded Court once repudiated *Plessy*. Indeed, I hope that day will not be long in coming."[320] Justice Reinhardt also acknowledged the limitations of *Romer v. Evans* in achieving equality among homosexuals and heterosexuals.[321] As his footnote made clear, *Romer v. Evans* only has application in "highly limited circumstances." [322]

The concerns of Judge Reinhardt and Judge Fletcher were later echoed in the District Court for the Eastern District of New York, which invalidated the Don't Ask Don't Tell policy based largely on *Romer v. Evans*.[323] In *Able v. United States,* Judge Nickerson went beyond the narrow reading of *Romer*

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308. *See id.* at 1130.
309. *See id.* at 1129-31.
310. *See id.* at 1137 (Reinhardt, J., dissenting).
311. *See id.* at 1132.
312. *See id.*
313. *See id.* at 1137 (Reinhardt, J., dissenting).
314. *See id.*
315. *See id.* at 1137-38.
316. *See id.* at 1140.
317. *See id.*
318. *See id.* at 1139.
319. *Id.*
320. *Id.* at 1137.
321. *See id.* at 1137 n.3.
322. *Id.*
323. *See* Able v. United States, 968 F. Supp. 850 (E.D.N.Y. 1997).

v. Evans the Eighth and Ninth Circuits used in upholding the Don't Ask Don't Tell policy.[324] The court cited *Romer v. Evans* for the proposition that "government discrimination against homosexuals in and of itself violates the constitutional guarantee of equal protection."[325] It went on to hold that implicit in the Court's reasoning is the idea that discriminatory legislation against homosexuals is inherently irrational and invidious if it is based on nothing more than the fears and prejudices of heterosexuals.[326] The court found the military's Don't Ask Don't Tell policy was based solely on these fears and prejudices.[327]

The United States sought to justify the policy on the ground that it furthered unit cohesion.[328] Specifically, it argued that the Don't Ask Don't Tell policy promoted cohesion by giving heterosexuals a greater feeling of privacy than forcing them to live in close quarters with homosexuals.[329] The government also contended the policy helped reduce "sexual tension" among soldiers.[330] The court rejected both claims.[331] It argued that the government's privacy claim was fundamentally flawed because it assumed that simply because no one was out of the closet, members of a unit would conclude there were no homosexuals in the unit at all.[332] This assumption was unlikely in the court's view because the Don't Ask Don't Tell policy does not exclude homosexuals altogether.[333] Instead, it merely excluded homosexuals who had come out of the closet and made their homosexuality known.[334] The court was also unpersuaded by the government's "sexual tension" argument, noting that all sexual relationships were subject to disciplinary action when they were "prejudicial to good order and discipline."[335] In the court's view, the Don't Ask Don't Tell policy was unnecessary and did not further the military's articulated policy.[336]

The district court went on to contend that both articulated reasons for the Don't Ask Don't Tell policy were pretexts for overt discrimination against homosexuals.[337] Both Generals Powell and Schwartzkopf acknowledged homosexuals were capable of performing all the duties of other soldiers and could serve as "good Americans."[338] But each believed open homo-

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324. *See id.* at 852.
325. *Id.*
326. *See id.* at 852, 860.
327. *See id.* at 860.
328. *See id.* at 858.
329. *See id.* at 860.
330. *See id.*
331. *See id.* at 861.
332. *See id.* at 860.
333. *See id.*
334. *See id.*
335. *See id.* at 861.
336. *See id.*
337. *See id.*
338. *See id.* at 858.

sexuality would be disruptive in the military.[339] Based on these statements, the court concluded the real reasons behind the policy were fear and prejudice.[340] In the court's view, such fear and prejudice was similar to the fear and prejudice faced by interracial couples attempting to adopt children.[341] While the court acknowledged the Constitution could not eliminate all discrimination, it argued such discrimination could not be tolerated under any notion of equal protection.[342]

After invalidating the Don't Ask Don't Tell policy under rational basis review using *Romer v. Evans,* the district court went on to hold homosexuals were a suspect class deserving of heightened scrutiny.[343] Judge Nickerson began his analysis by justifying the application of heightened scrutiny.[344] He noted that homosexuals had traditionally suffered discrimination throughout history and this discrimination was very much alive today.[345] Discrimination against homosexuals was present during the Congressional hearings over the military policy.[346] In his view, this history of discrimination, which was blatantly manifest today, was sufficient reason to protect homosexuals under strict scrutiny review.[347]

Judge Nickerson distinguished *Bowers v. Hardwick* on the ground that it was decided on Due Process grounds.[348] *Romer v. Evans* and *Able v. United States* were both decided on Equal Protection grounds.[349] Not surprisingly, the court concluded a law which could not pass rational basis review could not satisfy the more demanding strict scrutiny review.[350]

The court's use of strict scrutiny review is odd considering the fact that the *Romer v. Evans* Court declined to treat homosexuals as a suspect class despite arguments by amicus curie.[351] Moreover, after a lengthy discussion, the court found the Don't Ask Don't Tell Policy could not withstand even rational basis review, and it is surprising the court would go so far when it was unnecessary to invalidate the military's policy.[352] The decision may show a desire by at least some lower courts to expand *Romer v. Evans* to its logical limits in an effort to afford homosexuals more protection under the law. Judge Nickerson's opinion leaves little doubt that he saw the Don't Ask

339. *See id.*
340. *See id.* at 859-60.
341. *See id.* at 859.
342. *See id.*
343. *See id.* at 862-64.
344. *See id.*
345. *See id.* at 854-55, 862.
346. *See id.* at 862.
347. *See id.* at 862, 864.
348. *See id.* at 864.
349. *See id.*
350. *See id.*
351. *Romer,* 517 U.S. at 623-36.
352. *See Able,* 968 F. Supp. at 860-61.

