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"DISTINCTIONS WITHOUT A DIFFERENCE": HOW THE SIXTH CIRCUIT MISREAD *ROMER V. EVANS*

JASON D. KIMPEL*

I. INTRODUCTION

"'No, because I would have to tell you that right now we would not conform—we would not send our white children to the Negro schools.'"[1]

When the Supreme Court struck down the doctrine of "separate but equal"[2] in the field of public education[3] and later mandated that public schools end racial segregation "with all deliberate speed,"[4] resistance to the social policy announced by the Court was expected.[5] In fact, many of the lower courts displayed hostility and abhorrence toward the *Brown v. Board of Education* decisions. One court held that the *Brown* decisions did not require "the states [to] mix persons of different races in the schools. . . . [The] Constitution, in other words, does not require integration. [It] merely forbids the use of governmental power to enforce segregation."[6] Another judge scorned in response to *Brown II*, "'[T]he white man has a right to maintain his racial integrity and it can't be done so easily in integrated schools . . . . We will not name any date or issue any order. . . . The School Board should further study this question and perhaps take further action, maybe an election.'"[7] As a result of the hostility from the lower courts, only 2.3% of the black children in the South were attending desegregated schools ten years after *Brown I*.[8]

An important lesson learned from the aftermath of the *Brown* decisions was that the Supreme Court lacks the power to enforce its decisions, especially those with

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* J.D. Candidate, 1999, Indiana University School of Law-Bloomington; B.A., 1996, DePauw University. I would like to thank Professor David C. Williams for his advice, critique, and suggestions regarding this Note. I would also like to especially thank my parents for their inexhaustible love, support, and encouragement throughout my life. This Note is dedicated to my grandparents, Dr. William and Mrs. Betty Detroy.

1. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 359 (3d ed. 1993) (quoting S. Emory Rogers in response to a question from Chief Justice Warren as to whether there would be an honest attempt from the South to conform to the Court's decree in *Brown v. Board of Education*, 349 U.S. 294 (1955)).

2. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

3. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*).

4. Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (*Brown II*).

5. *See* O'BRIEN, *supra* note 1, at 359.

6. Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

7. J.W. PELTASON, FIFTY-EIGHT LONELY MEN 119 (1971) (quoting the comment by Judge J. Whitfield Davidson quoted in the Associated Press dispatch, July 30, 1959) (omissions in original) (alteration added)).

8. *See id.*

great social and emotional consequences.[9] This lesson has recently been re-taught to the pupils of constitutional law. Just as the lower courts were reluctant to follow the Court's mandate in *Brown II*, some courts now appear reluctant to follow the Supreme Court's landmark decision in *Romer v. Evans*.[10]

The Supreme Court in *Romer* struck down an amendment to the Colorado Constitution which prohibited all legislative, executive, and judicial action procured to benefit gays and lesbians.[11] Gay rights groups heralded the decision as a huge victory in their struggle for equal rights. However, gay rights groups were shocked when, less than a year later, the Sixth Circuit in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,[12] upheld a similar amendment to the Cincinnati City Charter.[13] Those in favor of the city charter amendment hailed the ruling as "a valid distinction that did not run afoul of *Romer*."[14] Thus, the debate over what impact *Romer* will have on the ultimate landscape of gay rights moved from academia to the court room. If *Equality Foundation* proves to be a harbinger of the judicial response to *Romer*, then the landmark victory for gay rights may not be realized for some time to come.

This Note posits that the Sixth Circuit's decision in *Equality Foundation* represents a ruling that misreads the Court's holding in *Romer*.[15] The analysis of *Equality Foundation* begins by first presenting a case history of *Romer*.[16] Next, a brief case history of *Equality Foundation* illustrates the sharp political debate which took place in Cincinnati. In the end, this Note argues that the Sixth Circuit failed to materially distinguish the two cases, and as a result, failed to follow the command of the Supreme Court.

II. CASE HISTORY

The thrust of this Note argues that the Sixth Circuit failed to materially distinguish *Equality Foundation* from *Romer v. Evans*. Accordingly, an examination of the respective case histories follows below.

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9. As Alexander Hamilton explained in *Federalist 78*, the judiciary will always be the "least dangerous" branch of government. THE FEDERALIST NO. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins 2d ed. 1981).

10. 517 U.S. 620 (1996).

11. *Id.* at 624.

12. 128 F.3d 289 (6th Cir. 1997), *reh'g denied*, Nos. 94-3855, 94-3973, 94-4280, 1998 WL 101701 (6th Cir. Feb. 5, 1998), *cert. denied*, 119 S. Ct. 365 (1998).

13. *See* David E. Rovella, *Gay Groups Are Angry at Sexual Preference Ruling*, NAT'L L.J., Nov. 10, 1997, at A9.

14. *Id.*

15. The Sixth Circuit's reluctance to follow the direction of the Supreme Court is reminiscent of the South's defiance of the *Brown* decisions.

16. Because the Court's decision is somewhat ambiguous, how a court chooses to read *Romer* determines how a court decides *Equality Foundation*.

A. Romer v. Evans

On November 3, 1993, 53.4% of voters in Colorado passed an amendment to the Colorado Constitution commonly known as Amendment 2.[17] Amendment 2 stated:

> *No protected status based on homosexual, lesbian, or bisexual orientation.* Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons 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.[18]

The immediate effect of this enactment was that it invalidated all current state and local legislative, regulatory, and administrative anti-discrimination measures protecting gays and lesbians.[19]

On November 12, 1992, some individuals, three cities, and a school district (collectively "plaintiffs") filed suit in the Denver District Court claiming that Amendment 2 was unconstitutional, and thus, a preliminary injunction should be imposed on its enforcement.[20] The district court granted the preliminary injunction and defendants appealed the court's decision to the Colorado Supreme Court.[21]

The Colorado Supreme Court affirmed the district court's grant of the preliminary injunction.[22] In doing so, the court held that the "Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subjected to strict judicial scrutiny."[23] The court held that Amendment 2 infringed upon this fundamental right because it "bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation."[24]

Although no court had ever invalidated a statute or amendment based upon a purported fundamental right to equal participation in the political process,[25] the Colorado court supported its ruling by relying upon two lines of cases. First, the court analyzed voting rights cases and distilled from them the principle that "laws may not create unequal burdens on identifiable groups with respect to the right to

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17. *See* Brief for Petitioners at 4, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039).

18. COLO. CONST. art. II, § 30b (emphasis in original) (held unconstitutional in *Romer*, 517 U.S. at 635-36).

19. *See* Brief for Petitioners at 3, *Romer* (No. 94-1039).

20. *See* Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994) (en banc) (*Evans II*), *aff'd*, 517 U.S. 620 (1996).

21. *See id.*

22. *See* Evans v. Romer, 854 P.2d 1270, 1286 (Colo. 1993) (en banc) (*Evans I*).

23. *Id.* at 1282 (quoting Gordon v. Lance, 403 U.S. 1, 5 (1971)).

24. *Id.* at 1285.