Don't Tell policy as nothing more than a bare desire to harm homosexuals.[353] He referred to the Don't Ask Don't Tell policy as "degrading" and "deplorable."[354] He went on to criticize the government's arguments supporting the policy calling the arguments "illogical."[355] In his eyes, the Don't Ask Don't Tell policy was one designed to encourage "animosity" towards homosexuals.[356]

The decision was a clear victory for gays, lesbians, and bisexuals, but one that was short lived.[357] On appeal, the Second Circuit reversed Judge Nickerson's opinion.[358] Using rational basis review, a unanimous court had little trouble upholding the Don't Ask Don't Tell policy.[359] The court provided little independent analysis for its holding, relying primarily on decisions in other circuits.[360] The only real analysis provided by the court was a general discussion of case law giving great deference to the military.[361] The court's discussion suggests that issues concerning military personnel that do not involve some suspect class are subjected to an even weaker form of rational basis review.[362] Oddly, the respondents did not seek to have the Don't Ask Don't Tell policy reviewed under any standard other than the lenient rational basis review.[363] It is likely this omission was calculated, as courts have been reluctant to extend suspect classification or individual rights under either the Equal Protection Clause or Due Process Clause.[364] To date, no circuit court has recognized homosexuals as a suspect class. Accordingly, no Circuit Court has reviewed the Don't Ask Don't Tell policy using anything but rational basis review. In so doing it has been easy for courts to simply rubber stamp the Don't Ask Don't Tell policy as passing constitutional muster.

The ease with which most courts have dismissed *Romer v. Evans* when reviewing the Don't Ask Don't Policy stems from the Supreme Court's preoccupation with the scope of Amendment 2. The thrust of Justice Kennedy's opinion focused on just how broad and sweeping Amendment 2 was, and the Court had little difficulty finding it unconstitutional for precisely that reason.[365] The military's Don't Ask Don't Tell policy is admittedly less sweeping in nature. The policy defines homosexuals to include only individuals

353. *See id.* at 861 (citing Department of Agriculture v. Moreno, 413 U.S. 528, 543 (1973)).
354. *Id.*
355. *Id.*
356. *Id.*
357. *See* Able v. United States, 155 F.3d 628 (2d Cir. 1998).
358. *See id.* at 636.
359. *See id.* at 630-36.
360. *See id.* at 632.
361. *See id.* at 632-33.
362. *See id.*
363. *See id.* at 632.
364. *See generally id.*
365. *See Romer*, 517 U.S. at 623-36.

who engage in homosexual contact.[366] Amendment 2 included not only those engaged in homosexual conduct but those who held homosexual beliefs or tendencies regardless of their actions.[367] The Don't Ask Don't Tell policy is more limited because it does not remove homosexuals from protection of generally applicable laws.[368] It excludes only those practicing homosexuals from a particular government benefit, military employment.[369] These distinguishing characteristics of the military's Don't Ask Don't Tell policy and Amendment 2 have made it easy for lower courts to ignore *Romer v. Evans.*

This reading is not surprising given the fact that the Court itself has been stingy in extending rights to homosexuals.[370] Lower courts have followed the Court's lead since *Bowers v. Hardwick.*[371] Nevertheless, the effects of the Don't Ask Don't Tell Policy are significant and sweeping even when compared against Amendment 2. While the policy would appear to exclude only those homosexuals who have come out of the closet, it has been used against closet homosexuals as well.[372] Nor can the significance of the government benefit be ignored. The Court itself has recognized this benefit as so significant that it triggers the Due Process Clause's right to a hearing before it can be revoked by a government body.[373] In other cases, Congress has sought to protect various classes of citizens from arbitrary discrimination in the work place.[374] While the military's Don't Ask Don't Tell policy does not remove a class of citizens from the general protection of various laws, it may have an equally devastating impact on the individuals effected.

The narrow reading courts have given *Romer v. Evans* is not mandated by the opinion itself. Quite the contrary. The Court's language supports an expansion of constitutional protection for homosexuals.[375] Justice Kennedy begins his analysis by citing Justice Harlan's famous dissent in *Plessy v. Ferguson,* in which he stated that the Constitution "neither knows nor toler-

366. *See* 10 U.S.C. § 654 (1994).

367. *See Romer,* 517 U.S. at 629-34.

368. *See* 10 U.S.C. § 654.

369. *See id.*

370. *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186 (1986).

371. *See, e.g.,* Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (1990); Ben Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); National Gay Task Force v. Board of Education, 729 F.2d 1270, 1273 (10th Cir. 1988).

372. *See* Jackson v. United States, *available in* 1997 WL 759144 (9th Cir. 1997). Jackson was living with a suspected child molester named Kenneth Lavato. When police entered their premise with a valid search warrant, they discovered materials indicating that Jackson was engaged in a homosexual relationship with Lavato. Nothing was found on the premises suggesting Jackson was a child molester and he was not accused or suspected of such activity. When the Air Force learned of this, he was honorably discharged. The district court upheld the discharge and the Ninth Circuit affirmed. *See id.*

373. *See, e.g.,* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

374. *See, e.g.,* 42 U.S.C. § 2000e-5 (1994); 29 U.S.C. § 206(d) (1994); 29 U.S.C. §§ 621-634 (1994); 29 U.S.C. §§ 706(8), 791, 793, 794, 794(a) (1994).

375. *See Romer,* 517 U.S. at 623-36.

ates classes among citizens."[376] He went on to state that "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[377] The Court concluded by stating that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."[378] However, few judges have seized upon this language to expand the scope of *Romer v. Evans*. Instead, because the Court used only rational basis review, *Romer v. Evans* has, at least in some respects, hindered those seeking to achieve equality for homosexuals.

If equality is to be achieved in the near future through the courts, proponents of gay rights must present novel arguments to the courts that give judges the opportunity to review discriminatory laws using some form of heightened scrutiny. To date, litigants have argued that homosexuals be considered a suspect class like racial minorities. In large part this argument has gone unrecognized or ignored by courts. But what has not been considered by litigants or courts is that discrimination against homosexuals is a form of gender discrimination.

C. Romer v. Evans *and Its Impact in Employment Discrimination Cases*

Homosexuals are not protected from discriminatory employment decisions based on their sexual orientation under Title VII.[379] Title VII only prohibits discrimination based on "race, color, religion, sex, or national origin."[380] Traditionally, many courts refused to acknowledge sexual harassment as actionable under Title VII.[381] In 1986, the Court ruled that sexual harassment was actionable under Title VII.[382] The Court's ruling in *Meritor Savings Bank* recognizes two types of sexual harassment are actionable under Title VII.[383] "Quid Pro Quo" sexual harassment occurs when an employer conditions employment or employment benefits upon the receipt of sexual favors.[384] A hostile environment case arises when an employee alleges the work environment is not suitable because of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[385] Most often, sexual harassment cases arise from alleged

376. *Id.* at 623.
377. *Id.* at 634 (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 543 (1973)).
378. *Id.* at 635.
379. *See* 42 U.S.C. § 2000e-2 (1994).
380. *Id.*
381. *See* Jo Bennett, *Same-Sex Sexual Harassment*, 6 LAW & SEX. 1, 5-6 (1996).
382. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
383. *See id.*
384. *See, e.g.*, Chamberlin v. 101 Reality, Inc., 915 F.2d 777 (1st Cir. 1990).
385. 29 CFR § 1604.11(a) (1999).

behavior of a male supervisor or employee against a female employee.[386] Recently, federal courts have been faced with claims of same-sex sexual discrimination; that is, male employees complaining of harassment by male supervisors or female employees complaining of harassment by female supervisors.[387] Initially, courts recognized such causes of action even before the Court's ruling in *Meritor Savings Bank.*[388]

Following *Meritor Savings Bank,* circuit courts divided on whether same-sex sexual harassment was actionable under Title VII.[389] The issue was initially addressed by the Fifth Circuit before the Court decided *Romer v. Evans.*[390] The court held male on male harassment was not actionable under Title VII even when accompanied with sexual overtones.[391] The court affirmed its decision the same day *Romer v. Evans* was handed down.[392]

Other circuit courts followed the Fifth Circuit's lead before the Court ruled in *Romer v. Evans.*[393] In *McWilliams v. Fairfax County Board of Supervisors,* the Fourth Circuit ruled that a Title VII hostile work environment case based on sexual harassment between a male heterosexual supervisor and a male heterosexual employee was not actionable.[394] The Fourth Circuit reasoned that while such harassment may be deplorable, it cannot be said to result "because of" the employee's gender as required under Title VII.[395]

After the Supreme Court's decision in *Romer v. Evans,* the Eighth Circuit held same-sex sexual harassment was actionable under Title VII.[396] It reasoned that the key inquiry of any sexual harassment case was whether

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386. *See* Ellen Bravo & Ellen Cassedy, THE 9 TO 5 GUIDE TO COMBATING SEXUAL HARASSMENT CANDID ADVICE FROM 9 TO 5, NAT'L ASS'N OF WORKING WOMEN 64 (1992) (stating that male on female sexual harassment is the most common form of sexual harassment, constituting roughly 90% of the sexual harassment cases filed).

387. *See, e.g.,* Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1996) (Title VII allows heterosexual male to maintain cause of action against homosexual supervisor); Quick v. Donaldson Company Inc., 90 F.3d 1372 (8th Cir. 1996) (holding Title VII recognizes same sex harassment); *overturned by* Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998) (holding same sex sexual harassment not actionable under Title VII); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (holding no sexual harassment for heterosexual male on male harassment); Torres v. National Precision Blanking, 943 F. Supp. 952 (N.D. Ill. 1996) (holding same sex harassment not actionable under Title VII).