25. *See* Anthony M. Dillof, Romer v. Evans *and the Constitutionality of Higher Lawmaking*, 60 ALB. L. REV. 361, 367-68 (1996).

participate in the political process absent a compelling state interest."[26] Second, the Colorado court relied upon cases involving direct limits imposed upon the democratic process.[27] Most important and most closely related, the court relied upon *Hunter v. Erickson*,[28] which involved an amendment to the Akron City Charter preventing the city council from "implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron."[29] The Colorado court interpreted broadly the language in *Hunter* concerning the disadvantaging of a singled-out group in the political process.[30] "[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf. . . ."[31] From this language, the Colorado court inferred the existence of a fundamental right to equal participation in the political process.[32]

The court also rejected the State's argument that *Hunter* was solely a race case, and thus, should be applied only to groups who qualify as a suspect class already falling under the protection of strict scrutiny.[33] Accordingly, the Colorado Supreme Court applied strict scrutiny and invalidated Amendment 2 under the Equal Protection Clause because Amendment 2 infringed upon a fundamental right—the right to equal participation in the political process.[34] After the Colorado Supreme Court ruling, the State sought certiorari review of the decision before the United States Supreme Court, which was denied.[35]

On remand from the Colorado Supreme Court, the issue for the district court was whether Amendment 2 was narrowly tailored to serve a compelling state interest.[36] The district court ruled that Amendment 2 violated homosexuals' fundamental right to equal participation in the political process and that no state interest advanced was narrowly tailored to achieve a compelling state interest. Therefore, the court entered a written order permanently enjoining the enforcement of Amendment 2.[37]

Colorado subsequently sought review of the trial court's decision from the Colorado Supreme Court in *Evans II*. On appeal, the Colorado Supreme Court upheld its previous ruling as well as the trial court's determination that no state interest passed strict scrutiny. Accordingly, the Colorado Supreme Court issued a permanent injunction.[38]

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26. *Evans*, 854 P.2d at 1279.

27. *See id.* at 1279-82.

28. 393 U.S. 385 (1969).

29. *Id.* at 386.

30. *See* Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 376 (1997).

31. *Hunter*, 393 U.S. at 393.

32. *See Evans*, 854 P.2d at 1282.

33. *See* Schacter, *supra* note 30, at 376.

34. *See Evans*, 854 P.2d at 1284-86.

35. *See* Romer v. Evans, 510 U.S. 959 (1993).

36. *See* Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994) (en banc), *aff'd*, 517 U.S. 620 (1996).

37. *See id.* at 1339-40.

38. *See id.* at 1350.

On February 21, 1995, the United States Supreme Court granted certiorari to review the Colorado Supreme Court decision in *Evans II*.[39] Although the petitioners' question for review was: "'Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections,'"[40] the Supreme Court affirmed the ultimate judgment of the Colorado Supreme Court (that Amendment 2 violated the Equal Protection Clause), "but on a rationale different from that adopted by the State Supreme Court."[41]

Instead of deciding the case based upon whether or not homosexuals' fundamental right to equal participation in the political process had been unconstitutionally infringed under the Equal Protection Clause, the Court declared that Amendment 2 constituted a "literal" violation of equal protection, and thus, defied the traditional equal protection inquiry into whether or not the legislative classification bears a rational relation to some legitimate end.[42] Even under a rational basis test, the Court declared that because Amendment 2 was "born of animosity," it therefore could not be "directed to an identifiable legitimate purpose or discrete objective."[43]

In sum, the Court did not invalidate Amendment 2 as a violation of equal protection on the same grounds as did the Colorado Supreme Court. Rather, the *Romer* Court held that Amendment 2 failed the rational basis test not only because it imposed an unusually broad harm upon an identifiable group, but also because the Court believed that it must have been singularly based on simple hostility toward that group.

B. Equality Foundation

1. The District Court

The struggle for equal rights by gays and lesbians in Cincinnati paralleled that of the events in Colorado. Although the battle over Amendment 2 in Colorado was waged on a statewide theater as opposed to the City of Cincinnati arena, the similarities between the two fights are compelling.

Early victories were scored for gay rights when the Cincinnati City Council passed the Equal Employment Opportunity Ordinance ("EEO") in 1991, and later

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39. *See* Romer v. Evans, 513 U.S. 1146 (1995).

40. John Daniel Dailey & Paul Farley, *Colorado's Amendment 2: A Result in Search of a Reason*, 20 HARV. J.L. & PUB. POL'Y 215, 242 (1996) (quoting Petition for Certiorari at i, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039)).

41. *Romer*, 517 U.S. at 626.

42. *See id.* at 631-32. The Court also avoided the question as to whether or not homosexuals constituted a suspect or quasi-suspect class. *See id.*

43. *Id.* at 621.

the Human Rights Ordinance ("HRO") in 1992.[44] The EEO prohibited the city from discriminating in its hiring for employment and in its appointments to city boards and commissions on the basis of sexual orientation.[45] The HRO, on the other hand, prohibited discrimination in private employment, public accommodations, and housing on the basis of sexual orientation.[46] However, the opposition countered these early victories.

The opponents to these ordinances organized themselves into a group called "Take Back Cincinnati," later known as "Equal Rights Not Special Rights" ("ERNSR").[47] ERNSR drafted an amendment to the Charter of the City of Cincinnati and collected enough signatures to have it placed on the ballot in the upcoming general election.[48] The proposed amendment, commonly known as Issue 3, read as follows:

> NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.
>
> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.[49]

The struggle for and against this amendment proposal was highly debated and emotional with neither side refraining from punching below the belt. Opponents of Issue 3 associated the amendment proposal with the likes of Hitler, the KKK, and McCarthey.[50] On the other hand, the proponents of Issue 3 not only lobbied voters on the theme of denying "special rights" for gays and lesbians, but more vulgarly campaigned for votes by characterizing gays and lesbians as pedophiles and characterizing homosexuality as simply a matter of "'who one chooses to have sex with.'"[51] In the end, the voters of Cincinnati succumbed to the "special rights"

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44. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 421 (S.D. Ohio 1994), *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

45. *See id.* The EEO also prohibited discrimination on the basis of race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. *See id.*

46. *See id.* The HRO also prohibited discrimination on the other bases that the EEO prohibited. *See supra* note 45. Moreover, the HRO provided exemptions for fraternal and religious organizations. *See Equality Found.*, 860 F. Supp. at 421.

47. *See Equality Found.*, 860 F. Supp. at 422.

48. *See id.*

49. *Id.* Note the similarities to Amendment 2. *See supra* text accompanying note 18.

50. *See Equality Found.*, 860 F. Supp. at 422.

51. *Id.* (quoting Plaintiffs' Exhibit 2, at 10).

propaganda and passed the amendment proposal by a 62% majority.[52] Although defeated, the opponents to Issue 3 did not roll over. Instead, they moved the fight from the ballot box to the court room and scored two huge victories.

On November 8, 1993, Equality Foundation of Greater Cincinnati, Inc. ("Equality Foundation") filed suit in federal district court claiming that Issue 3 violated their constitutional rights to equal protection, free association, and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution.[53] On November 19, 1993, the district court, following an evidentiary hearing, issued a preliminary injunction against the implementation of Issue 3.[54] Subsequently, in one of the most favorable decisions for gay rights, the district court ordered a permanent injunction against the enforcement of Issue 3.[55]

In ordering the permanent injunction, the district court made several ground breaking conclusions of law, which were based on equally ground breaking findings of fact. The court deduced these facts from an enormity of expert testimony given in both the preliminary and permanent injunction hearings.[56] Some of the decisive findings of fact were as follows:

> 2. Sexual orientation is a characteristic which exists separately and independently from sexual conduct or behavior.
>
> . . . .
>
> 8. Sexual orientation is set in at a very early age—3 to 5 years—and is not only involuntary, but is unamenable to change.
>
> 9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society.
>
> . . . .
>
> 13. Homosexuals have suffered a history of pervasive, irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.
>
> . . . .
>
> 15. Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic.
>
> . . . .
>
> 17. In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless.
>
> . . . .
>
> 22. Amending the city charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation . . . .[57]

From these and other findings of fact, the court delivered a powerful blow to the opponents of gay equal rights. First, the court held on three different grounds that

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52. *See id.*

53. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 838 F. Supp. 1235, 1236 (S.D. Ohio 1993). Equality Foundation is an Ohio not-for-profit corporation formed to oppose ERNSR's efforts to promote an anti-gay initiative in Cincinnati. Other plaintiffs included several gay Cincinnati residents, as well as Housing Opportunities Made Equal (H.O.M.E.), a civil rights organization with a diverse membership of people of all races and sexual orientations that promotes equal housing opportunities in Cincinnati. *See Equality Found.*, 860 F. Supp. at 423.