388. *See, e.g.,* Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd. without opinion,* 749 F.2d 732 (11th Cir. 1984); Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307 (N.D. Ill. 1981); Barlow v Northwestern Mem'l Hosp., 30 Fair Empl. Prac. Case (BNA) 223 (N.D. Ill. 1980).

389. *See supra* note 353.

390. *See* Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994).

391. *See id.*

392. *See* Oncale v. Sundowner Offshore Services, Inc., 83 F.3d 118 (5th Cir. 1996).

393. *See* McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996).

394. *Id.* at 1196.

395. *Id.* at 1195-96.

396. *See* Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996).

unwelcome sexual advances were made.[397] To the court, it was irrelevant that those advances occurred between heterosexual males.[398] Several other circuits have suggested same-sex sexual harassment is actionable under Title VII.[399]

Romer v. Evans did little to change the way lower courts think of employment discrimination issues concerning gays, lesbians, and bisexuals. Admittedly, Title VII cases involve issues of statutory interpretation and *Romer v. Evans* involved constitutional issues. Nevertheless, lower courts have classified gays, lesbians, and bisexuals as fundamentally different, and have subjected them to different treatment based on nothing more than sexual orientation. Following the Fourth Circuit's opinion regarding same-sex sexual harassment, the court revisited the issue after *Romer v. Evans*.[400] Prior to *Romer v. Evans,* the Fourth Circuit refused to acknowledge a sexual harassment case under Title VII between a male heterosexual employee and a male heterosexual supervisor.[401] In *Wrightson v. Pizza Hut of America,* the Fourth Circuit ruled that an employee of the same gender as his/her supervisor could maintain a Title VII action if the supervisor was a homosexual.[402] The *Wrightson* case and the Fourth Circuit's earlier cases involving same-sex sexual harassment mean that a homosexual supervisor may be liable and subject to Title VII for behavior that would not subject a heterosexual to any liability.[403] *Romer v. Evans* would have appeared to preclude classifications which subjected homosexuals to burdens not suffered by heterosexuals but the Fourth Circuit ignored this teaching as it failed to even cite *Romer v. Evans*.[404]

In 1998, the Supreme Court handed down *Oncale v. Sundowner Offshore Services, Inc.*, which ended the split among Circuit Courts.[405] In a unanimous opinion delivered by Justice Scalia, the Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[406] The Court reasoned that Title VII required no more than that a person suffer harassment

397. *See id.* at 1377-78.

398. *See id.* at 1379.

399. *See* Baskervill v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1994); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993) (Graafeiland, J., concurring); Bundy v. Jackson, 641 F.2d 932, 942 n.7 (D.C. Cir. 1981).

400. *See* Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1996).

401. *See supra* note 387 and accompanying text.

402. *Wrightson*, 99 F.3d at 143.

403. *See id.* at 138. *Compare* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996).

404. *See Wrightson*, 99 F.3d at 138.

405. 118 S. Ct. 998 (1998).

406. 118 S. Ct. at 1001-02.

"because of" sex.[407] The nine justices agreed that the gender of the parties was largely irrelevant in determining whether this requirement was satisfied.[408] Justice Scalia cautioned that not all work place horseplay rose to the level of sexual harassment.[409] He explained that while a football coach would be able to slap a player on the behind, that same act would be actionable if directed toward the coach's secretary at the office.[410]

While *Oncale* settled the dispute between the circuit courts, it did nothing to stop the erosion of *Romer v. Evans*. The Court purposefully avoided any reference to *Romer* in deciding *Oncale*. Indeed, the author of *Oncale*, Justice Scalia, delivered a bitter dissent in *Romer v. Evans*.

Outside the scope of Title VII, courts have also ignored *Romer v. Evans*.[411] In *Shahar v. Bowers,* the Georgia Attorney General revoked an employment offer from Robin Shahar after he learned of a marriage ceremony to be performed between Shahar and her lesbian lover.[412] The marriage service was to be performed by a local rabbi but would not be legally recognized under Georgia's marriage law.[413] The ceremony was later performed and Shahar was subsequently notified that her employment offer had been revoked.[414] The Attorney General justified the decision saying Shahar's decision showed a lack of judgment, would make it difficult to maintain a supportive working environment within the office, and might create the appearance of conflicting interpretations of Georgia's sodomy law.[415] Without the benefit of the Court's decision in *Romer v. Evans,* the district court held the Attorney General's revocation permissible under the Constitution.[416]

The Eleventh Circuit affirmed.[417] Judge Edmondson's majority opinion gave scant mention to *Romer v. Evans,* curtly dismissing the Court's teachings by writing "Romer is about people's condition; this case is about a person's conduct."[418] It is not clear what the court was trying to say and Judge Edmondson did not bother to offer any explanation.[419] The court rejected Shahar's argument that the Attorney General's decision should be evaluated under strict scrutiny review.[420] It applied a balancing test, weighing the State's interest in employing people of its choice against the individual's

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407. *Id.*
408. *See id.*
409. *See* 118 S. Ct. at 1002-03.
410. *See* 118 S. Ct. at 1003.
411. *See* Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).
412. *See id.* at 1101.
413. *See id.* at 1100.
414. *See id.* at 1100-01.
415. *See id.* at 1101.
416. *See* Shahar v. Bowers, 836 F. Supp. 859 (N.D. Ga. 1993).
417. *See* Shahar v. Bowers, 114 F.3d 1097, 1110-11 (11th Cir. 1997).
418. *Id.* at 1110.
419. *See id.*
420. *See id.* at 1102.