54. *See Equality Found.*, 838 F. Supp. at 1243.

55. *See Equality Found.*, 860 F. Supp. at 449.

56. *See id.* at 424-26 (summarizing the expert testimony given).

57. *Id.* at 426-27.

Issue 3 violated the Equal Protection Clause.[58] Second, the court held that the provision violated the First Amendment by unconstitutionally deterring political speech and association.[59] Finally, the court held that Issue 3 was unconstitutionally vague in violation of due process.[60]

In confronting the equal protection claim, the district court first discussed the constitutional standards of review under the Equal Protection Clause. Specifically, the court reiterated that if a law infringes upon a fundamental right or makes a classification based upon a suspect class, then it will be reviewed under strict scrutiny.[61] Under strict scrutiny, the law is unconstitutional unless it is narrowly tailored to achieve a compelling state interest.[62] Further, the court explained that if legislation classifies on the basis of a quasi-suspect class, then it will be subjected to intermediate scrutiny; thus, the law must be substantially related to an important government interest in order to be constitutional.[63] Finally, the court stated that under rational basis review, a law must be rationally related to a legitimate government interest.[64] After setting out the standards of review, the court held that Issue 3 violated gays' and lesbians' fundamental right to equal access to the political process,[65] that sexual orientation is a quasi-suspect classification,[66] and that Issue 3 was not rationally related to a legitimate government interest.[67]

In finding that Issue 3 violated homosexuals' fundamental right to equal access to the political process, the district court relied upon the same line of cases used by the Colorado Supreme Court in *Evans*. Specifically, the court took great pains to defend its reliance on *Hunter* to declare that indeed such a fundamental right exists.[68] In doing so, the court emphasized that *Hunter* transcended a simple case of racial classification, explaining that the United States Supreme Court in *Hunter* spoke in race-neutral terms and relied solely on voting cases "which had nothing to do with any racial classification."[69] Moreover, the court illuminated the fact that the Supreme Court in *Washington v. Seattle School District No. 1*[70] made reference to the "Hunter Doctrine," inferring that if *Hunter* was only a race case, then the "Hunter Doctrine" would refer to nothing more than the principle that classifications based upon race are subjected to strict scrutiny.[71] Accordingly, the court concluded, that the "Hunter Doctrine," requires that "'the State may no more disadvantage any particular group by making it more difficult to enact legislation

58. *See id.* at 449.
59. *See id.* at 446.
60. *See id.* at 449.
61. *See id.* at 429-30.
62. *See id.* at 430.
63. *See id.*
64. *See id.* at 441.
65. *See id.* at 433-34.
66. *See id.* at 436.
67. *See id.* at 441.
68. *See id.* at 431-33 (citing Hunter v. Erickson, 393 U.S. 385 (1969)).
69. *Id.* at 431.
70. 458 U.S. 457 (1982).
71. *Equality Found.*, 860 F. Supp. at 431 n.11 (quoting *Seattle Sch. Dist. No. 1*, 458 U.S. at 473).

in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.'"[72] Further, the doctrine exists separately and independently from "race cases."[73] In sum, the court, like the Colorado court in *Evans*, concluded that Issue 3 violated homosexuals' fundamental right to equal access to the political process "by singling out and disadvantaging an independently identifiable group of citizens—gays, lesbians, and bisexuals—by making it more difficult for that group to enact legislation in its behalf."[74]

Next, the district court took up the issue of whether or not gays and lesbians constitute a quasi-suspect class.[75] First, the court concluded that homosexuals "have suffered a history of invidious discrimination based upon their sexual orientation."[76] Second, the court concluded that sexual orientation bears no relation to an individual's ability to perform in, participate in, or contribute to society.[77] Third, the court concluded that sexual orientation "is a characteristic beyond the control of the individual," and also exists independently of any conduct.[78] Fourth, the court determined that, although not a wholly politically powerless group, homosexuals suffer significant political obstacles.[79] For example, the court found that other minority groups refused to form coalitions with homosexual groups because of their strong dislike for gays and lesbians. Thus, the court concluded that homosexuals' inability to form coalitions seriously retards their political power.[80] Finally, the court held that *Bowers v. Hardwick*[81] does not pose an impediment to a finding that homosexuals constitute a quasi-suspect class.[82] The court's reasoning was that, although *Bowers* constitutionally permits the criminalization of homosexual sodomy, "sexual orientation . . . exists independently of any conduct," and therefore, *Bowers* is not controlling.[83] As a result, the court held that gays, lesbians, and

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72. *Id.* at 432 (quoting *Hunter*, 393 U.S. at 393 (emphasis omitted)).

73. *Id.*

74. *Id.* at 433-34.

75. *See id.* at 434.

> Although the Supreme Court has never articulated a precise test for determining which groups should be regarded as suspect or quasi-suspect, the Court has repeatedly considered a number of factors[:] . . . whether the group's defining characteristic is immutable[,] . . . whether the group has suffered a history of discrimination, . . . "or [if the group has been] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. (citations omitted) (quoting San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 28 (1973) (emphasis omitted) (third alteration in original)).

76. *Id.* at 436.

77. *See id.* at 437.

78. *Id.*

79. *See id.* at 437-39.

80. *See id.* at 438.

81. 478 U.S. 186 (1986) (holding that laws criminalizing homosexual sodomy did not run afoul of the Due Process Clause because there is no fundamental right to engage in homosexual sodomy).

82. *See Equality Found.*, 860 F. Supp. at 439.

83. *Id.* at 440.

bisexuals constitute a quasi-suspect class and, therefore, Issue 3 must meet intermediate scrutiny to be constitutional.[84]

In its dealing with the equal protection claim, the district court held that Issue 3 did not bear a rational relationship to a legitimate state interest. The court rebutted the City's argument that Issue 3 advanced the state interests of saving resources and minimizing government regulation by stating that any money saved by the elimination of laws prohibiting discrimination against homosexuals "would be, at best, de minimis."[85] The court rebutted the argument that Issue 3 would serve the government interest of preserving the nuclear family by explaining that such an interest is not sufficiently related to Issue 3's broad and prospective ban on all laws forbidding discrimination against homosexuals.[86] More importantly, however, the court held that "the very structure of Issue 3"—its sweeping scope and its prospective ban on all anti-discrimination legislation, policies, or regulations on behalf of homosexuals—infers that its passage was a result of a "'bare . . . desire to harm a politically unpopular group . . .' [and s]uch an objective can never 'constitute a legitimate governmental interest.'"[87] The court went even further, stating that "[t]he purpose not only to permit discrimination, but also to encourage it, [is] constitutionally defective."[88]

Because the district court declared Issue 3 unconstitutional under the most deferential standard of rational basis review, the district court ruled, a fortiori, that Issue 3 did not meet the intermediate level of scrutiny demanded by its classification as a quasi-suspect class, nor the strict scrutiny level demanded by Issue 3's infringement upon homosexuals' fundamental right to equal access to the political process.[89]

Despite the district court's invalidation of Issue 3 on the equal protection claim, the court went further and declared that Issue 3 violated homosexuals' First Amendment right to free speech and association.[90] Moreover, the court held that Issue 3 was unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.[91]

2. The Sixth Circuit

True to the spirit of the struggle, the proponents of Issue 3 were not going to let the district court have the last word. Accordingly, the district court's decision was appealed by ERNSR and the City to the Sixth Circuit United States Court of

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84. *See id.*

85. *Id.* at 441 (emphasis omitted).

86. *See id.* at 442.

87. *Id.* at 443 (citation omitted) (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (omissions in original) (emphasis omitted)).

88. *Id.*

89. *See id.* at 449.

90. *See id.* at 444.

91. *See id.* at 449. Because the focus here is the Sixth Circuit's decision in light of *Romer*, and because the Court in *Romer* did not address First Amendment issues or questions of vagueness, these holdings, although significant, are not relevant to the scope of this Note.

Appeals. On appeal, the judgment of the district court was reversed and the permanent injunction vacated.[92]

The Sixth Circuit began its review of the district court's ruling by disregarding the findings of fact made by the lower court. Stating that because the lower court's findings of fact constituted "ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support 'constitutional facts,'" the Sixth Circuit held that such findings of fact were subject to de novo review.[93] Once freed from the novel findings of fact, the Sixth Circuit made quick work of the district court's ruling. It ruled that Issue 3 violated neither the Equal Protection Clause, the First Amendment, nor the Due Process Clause.[94]

In addressing the equal protection claim, the Sixth Circuit first dealt with the issue of whether or not homosexuals constitute a quasi-suspect class. In doing so, the Sixth Circuit held that the district court misconstrued *Bowers* by holding that homosexuals constituted a quasi-suspect class.[95] It reasoned that even, assuming arguendo, sexual orientation is a separate characteristic beyond the control of the individual, homosexuals cannot comprise an identifiable class because "'they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.'"[96] The court opined that persons affected by legislation concerning sexual orientation are so affected because of their conduct which identifies them as homosexual, not because of their sexual orientation.[97] Hence, the Sixth Circuit held that *Bowers* commands, as a matter of law, that homosexuals cannot comprise a quasi-suspect class, and thus, the district court's holding to the contrary was erroneous.[98]

Next, the Sixth Circuit asserted that the lower court's recognition of a fundamental right to equal participation in the political process was "erroneously fashioned."[99] Accordingly, the Sixth Circuit reasoned that none of the cases relied upon by the lower court supported the recognition of a fundamental right to equal participation in the political process.[100] Therefore, the circuit court held that because Issue 3 only has the effect of rendering futile the lobbying of the City Council for legislation preferential to homosexuals, and because homosexuals may still seek relief via the Ohio Legislature or the United States Congress, opponents of Issue 3 simply lost a battle in a political dispute, not a fundamental constitutional right.[101]

After concluding that homosexuals do not constitute a quasi-suspect class and that Issue 3 impinged on no fundamental right, the Sixth Circuit held that Issue 3

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92. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 271 (6th Cir. 1995) (*Equality Foundation I*), *vacated*, 518 U.S. 1001 (1996).

93. *Id.* at 265.

94. *See id. passim.*

95. *See id.* at 268.

96. *Id.* at 267 (quoting Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (alteration in original)).

97. *See id.*

98. *See id.* at 268.

99. *Id.*

100. *See id.* at 268-69.

101. *See id.* at 269.

was subject to and passed the rational basis test.[102] In ruling as such, the court found that Issue 3 furthered a "litany of valid community interests."[103] Specifically, the court found that Issue 3

> enhanced associational liberty on the part of Cincinnati residents[,] . . .return[ed] the municipal government to a position of neutrality on the issue[,] . . . reduced governmental regulation of the private social and economic conduct of Cincinnati residents, . . . [and] decreased municipal supervision of private conduct, which necessarily may result in some cost savings for the City's taxpayers.[104]

As a result, the Sixth Circuit held that Issue 3 did not violate the Equal Protection Clause of the United States Constitution.[105]

3. The U.S. Supreme Court

Equality Foundation appealed the Sixth Circuit's decision to the United States Supreme Court. Yet, prior to the Sixth Circuit's decision in *Equality Foundation I*, the Supreme Court had already granted certiorari to *Romer v. Evans*. Therefore, when it granted the petition for writ of certiorari, the Court vacated the Sixth Circuit's judgment and remanded the case back to the Sixth Circuit "for further consideration in light of *Romer v. Evans*."[106]

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented to the Court's decision to grant certiorari and remand. Justice Scalia wrote that Issue 3 involves a decision at the "lowest electoral subunit" to deprive homosexuals of "special protection."[107] Therefore, Justice Scalia scorned, "the consequence of holding this provision unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals."[108] Finally, Justice Scalia characterized the issue in the *Equality Foundation* cases as an "*ultra-Romer* issue"—an issue not embraced by *Romer*.[109] On the other hand, the majority of the Court apparently felt that the issue in *Equality Foundation* was embraced within *Romer* and therefore, commanded the Sixth Circuit to decide the remanded case consistent with the "light" of *Romer*.[110]

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102. *See id.* at 268.

103. *Id.* at 270.

104. *Id.*

105. *See id.* at 270-71. The court also held that Issue 3 did not violate the First Amendment nor was it unconstitutionally vague; however, for reasons previously mentioned, the analysis on these issues is not pertinent to the scope of this Note. *See supra* note 91.

106. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001, 1001 (1996).

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

108. *Id.* (emphasis omitted).

109. *Id.* (emphasis in original).

110. *See id.* Although the fact that the majority of the Supreme Court did not agree with the views of the dissent, the Sixth Circuit panel still attempted to distinguish *Romer* on grounds based upon the rationale of the dissent. Thus, the Sixth Circuit's use of the dissent's rationale appears misguided. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, Nos. 94-3855, 94-3973, 94-4280, 1998 WL 101701, at *4 (6th Cir. Feb. 5, 1998).

4. The Sixth Circuit—Again

Upon remand, the Sixth Circuit reaffirmed its decision in *Equality Foundation I* despite the Supreme Court's decision in *Romer*. The court began by noting that *Romer* did not hold Amendment 2 unconstitutional under strict scrutiny or intermediate scrutiny because the *Romer* Court did not address the issues of whether a fundamental constitutional right to equal participation in the political process existed or whether homosexuals constitute a quasi-suspect class.[111] The Sixth Circuit explained that instead, the Court in *Romer* had reconfirmed the traditional equal protection review of legislative enactments and had ultimately applied the rational basis test to Amendment 2.[112]

Next, the Sixth Circuit tried to distinguish Issue 3 from Amendment 2. The court stated, "the two cases involved substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures."[113] It further stated that the "salient operative factors which motivated the *Romer* analysis and result were unique to that case and were not implicated in *Equality Foundation I*."[114] In other words, the Sixth Circuit agreed with Justice Scalia's dissent to the Court's remanding of *Equality Foundation I*. In the end, the Sixth Circuit distinguished Amendment 2 and upheld Issue 3 based on the fact that Issue 3 applied to the city charter of Cincinnati, while Amendment 2 applied to the Colorado state constitution.[115]

After the Sixth Circuit handed down its decision upholding Issue 3, Equality Foundation petitioned the Sixth Circuit for a rehearing en banc.[116] "The panel . . . reviewed the petition for rehearing and conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition [was] denied."[117]

In concurring with the denial of the suggestion for rehearing en banc, Judge Boggs asserted that "*Romer* said nothing about whether a city like Cincinnati could choose to foreclose the enactment of possibly salutary, but also possibly insidious, gay-rights ordinances."[118] Judge Boggs emphasized the different character a city has as compared to a "constitutionally cognizable political sovereignt[y]," that is, a state.[119] Therefore, Boggs opined that "Issue 3 merely reflects the kind of social and political experimentation that is such a common characteristic of city government."[120] Finally, Boggs put forth that only a rational reason for Cincinnati voters to have approved Issue 3 need be contemplated to sustain Issue 3's

111. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 294 (6th Cir. 1997) (*Equality Foundation II*), *cert. denied*, 119 S. Ct. 365 (1998).