right to exercise constitutional rights.[421]

In the court's view, the balance tipped decisively in favor of the State.[422] It noted that an attorney who works for the Attorney General's office was privy to classified information.[423] This was of particular concern to the court in this case because of the ongoing debate in Georgia over homosexual sodomy, same sex marriages, and other social and political issues relating to homosexuals.[424] For the purposes of the litigation, the court acknowledged Shahar's rights of association were "substantial."[425] But it found these interests insufficient to outweigh the State's interest in staffing its offices and avoiding any conflict of interest that might arise because of Georgia's sodomy law and Shahar's homosexuality.[426]

The court held *Romer v. Evans* had no impact on the balancing test it used to evaluate Shahar's claim.[427] In distinguishing *Romer v. Evans*, the court noted that Amendment 2 excluded an entire class of people from the general protection of discrimination law.[428] In contrast, the court took the position that *Romer v. Evans* was limited to laws classifying homosexuals based on their sexual orientation.[429] It has no application in cases where the State denies a single person employment based on his/her sexual orientation.[430]

The court's reasoning is suspect. The majority opinion itself sparked one concurring opinion and four dissenting opinions, each criticizing the majority opinion on one ground or another.[431] Perhaps what is most troubling in the *Shahar* opinion is the court's failure to explain why dismissing a government employee because of her lesbian relationship meets the rationale basis standard set out in *Romer v. Evans*. Instead, the court purports to balance Georgia's interest and Shahar's rights, concluding Georgia has a greater interest than Shahar. The court's discussion gives only curt mention to *Romer v. Evans*, and the reasoning the Court used to invalidate Amendment 2 does not enter the Eleventh Circuit's equation. Instead of engaging in any real analysis, the court summarily concludes that *Romer v. Evans* has no application to the case.

The Eleventh Circuit's treatment of Shahar's claim is consistent with what other federal court's have done. All the courts interpreting *Romer v. Evans,* except one, have found its application limited. Many courts have

421. *See id.* at 1103-04.
422. *See id.* at 1110-11.
423. *See id.* at 1105-06.
424. *See id.* at 1104.
425. *See id.* at 1106.
426. *See id.* at 1108.
427. *See id.* at 1110.
428. *See id.*
429. *See id.* at 1110.
430. *See id.*
431. *See id.* at 1111 (Tjoflat, J., concurring), 1118 (Godbold, S.J., dissenting), 1122 (Kravitch, S.J., dissenting), 1125 (Birch, J., dissenting), 1129 (Barkett, J., dissenting).

failed to even mention *Romer v. Evans*. Those that have dealt with the case directly have given it only cursory discussion and have not applied its rational in any meaningful way. Courts have generally dismissed the case by arguing that *Romer v. Evans* is essentially limited to its facts. Accordingly, most lower courts have concluded that *Romer v. Evans* has no application in most gay rights cases.

IV. WHERE THE COURT WENT WRONG IN *ROMER V. EVANS:* REEVALUATING LAWS THAT DISCRIMINATE AGAINST HOMOSEXUALS

In many ways *Romer v. Evans* was a clear victory for gays, lesbians, and bisexuals. It marked the first time the Court overturned a law discriminating on the basis of sexual orientation. Justice Kennedy's majority opinion compared Amendment 2's impact to racial discrimination and suggested that a naked desire to harm homosexuals was not a valid exercise of state power.[432] The majority opinion itself seemed to undermine the holding and rationale used in *Bowers v. Hardwick*.[433] The Court did not mention *Hardwick,* apparently believing it had no application to the case.[434] But since *Romer v. Evans,* little has changed. Lower courts have overwhelmingly upheld laws which discriminate against homosexuals. Except for one district court opinion holding the military's Don't Ask Don't Tell policy unconstitutional, every case dealing with gay, lesbian and bisexual rights citing *Romer v. Evans* has distinguished the Court's ruling or has ignored its teachings altogether. These courts have often resorted back to the rationale used by the Court in *Hardwick.* The reason for this regression results from the Court's use of rational basis review to invalidate Amendment 2. Lower courts have found it easy to justify discriminatory laws on the ground that there could be some reason for the law outside a bare desire to harm homosexuals. With an overwhelming majority of lower courts still upholding discriminatory laws, one might well ask what went wrong?

The most obvious answer is that the Court should have reviewed Amendment 2 using strict scrutiny review. Most of the briefs presented to the Court argued Amendment 2 was invalid because it burdened a fundamental right, or should be reviewed under the strict scrutiny standard because homosexuals are a suspect class.[435] Not surprisingly, the Court declined to address either of these arguments.[436] The Court has been reluctant in expanding suspect class status beyond race, national origin, and alienage.[437]

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432. *See Romer,* 517 U.S. at 623, 634.

433. *See id.* at 623-36.

434. *See id.*

435. *See* Romer Briefs, *supra* note 104.

436. *See Romer,* 517 U.S. at 623-36.

437. *See, e.g.,* Clark v. Jeter, 486 U.S. 456 (1988) (applying intermediate scrutiny to classifications based on illegitimacy); Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (holding mental retardation is not a suspect class but invalidating city's denial of zoning variance based on mental retardation of applicants); James v. Valtierra, 402 U.S. 137 (1971)

It has also been hesitant in recognizing "fundamental rights" which trigger strict scrutiny review.[438] The Court's reluctance to address these arguments probably stems from the fact that it has never articulated criteria for determining suspect class status or for determining which rights are fundamental. Instead, it has dealt with problems on a case by case basis and has only given factors which are relevant in determining whether a class is suspect or a right fundamental.[439] This uncertainty in the area likely prompted the Justices to avoid addressing the issue until it could establish more concrete criteria for determining suspect classification or fundamental rights.

What has not been addressed by the Court or the lower courts since *Romer v. Evans* was handed down is the possibility that discrimination against homosexuals is a form of gender discrimination requiring courts to use intermediate scrutiny. This idea is simple: if a homosexual chooses a partner of the opposite gender instead of a partner of the same gender, the State would not discriminate.[440] The argument may be understood by considering the landmark case of *Bowers v. Hardwick*[441] and some contemporary problems presented in other cases. In *Hardwick*, Michael Hardwick was charged with homosexual sodomy when police executed a valid search warrant and found him engaged in acts in violation of Georgia's sodomy law.[442] He challenged the law claiming it violated his right to privacy.[443] In a 5-4 decision, the Court rejected this claim holding that their was no right protected by the Constitution to engage in homosexual sodomy.[444] The Court's ruling was narrow, it held only that their was no right for homosexuals to engage in sodomy under the Due Process clause.[445] It did not decide whether heterosexuals had the right to engage in sodomy under the Constitution.[446]

And there lies the problem. Had Michael Hardwick's partner been female instead of male, the case would have been easy.[447] Indeed, it would seem the act would have been protected under *Griswold v. Connecticut* and its progeny.[448] What subjected Michael Hardwick to liability was as much his

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(stating classifications based on wealth did not trigger heightened scrutiny).

438. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (declining to recognize homosexual sodomy as a fundamental privacy interest protected under substantive due process); Plyler v. Doe, 457 U.S. 202 (1982) (declining to recognize public education as a fundamental right but acknowledging that it was more than a government benefit); Dandridge v. Williams, 397 U.S. 471 (1970) (holding there is no fundamental right to welfare benefits).

439. *See* TRIBE, *supra* note 22, §§ 16-7 to 16-12, at 1454-65.

440. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 201-02 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

441. 478 U.S. 186 (1986).

442. *See id.* at 188.

443. *See id.*

444. *See id.* at 191.

445. *See id.*

446. *See id.* at 188 n.2.

447. *See generally* TRIBE, *supra* note 22, § 15-10, at 1338-62.

448. *See generally id.*

choice of a male partner over a female partner as it was the actual act of sodomy. One might therefore ask why should Michael Hardwick's choice of a male partner instead of a female partner subject him to criminal liability?

We might look at the problem from a slightly different angle. Consider the facts in *Shahar v. Bowers*.[449] The Georgia Attorney General offered Robin Shahar employment with his office but revoked that offer when he learned she was a lesbian and planned to be married in a religious ceremony to another woman.[450] Had the Attorney General refused to hire Robin Shahar because she was a woman, there is no question that this would have been considered a form of gender discrimination, and would have been held unconstitutional by a court applying intermediate scrutiny. Why should a court not apply the same standard of review when the Attorney General's decision centers around the gender of the Robin Shahar's life partner? Had Robin Shahar announced she was marrying a man, no reprisals would have been taken. Because she married someone of the same gender, her offer for employment was revoked. How can this be anything but a form of gender discrimination?

The idea that discrimination on the basis of sexual orientation is a form of gender discrimination is not new and has been argued since at least the early 1970s.[451] Until recently, the issue has been ignored by the courts and, even today, the federal courts have not addressed the argument. Apparently, few litigants have even made the argument to courts. Instead, they have focused their arguments around privacy concerns, or have argued that gays and lesbians should be considered a suspect class based on the abuse and discrimination they have suffered in the past.[452] Litigants in *Romer v. Evans* used these arguments by claiming that Amendment 2 burdened the fundamental right of political participation.[453] Yet, the Court was unwilling to address this argument and used rational basis review to invalidate Amendment 2.[454] What was not argued, and what apparently has not been argued with any degree of regularity or seriousness in the federal courts, is that discrimination on the basis of sexual orientation is a form of gender discrimination.

Undoubtedly, some will think the argument ill-conceived and troublesome.[455] Perhaps this is because most laws the Court has invalidated as discriminating on the basis of gender have burdened one gender in favor of the other gender.[456] That is not the case with laws that discriminate against ho-

449. *See supra* note 411 and accompanying text.

450. *See* Shahar v. Bowers, 114 F.3d 1097, 1101 (11th Cir. 1997).

451. *See* Koppelman, *supra* note 440, at 199.

452. *See, e.g.*, Brief of Respondents, City of Aspen and City Council of Aspen, Romer v. Evans, No. 94-1039, 1995 WL 370335; Amicus Brief of Lamda Legal Defense Fund 1995, Romer v. Evans, No. 94-1039, 1995 WL 782809.

453. *See* Romer Briefs, *supra* note 104.