112. *See id.*

113. *Id.* at 295.

114. *Id.*

115. *See id.* at 296-301.

116. *See Equality Found.*, 1998 WL 101701, at *1.

117. *Id.*

118. *Id.* (Boggs, J., concurring).

119. *Id.*

120. *Id.* at *2.

constitutionality, and therefore proceeded to give examples of voters' possible rational reasons for approving the city charter.[121]

However, six Sixth Circuit judges, including Chief Judge Martin, dissented to the denial of the petition for rehearing en banc: "we believe that the panel's opinion . . . conflicts with the Supreme Court's decision in [*Romer*]."[122] The dissent argued that the panel's distinctions of Issue 3 from Amendment 2 were initially suspect because they were based upon Justice Scalia's dissent in the decision to remand *Equality Foundation*, and that those distinctions "appear to be either refuted by the facts or the principle of law announced in *Romer*."[123] In the end, the dissent stated:

> We believe the panel decision in this case draws "distinctions without a difference" and fails to abide by the key ruling in *Romer* that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[124]

5. The U.S. Supreme Court—Again

Finally, *Equality Foundation II* was appealed to the United States Supreme Court. The Supreme Court denied the petition for a writ of certiorari.[125] Although some news reporters stated that the Supreme Court had upheld the Sixth Circuit's decision,[126] no national precedent was set by the Court's denial of certiorari.

Moreover, in a somewhat unusual step, Justice Stevens, joined by Justices Souter and Ginsburg, delivered an opinion respecting the denial of the petition of the writ of certiorari. Stevens re-emphasized that a denial of certiorari "is not a ruling on the merits."[127] Such a denial of certiorari "reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue."[128] Concluding, Justice Stevens stated, "The Court's action today should not be interpreted either as an independent construction of the charter or as an expression of its views about the underlying issues that the parties have debated at length."[129] In other words, the constitutionality of city charters like Cincinnati's is not resolved.[130]

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121. *See id.* at *2-3.

122. *Id.* at *3 (Gilman, J., dissenting from denial of rehearing en banc).

123. *Id.* at *4.

124. *Id.* at *5 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

125. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 119 S. Ct. 365 (1998).

126. *See* Richard Carelli, *High Court Upholds City's Gay-Protection Ban*, INDIANAPOLIS STAR, Oct. 14, 1998, at A5.

127. *Equality Found.*, 119 S. Ct. at 365; *see also* Brown v. Texas, 118 S. Ct. 355, 356 (1997); Lackey v. Texas, 514 U.S. 1045, 1047 (1995); Barber v. Tennessee, 513 U.S. 1184, 1184 (1995).

128. *Equality Found.*, 119 S. Ct. at 365.

129. *Id.* at 366.

130. This Note was written well before the Supreme Court denied certiorari. Accordingly, this Note does not primarily address the Supreme Court's action regarding *Equality Foundation II*. Instead, this Note concentrates upon the Sixth Circuit's ruling in light of *Romer*.

Thus, the Sixth Circuit's ruling in *Equality Foundation II*, the subsequent denial of the petition for rehearing en banc, and the Supreme Court's denial of certiorari set the stage for the argument herein; the crux of which asserts that the Sixth Circuit's attempt to distinguish Issue 3 from Amendment 2 failed. As a result, the *Equality Foundation II* decision stands as a contradiction and misreading of the majority opinion in *Romer*.[131]

III. HOW *EQUALITY FOUNDATION* MISCONSTRUED *ROMER*

The Sixth Circuit misconstrued *Romer v. Evans* on two somewhat overlapping grounds. First, the Court in *Romer* did not employ any traditional equal protection level of scrutiny; but instead, the Court identified Amendment 2 as a per se violation of the Equal Protection Clause.[132] The Sixth Circuit, on the other hand, failed to identify Issue 3 as a per se violation. Second, despite recognizing Amendment 2 as a per se violation of equal protection, the Court in *Romer* further held that Amendment 2 violated the rational basis test as well. In doing so, however, the Court employed a heightened form of the rational basis test, which some commentators have coined "legitimacy review."[133] In contradiction, the *Equality Foundation II* court applied the traditional rational basis standard and determined that Issue 3 was not violative of the Equal Protection Clause. In distinguishing the two cases, the Sixth Circuit argued that Issue 3 did not have a similar scope of impact, was not predicated on animosity towards any particular group, and did nothing more than invalidate and prohibit the granting of special rights to gays and lesbians. As elucidated below, no material distinction was ultimately made by the Sixth Circuit to warrant the upholding of Issue 3 in light of *Romer*.

A. Per Se Invalidity and the Scope of Impact

Many commentators view the *Romer* decision as a declaration that Amendment 2-type statutes are so invidiously discriminatory that they constitute a per se violation of the Equal Protection Clause.[134] Illustratively, the *Romer* majority opined, "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation."[135] The Court further stated, "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and *each of its parts* remain open on impartial terms to all who seek its assistance."[136] From these statements Joseph S. Jackson concluded that:

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131. Because of the ambiguous nature of the *Romer* majority opinion, the Sixth Circuit's decision in *Equality Foundation II* may not be characterized as entirely deceitful.

132. *See* Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 464-65 (1997).

133. Todd M. Hughes, *Making* Romer *Work*, 33 CAL. W. L. REV. 169, 176 (1997).

134. *See* Jackson, *supra* note 132, at 465 n.61.

135. Romer v. Evans, 517 U.S. 620, 632 (1996).

136. *Id.* at 633 (emphasis added).

> [T]he Court seems to say [that Amendment 2] is a per se denial of equal protection: a law providing "in general" that one group of citizens must surmount greater barriers than others to obtain aid from the government "is itself a denial of equal protection of the laws in the most literal sense."[137]

Another commentator proposed that "the [J]ustices in the [*Romer*] majority appear to have been influenced by the argument offered by five prominent constitutional law professors who filed a brief amicus curiae," and argued that "Amendment 2 amounted to a per se violation of the Equal Protection Clause, one so literal as to require no inquiry into the applicable level of scrutiny."[138] The amicus brief argued that:

> To decree that some identifying feature or characteristic of a person or group may not be invoked as the basis of any claim of discrimination under any law or regulation enacted, previously or in the future, by the state, its agencies, or its localities—when persons and groups not sharing this characteristic are not similarly handicapped—is, *by definition*, to deny the "equal protection of the laws" to persons having that characteristic.[139]

The amicus brief contended that this is exactly what was done in Amendment 2[140] and this Note argues that this is also exactly what was done in Issue 3.