454. *See Romer*, 517 U.S. at 623-36.

455. *See, e.g.*, Massaro, *supra* note 179, at 81-83.

456. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (invalidating Oklahoma statute which prohibited alcohol sales to males under age 21 and females under age 18); Reed v. Reed, 404

mosexuals. Both gay men and women are impacted equally by such laws. Laws which discriminate on the basis of sexual orientation nevertheless discriminate against a class of people based on traditional notions of the relationships between men and women. Most heterosexuals who are opposed to homosexual behavior find nothing wrong with the same activities when the gender of one partner changes. A number of heterosexuals find it offensive to see two gay lovers holding hands or kissing in a public park. For many heterosexuals, the very idea of one man performing oral sex on another man in private is so offensive that the State should outlaw such behavior. As Chief Justice Burger succinctly stated in his concurring opinion in *Bowers v. Hardwick,* homosexual sodomy is "the infamous *crime against nature.*"[457] Yet, the same acts and practices offend few when they occur between a heterosexual couple. Few people would advocate a law barring heterosexuals from holding hands or kissing in the park, and it is almost certain the Court would invalidate any such attempt. What is clear is that laws discriminating against homosexuals spring from popular notions that men and women should be together and that people of the same gender should not be together in intimate relationships. In an effort to preserve these traditional notions of morality, voters enact laws like Amendment 2. The purpose of such laws is to preserve traditional notions of morality, and while this purpose might be sufficient to satisfy rational basis review, it is probably not sufficient to withstand intermediate scrutiny.

The Court has looked at laws which attempt to preserve traditional notions of morality with a skeptical eye when they are based on suspect classes such as race, or quasi suspect classes such as gender.[458] In *Loving v. Virginia,* for example, a Virginia law prohibited inter-racial marriages.[459] The State defended the law on the ground that it affected blacks and whites equally.[460] The Court saw through the smoke screen and invalidated the law, reasoning that the law was nothing more than an attempt to preserve traditional notions of "racial integrity."[461] In the Court's eyes, simply because citizens found the idea of interracial couples offensive did not give it a sufficient interest in preventing interracial marriages.[462]

The same reasoning should be applied to laws discriminating against homosexuals. The fact that laws discriminating against homosexuals burden men and women equally is unimportant.[463] What is significant is the fact that

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U.S. 71 (1971) (invalidating Idaho statute which provided that as between persons equally qualified to administer estates, males must be preferred to females).

457. *Bowers,* 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES ON LAW 215 (1978) (emphasis in original)).

458. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967).

459. *See id.*

460. *See id.* at 7-8.

461. *Id.*

462. *See id.* at 12.

463. *See id.* at 7-8.

societal attitudes concerning relationships between men and women are the frame work used to pass laws discriminating against homosexuals.[464]

Litigants rarely make such arguments, and the courts don't even seem aware of the logic. This point might best be illustrated by Judge Fletcher's dissenting opinion in *Philips v. Perry*.[465] Philips challenged the military's Don't Ask Don't Tell policy after he was discharged.[466] The Ninth Circuit upheld the policy.[467] Judge Fletcher dissented, arguing that Philips discharge was unconstitutional because had Philips' partner been female instead of male, his acts would not have been covered under the military's policy.[468] In Judge Fletcher's words, "[I]t is clear that Philips would not have been discharged had his sexual partners been women rather than men."[469] Ironically, he did not apply intermediate scrutiny.[470] He would have invalidated the Don't Ask Don't Tell policy using only rational basis review.[471] But he did not even explain why a law which discriminated against Philips because he chose to have intimate relationships with men and not women should be reviewed under the rational basis standard and not the intermediate scrutiny standard used by courts in gender discrimination cases.[472]

The Court has used this standard when military regulations classify a soldier's dependents on the basis of gender. In *Frontiero v. Richardson,* a military regulation gave benefits automatically to women who were dependents of men in the armed forces.[473] Men who were dependents of women in the armed forces had to make an actual showing that they were legally dependent to receive the same benefits.[474] The Court applied strict scrutiny to invalidate the regulation,[475] although today the Court would likely apply intermediate scrutiny to invalidate the regulation.[476] Implicit in the Court's reasoning is the idea that regardless of the gender of the actual service person, classifications based on the gender of his/her partner are still subject to some form of heightened scrutiny.[477] In *Philips v. Perry,* had the military denied Philips' dependents benefits based on their gender, the Court would have invalidated the regulation using intermediate scrutiny.[478] That same scrutiny

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464. *See id.*
465. 106 F.3d 1420, 1432 (9th Cir. 1996) (Fletcher, J., dissenting).
466. *See id.* at 1421.
467. *See id.*
468. *See id.* at 1433 (Fletcher, J., dissenting).
469. *Id.*
470. *See id.*
471. *See id.*
472. *See id.*
473. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).
474. *See id.* at 680.
475. *See id.* at 682.
476. *See* Craig v. Boren, 429 U.S. 190 (1976). After *Frontiero,* the Court reviewed gender discrimination cases under intermediate scrutiny. *See id.*
477. *See Frontiero*, 411 U.S. at 688.
478. *See id.*

should be used by courts when government benefits are denied to homosexuals based on the gender of their partners.

The Hawaii Supreme Court recently used similar reasoning in a different context.[479] The Hawaii court recently reviewed the state marriage statute restricting marriage licenses to those couples of the opposite gender.[480] Gay and lesbian couples challenged the statute, contending that it burdened the fundamental right of marriage and was a form of gender discrimination.[481] The court refused to find same sex marriage a fundamental right which triggered strict scrutiny.[482] It reasoned strict scrutiny review was appropriate under Hawaii's state constitution because the statute classified citizens based on their gender.[483] Like the *Loving* Court, the Hawaii court found it irrelevant that the statute applied equally to men and women.[484] Underlying the court's analysis is the idea that the State cannot use gender classifications to deny a group equal protection under the law without triggering heightened scrutiny.[485]

The idea that discrimination on the basis of sexual orientation is a form of gender discrimination requiring courts to use intermediate scrutiny finds support outside of Hawaii.[486] Commentators have long recognized the power of the argument and its potential significance in gay rights litigation.[487] Even those commentators who do not favor any form of heightened scrutiny have acknowledged the difficulties with rejecting the gender discrimination argument.[488]

The gender discrimination argument is not precluded by the Court's decision in *Romer v. Evans*. Litigants did not argue that Amendment 2 was a form of gender discrimination.[489] The only arguments before the Court were that Amendment 2 burdened a fundamental right and that the Court should treat homosexuals as a suspect class.[490] The Court expressed no opinion on the gender discrimination issue.[491] The gender discrimination argument may even supplement what the Court said in *Romer v. Evans*. Justice Kennedy is surely right that no State may classify citizens in a way that denies a certain group protection under the law,[492] but neither should a law escape intermediate scrutiny by the courts when it discriminates by classifying citizens on the

479. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
480. *See id.* at 55.
481. *See id.* at 48-50.
482. *See id.* at 57.
483. *See id.* at 68.
484. *See id.*
485. *See id.* at 64-68.
486. *See generally* Koppelman, *supra* note 440; Law, *supra* note 440.
487. *See generally* Koppelman, *supra* note 440; Law, *supra* note 440.
488. *See, e.g.*, Massaro, *supra* note 179.
489. *See* Romer Briefs, *supra* note 104.
490. *See id.*
491. *See Romer*, 517 U.S. at 623-36.
492. *See id.* at 623.

basis of gender choices.

The gender discrimination argument also avoids many of the pitfalls of *Bowers v. Hardwick*. The *Hardwick* Court was careful to ground its decision solely on the Due Process Clause.[493] The Court expressed no opinion concerning any Equal Protection challenges to the Georgia sodomy law.[494] Specifically, the Court held the Constitution's Due Process clause did not protect homosexual sodomy; but the Justices expressed no opinion as to whether heterosexual sodomy was a protected right.[495] The argument that discrimination on the basis of sexual orientation is a form of gender discrimination is grounded in the Equal Protection clause and does not rely on Due Process analysis for its strength. Thus, issues may be framed without reference to *Hardwick*, and *Hardwick* may be easily distinguished by litigants and courts.

The argument that discrimination on the basis of sexual orientation is a form of gender discrimination has application to almost every law which discriminates on the basis of sexual orientation. Cincinnati's amendment repealing all legislation preventing discrimination on the basis of sexual orientation, the military's Don't Ask Don't Tell policy, and state employers that discriminate against homosexuals would be reviewed under intermediate scrutiny. The Court's recent cases using intermediate scrutiny make it unlikely that any of the laws or employment practices listed above would survive constitutional analysis by a court faithfully applying the intermediate scrutiny standard.

This argument has added value because it gives litigants novel approaches to achieving equality. Courts have been reluctant to address arguments claiming homosexuals are a protected class or that laws that discriminate against them burden some fundamental right.[496] Courts which have addressed such arguments have generally ruled in ways unfavorable to gays, lesbians, and homosexuals.[497] This argument presents courts with a simpler alternative than deciphering fundamental rights or determining suspect class status from a variety of factors and cases. It merely asks courts to apply already existing case law to statutes and government decisions which discriminate on the basis of sexual orientation. The link between gender discrimination and homosexuality is direct: "But for" two partners being the of the same gender, the state would not discriminate against the couple. If the gender of one of the partners changes, the State would no longer discrimi-

493. *See Bowers*, 478 U.S. at 188 n.2.

494. *See id.* at 186-97.

495. *See id.* at 188 n.2.

496. *See, e.g., Romer*, 517 U.S. at 620; *Bowers*, 478 U.S. at 186.

497. *See, e.g.*, Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990); Ben Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); National Gay Task Force v. Board of Education, 729 F.2d 1270, 1273 (10th Cir. 1988), *aff'd mem.*, 470 U.S. 903 (1985). *But see* Able v. U.S. 968 F. Supp. 850 (E.D.N.Y. 1997).

nate against the couple.

V. CONCLUSION

Romer v. Evans was an important step in the fight for gay rights, giving homosexuals their most significant victory in the federal courts. However, reliance on that case is unlikely to produce future victories for homosexuals. Lower courts have ignored *Romer v. Evans* whenever possible and have rarely relied on it to invalidate laws discriminating on the basis of sexual orientation. Litigants and courts should take seriously the argument that discrimination on the basis of sexual orientation is a form of gender discrimination.