The *Equality Foundation II* court neglected to recognize Issue 3 as constituting a per se denial of equal protection because it concluded that the scope of impact of Issue 3 was "conceptually and analytically" distinguishable from that of Amendment 2.[141] The court grounded this distinction on the fact that Amendment 2 applied statewide whereas Issue 3 was limited to local city legislation and thus local in scope.[142] Consequently, the court reasoned that Issue 3 did not present the same constitutional problem as Amendment 2 because opponents of a "strictly local enactment need not undertake the monumental political task of procuring an amendment to the Ohio Constitution."[143] Instead, the court reasoned, such opponents could pursue relief from a higher level of Ohio government.[144] Furthermore, the court insisted that Issue 3 deprived homosexuals only of special rights, not equal rights, and thus, was distinguishable from Amendment 2.[145]

However, the scope of impact of Issue 3 was materially similar to the scope of impact of Amendment 2, which the Court in *Romer* found so repugnant. Moreover, the "special rights" argument advanced in *Equality Foundation II* appears analogous to the "special rights" argument put forth in *Romer*, which the Supreme Court emphatically rejected. Simply stated, the Sixth Circuit failed to materially

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137. Jackson, *supra* note 132, at 465 (quoting *Romer*, 517 U.S. at 633).

138. Schacter, *supra* note 30, at 378.

139. Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as Amici Curiae in Support of Respondents at 3-4, *Romer* (No. 94-1039) [hereinafter Amicus Brief] (emphasis added).

140. *See id.*

141. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 295 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

142. *See id.* at 296-301.

143. *Id.* at 297.

144. *See id.* at 301.

145. *See id.* at 296-98.

distinguish Issue 3 from Amendment 2 by not recognizing Issue 3 as a per se violation of equal protection.

The Court in *Romer* explained why Amendment 2 defies the traditional equal protection conventional inquiry stating, "First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, . . . [and s]econd, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects."[146] With regard to the first explanation, the Court's concern with the scope of Amendment 2 was twofold. First, the Court was concerned with the "horizontal" impact that Amendment 2 has on the "substantive, or first-order, interests;"[147] and second, the Court was concerned with the "vertical" impact that Amendment 2 has on the "political, or second-order, rights of Colorado's citizens."[148] Each concern represents a significant reason for the Court's invalidation of Amendment 2 as a per se violation of equal protection.[149] In contrast, the court in *Equality Foundation II* distinguished Amendment 2 from Issue 3 based primarily on the vertical scope of impact, and failed to materially distinguish the two anti-gay rights initiatives based on the horizontal scope of impact.[150] Although it is unclear which component was more relevant, the *Romer* Court was certainly concerned with both the horizontal impact of Amendment 2 as well as the vertical impacts.[151]

Particularly, the *Romer* Court looked to the fact that Amendment 2 operated to repeal and forbid public-accommodation laws that had been enacted throughout the state to protect homosexuals from discrimination, as well as the fact that Amendment 2 operated to nullify "specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment."[152] Furthermore, the Court declared that it could be inferred from the sweeping language of Amendment 2 that it "deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."[153] Hence, to effectively distinguish Issue 3 from Amendment 2, a court must distinguish the

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146. Romer v. Evans, 517 U.S. 620, 632 (1996).

147. Dillof, *supra* note 25, at 374.

148. *Id.* ("At this point, it is useful to conceptualize Amendment 2 as having horizontal and vertical components."); *cf.* Craig Cassin Burke, Note, *Fencing Out Politically Unpopular Groups from the Normal Political Processes: The Equal Protection Concerns of Colorado Amendment Two*, 69 IND. L.J. 275, 287-88 (1993) ("[T]he arm of equal protection . . . has essentially two axes of application: a horizontal axis, which mandates equality in state action in all branches of government, and a vertical axis, which governs the method by which decision-making power may be allocated along the governmental hierarchy.") (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-17 (2d ed. 1988)) (footnotes omitted).

149. *But cf.* Dillof, *supra* note 25, at 375 ("It is not clear, however, which component is more relevant to the Court's view that Amendment 2 was so unusual as to defy conventional analysis.").

150. *See id.* at 374.

151. The Court exclaimed, "The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." *Romer*, 517 U.S. at 633.

152. *Id.* at 629.

153. *Id.*

respective scopes of impact on both equal protection axes. However, the Sixth Circuit failed to make such material constitutional distinctions.

1. Horizontal Impact

Issue 3 operates to have the same horizontal (substantive) impact upon the rights of gays and lesbians in Cincinnati as Amendment 2 had upon citizens of Colorado. For example, Issue 3 was drafted in response to two ordinances adopted by the Cincinnati City Council which protected gays and lesbians from discrimination in the public and private sphere.[154] The first ordinance mandated that the City could not discriminate on the basis of sexual orientation in its hiring practices.[155] The second ordinance barred "private discrimination in employment, housing, or public accommodation for reasons of sexual orientation."[156] Thus, in comparing Amendment 2 with Issue 3, these horizontal impacts, such as employment, housing, and public accommodation, affect homosexuals in their respective localities equally.

One of Colorado's main arguments for sustaining Amendment 2 was that such measures do no more than deny homosexuals special rights.[157] In fact, this argument has been the "signature slogan of the organized opposition to gay civil rights for the last several years."[158] However, the *Romer* Court declined to accept the view that Amendment 2 did nothing more than deprive homosexuals of special rights.[159] Emphatically, the Supreme Court in *Romer* rejected this argument stating, "We find nothing special in the protections Amendment 2 withholds;" moreover, "[t]hese are protections taken for granted by most people either because they already have them or do not need them."[160] The Sixth Circuit recognized that the *Romer* Court asserted that Amendment 2 could be construed to deprive homosexuals of all state law protections which other people take for granted.[161] However, as the Sixth Circuit also recognized, *Romer* "did not rely upon that potential universally exclusive effect to invalidate the measure, but instead ultimately construed Colorado Amendment 2 only to remove and prohibit special legal rights for homosexuals under state law."[162]

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154. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 291-92 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

155. *See id.*

156. *Id.* at 292.

157. *See Romer*, 517 U.S. at 626; *see also* Schacter, *supra* note 30, at 381; Gary Alan Collis, Note, Romer v. Evans: *Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 PEPP. L. REV. 991, 1035 (1997).

158. Schacter, *supra* note 30, at 381.

159. *Romer*, 517 U.S. at 631.

160. *Id.*

161. *See Equality Found.*, 128 F.3d at 296.

> "Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."

Id. (quoting *Romer*, 517 U.S. at 630).

162. *Id.* at 295.

Yet, because of *Romer's* language that the Court found "nothing special in the protections Amendment 2 withholds,"[163] the *Equality Foundation II* court opined that the true constitutional deficiency in Amendment 2 was the possibility that it could be read to deprive homosexuals of the general protections afforded to all of the citizens of Colorado.[164] Accordingly, the Sixth Circuit found Issue 3 distinguishable from Amendment 2 because it construed Issue 3 to only deprive homosexuals of special rights.[165]

Here the Sixth Circuit's distinction broke down for two reasons. First, the Supreme Court expressly stated that it did not decide *Romer* on such a possibility that Amendment 2 may be read as to withhold protection from homosexuals provided by statutes of general application: "If this consequence [(the deprivation of protection from state laws of general applicability)] follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we."[166] Second, the Sixth Circuit's argument that Issue 3 only deprives homosexuals of special rights ultimately fails. True, Issue 3 states: "No *special* class status may be granted based upon sexual orientation, conduct or relationships;"[167] thus, the Sixth Circuit's distinction seemed initially plausible. However, the Sixth Circuit analogized special privileges and preferences to the "legally sanctioned power to force employers, landlords, and merchants to transact business with them."[168] The *Romer* Court, on the other hand, did not view such as a special right. Instead, the Court found nothing special about protections against the exclusion from "endeavors that constitute ordinary civic life in a free society."[169]

Although one can see how a court may become confused following *Romer's* foggy light, the Sixth Circuit failed to make a distinction which makes a constitutional difference between the horizontal harms effectuated by Amendment 2 and those harms effectuated by Issue 3. Not only did the Sixth Circuit fail to distinguish the horizontal harms, but it also failed to materially distinguish the vertical harms created by Issue 3 from the vertical harms created by Amendment 2.

2. Vertical Harms

The court in *Equality Foundation II* focused primarily on the "vertical" (political) scope of impact that Issue 3 would have upon the political rights of gays and lesbians. It reasoned that what the Supreme Court considered so extraordinary about Amendment 2 was the fact that its scope was statewide. The Sixth Circuit reasoned:

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163. *Romer*, 517 U.S. at 631.

164. *Equality Found.*, 128 F.3d at 296.

165. *See id.* at 297.

166. *Romer*, 517 U.S. at 630; *see also* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, Nos. 94-3855, 94-3793, 94-4280, 1998 WL 101701, at *4 (6th Cir. Feb. 5, 1998) (Gilman, J., dissenting from denial of rehearing en banc).

167. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 264 (6th Cir. 1995) (emphasis added), *vacated*, 518 U.S. 1001 (1996).

168. *Equality Found.*, 128 F.3d at 296.

169. *Romer*, 517 U.S. at 631.

> The low level of government at which [Issue 3] becomes operative is significant because the opponents of that strictly local enactment need not undertake the monumental political task of procuring an amendment to the Ohio Constitution as a precondition to achievement of a desired change in the local law, but instead may either seek local repeal of the subject amendment through ordinary municipal political processes, or pursue relief from every higher level of Ohio government including but not limited to Hamilton County, state agencies, the Ohio legislature, or the voters themselves via a statewide initiative.[170]

The Sixth Circuit was correct to conclude that the vertical scope of impact of Amendment 2 was more sweeping than Issue 3. The Sixth Circuit was wrong, however, to conclude that that difference amounts to a constitutional distinction. The burden Issue 3 places upon the political rights of gays and lesbians in Cincinnati is materially analogous to the burden Amendment 2 produced so as to warrant it a per se invalidation of equal protection.

For example, the *Romer* Court acknowledged that "[i]t is not within our constitutional tradition to enact laws of this sort."[171] The unusual character of Amendment 2 and Issue 3 was that they both singled out a particular class of citizens and made it more difficult for that group to acquire aid, protections, or advantages from the government relative to the rest of the populace. Just as Amendment 2 rendered a particular class of persons "in Colorado completely ineligible for the protection of its laws from an entire category of mistreatment,"[172] so too, "Issue 3 completely cuts-off gay[s], lesbians and bisexuals [in Cincinnati] from the normal and accessible avenues of political action and political participation, and requires them to seek a charter amendment any time they want or require any rule, regulation, ordinances or policy on their behalf."[173]

Logically, there exists no less a facial violation of the Equal Protection Clause to require gays and lesbians in Cincinnati to seek an amendment to the city charter in order to receive city government laws in their favor, than there exists to require gays and lesbians in Colorado to seek an amendment to the state constitution. In both instances, the "normal political process" has been removed from gay and lesbian citizens, and in its place is substituted a political process which is "more complex, costly and burdensome."[174] One constitutional law professor was quoted as calling the Sixth Circuit's distinction "indefensible."[175] He was further quoted as stating that "[b]oth measures allow every group access to the political process except gays and lesbians."[176]

Again, the Sixth Circuit rightly recognized that a group could more easily seek the repeal of a city charter amendment as opposed to a state constitutional

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170. *Equality Found.*, 128 F.3d at 297.

171. *Romer*, 517 U.S. at 633.

172. Amicus Brief, *supra* note 139, at 4.

173. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 429 (S.D. Ohio 1994), *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

174. *Id.*

175. Kelly McMurry, *Cincinnati Antigay Measure Upheld by Sixth Circuit*, TRIAL, Apr. 1998, at 105, 105 (quoting Erwin Chemerinsky, Professor of Law, University of Southern California, Los Angeles).

176. *Id.*

amendment. The court stated that opponents to the local enactment could "seek local repeal of the subject amendment through the ordinary municipal political processes."[177] However, given the fact that the Supreme Court in *Romer* declined to base its holding on its precedents involving discriminatory political restructuring,[178] the Sixth Circuit's distinction is unpersuasive. As the dissent to the denial of the petition for rehearing in *Equality Foundation II* stated, "the fact that it is easier for a group to seek the repeal of a city charter amendment as opposed to a state constitutional amendment is of no consequence as far as the essential rationale of *Romer* is concerned."[179] The dissent further asserted that because *Romer* was decided on equal protection grounds, which apply to local and state governmental action, "the fact that Issue Three is a local as opposed to a state measure is of no controlling significance for purposes of the Equal Protection Clause."[180] Hence, the fact that Issue 3 applies only to a city charter while Amendment 2 applies to a state constitution makes no constitutional distinction. It is a distinction without a difference.

In sum, the Sixth Circuit's attempt to distinguish Issue 3 from Amendment 2 based on their respective scopes of impact falls short. While the Supreme Court in *Romer* focused upon the "horizontal" and "vertical" scope of impacts that Amendment 2 would have upon gay and lesbian rights, the Sixth Circuit emphasized strongly the distinction in the "vertical" political impact. In doing so, the Sixth Circuit incorrectly concluded that Issue 3 represented less of an equal protection problem than Amendment 2 because Issue 3 operated only at the city and not the state level. Moreover, the Sixth Circuit failed to materially distinguish the "horizontal" harms created by the anti-gay initiatives as well. Hence, the Sixth Circuit declined to follow the command of *Romer* and failed to distinguish the two anti-gay initiatives on the basis of scope of impact.

B. Traditional Rational Basis Review?

After determining that Amendment 2's overly broad scope of impact based on both horizontal and vertical harms constituted a bare desire to harm homosexuals as a group, and thus constituted a per se violation of equal protection, the *Romer* Court concluded that "in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not."[181] However, the Court's use of the rational

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177. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 297 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

178. *See* Romer v. Evans, 517 U.S. 620, 625-26 (1996) (stating that the Colorado Supreme Court had relied on such cases, but affirming the court's decision on different rationale).

179. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, Nos. 94-3855, 94-3973, 94-4280, 1998 WL 101701, at *5 (6th Cir. Feb. 5, 1998) (Gilman, J., dissenting from denial of rehearing en banc).

180. *Id.*; *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (stating that "the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause").

181. *Romer*, 517 U.S. at 635 (citations omitted).

basis test to invalidate Amendment 2 defied the conventional understanding of rational basis scrutiny. Before examining what level of scrutiny the Court employed in *Romer*, some light must be shed on the traditional tripartite equal protection analysis developed by the Supreme Court.

The Supreme Court has established three levels of equal protection review.[182] First, strict scrutiny, the highest level of review, will be applied if a law makes a classification which "impinge[s] on personal rights protected by the Constitution"[183] or targets a suspect class.[184] Laws which are subjected to strict scrutiny "will be sustained only if they are suitably tailored to serve a compelling state interest."[185] Second, intermediate scrutiny is applied to laws which classify on the basis of sex or illegitimacy.[186] Such a classification "fails unless it is substantially related to a sufficiently important governmental interest."[187] Finally, the lowest level of scrutiny is the traditional rational basis test. If a law neither infringes upon a fundamental constitutional right nor classifies on the basis of a suspect or quasi-suspect group, then "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[188] The Supreme Court has warned that the rational basis test is not a "license for courts to judge the wisdom, fairness, or logic of legislative choices."[189] Still, the Supreme Court has declared that such a statute will pass constitutional muster as long as there exists "any reasonably conceivable state of facts that could provide a rational basis for the classification."[190] Although it is unclear, the Court in *Romer* seemed to apply some level of scrutiny higher than the traditional rational basis review.

1. "Legitimacy Review"

The *Romer* Court did not scrutinize whether or not gays and lesbians constitute a suspect or quasi-suspect class, but instead, presumed that the rational basis test would be employed.[191] However, some commentators have recognized that the

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182. *See Cleburne*, 473 U.S. at 440-41.

183. *Id.* at 440.

184. *See* William M. Wilson III, Note, Romer v. Evans: *"Terminal Silliness," or Enlightened Jurisprudence?*, 75 N.C. L. REV. 1891, 1894 (1997).

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

Id. (footnotes omitted) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986), and Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)).

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

186. *See id.* at 440-41. Groups afforded intermediate level scrutiny are commonly referred to as quasi-suspect classes. *See, e.g., Murgia*, 427 U.S. at 325 (per curiam) (Marshall, J., dissenting).

187. *Cleburne*, 473 U.S. at 441.

188. *Id.* at 440.

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

190. *Id.*

191. *See* Hughes, *supra* note 133, at 175.

Romer Court did not use the traditional rational basis test, but instead, applied some form of heightened rational basis review.[192] One commentator has called this form of heightened rational basis review "legitimacy review."[193] Under traditional rational basis review the Court has been satisfied that a statute is constitutional as long as *any* reasonably conceivable state of facts provided the government with a rational basis for the statute. Because Colorado advanced many reasons for Amendment 2 which normally would have passed the highly deferential traditional rational basis test, *Romer*, therefore, "demanded not only some rational basis but that the basis bear a 'rational relation to some legitimate end.'"[194] The Court in applying "legitimacy review" concluded that Amendment 2 bore no relation to any legitimate end.[195] More importantly, the Court held that Amendment 2 was itself an illegitimate end. For example, the Court stated, "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[196] Thus, the *Romer* Court demanded something more than just *any* conceivable rational basis for the enactment. Yet, *Romer* was not the first case in which the Court had used some type of heightened rational basis test.

In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court held that although the mentally retarded do not constitute a quasi-suspect class, a state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[197] Although the city advanced seemingly rational reasons for its requirement of a special use permit for a group home for the mentally retarded (such as the fear of decreased property values and several safety concerns), the Court was able to see through the proffered state interests and recognize them as resting upon fears and negative attitudes against the mentally retarded.[198]

Similarly, the Court in *Romer* saw through the state interests advanced by Colorado recognizing them as resting upon irrationality and animus towards gays and lesbians. The Court stated that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of *animosity* toward the class of persons affected."[199] The *Romer* Court asserted that Amendment 2's general, broad denial of protections from the law to homosexuals "inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[200] In other words, where the harm is so broad and diffuse, the Court will presume the malign motive to harm that particular

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192. *See id.* at 175-76; Dillof, *supra* note 25, at 379 (arguing that some higher level of scrutiny than traditional rational basis was employed by the Court).

193. Hughes, *supra* note 133, at 176.

194. *Id.* at 175 (quoting Romer v. Evans, 517 U.S. 620, 631 (1996)).

195. *See Romer*, 517 U.S. at 635 ("We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective.").

196. *Id.*

197. 473 U.S. 432, 446 (1985).

198. *See id.* at 450.

199. *Romer*, 517 U.S. at 634 (emphasis added).

200. *Id.* at 635.

group: "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."[201]

Hence, the Court made clear that the Equal Protection Clause will not tolerate enactments solely motivated by animus towards homosexuals.[202] And in doing so, the Court relied on well-settled doctrine.[203] Yet, the Sixth Circuit deviated from *Romer* and this well-settled doctrine in concluding that Issue 3 passed rational basis scrutiny.

2. The Sixth Circuit's Rational Basis Analysis

As stated above, under a traditional rational basis review, a court should uphold the law in question if merely any possible legitimate motive can be recognized by the court. Instead, in *Romer* the Court did not accept any possible legitimate basis for Amendment 2 because of its unusually broad and harmful effect. Because the Court in *Romer* seemingly applied some level of review above the traditional rational basis test, but continued to speak in terms of rational basis, one can understand the Sixth Circuit's confusion. Amidst the confusion, the Sixth Circuit failed to pick up on the heightened form of review employed in *Romer*, and therefore, ultimately misread *Romer's* holding.

The Sixth Circuit's rational basis analysis in *Equality Foundation II* contradicts the Court's rational basis analysis in *Romer* on two grounds. First, the Sixth Circuit applied the traditional rational basis review to Issue 3 instead of the heightened rational basis review applied in *Romer*. Second, the Sixth Circuit court concluded that Issue 3's enactment was not motivated by animosity towards gays and lesbians, and therefore, the court declared that the state interests put forth by the city passed equal protection scrutiny. In other words, the Sixth Circuit failed to follow the rational basis analysis performed in *Romer*.

The *Equality Foundation II* court began its re-analysis of Issue 3 by erroneously concluding that *Romer* had used the traditional rational basis test to evaluate laws which "uniquely burdened the interests of homosexuals."[204] In other words, the Sixth Circuit took the position that as long as Issue 3 advanced *any* conceivable state interest, it should be upheld. Under such an analysis, the *Equality Foundation II* court recognized two state interests advanced by Issue 3 which were sufficient to pass the traditional rational basis test.[205]

First, the court concluded that Issue 3's withdrawal of gays and lesbians from the protected persons category under pre-existing anti-discrimination ordinances, as well as its preclusion of such persons from protection in any future anti-

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201. *Id.*

202. One commentator has argued that the Court treats the "absence of a rational basis for Amendment 2, and the existence of animus toward gays and lesbians, as two sides of the same coin." Jackson, *supra* note 132, at 495.

203. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding unconstitutional an enactment which was motivated by a "bare . . . desire to harm a politically unpopular group"); *see also Cleburne*, 473 U.S. at 447 (citing *Moreno*, 413 U.S. at 534).

204. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 294 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

205. *Id.* at 300.

discrimination ordinances, "would eliminate and forestall the substantial public costs that accrue from the investigation and adjudication of sexual orientation discrimination complaints."[206] Second, the court concluded that Issue 3 would reduce the city residents' litigation costs by eliminating a municipally created class of legal claims.[207] Thus, the court held that Issue 3 passed the traditional rational basis review and was, therefore, distinguishable from *Romer*.

However, the equal protection analysis in *Romer* concentrated on the legitimate ends, not merely whether *any* conceivable reason to justify the enactment existed.[208] For example, the *Romer* Court also considered Colorado's interest in conserving funds, but disregarded such a justification because the wide breadth of Amendment 2 was too far removed from such a justification.[209] The Court opined that the breadth and limitless sweep of Amendment 2 gave rise to the "inevitable inference" that it was enacted out of animosity and moral disregard for gays and lesbians.[210] As a result, because the Court recognized that the so called "legitimate end"[211] of Amendment 2 was born out of animosity toward homosexuals, Amendment 2 failed the Court's "legitimacy review."

In contradistinction, the *Equality Foundation II* court declared that the passage of Issue 3 was not motivated by animosity for gays and lesbians because Issue 3 constituted only local legislation which does not have the extreme scope and effect that Amendment 2 did.[212] Again, the Sixth Circuit appeared to reason that if a particular anti-gay rights enactment is given effect on a statewide level then this raises the "inevitable inference" of animosity, but if the same, exact type of enactment is given effect on a municipal or city level, then the inference of animosity is lacking.

The Sixth Circuit's logic should not be accepted. Such logic is fallacious for two reasons. First, the scope of impact of Issue 3 is not significantly different than that of Amendment 2. Second, the particular level of government at which an enactment is effectuated is not determinative of the existence of an unconstitutional motivation for such an enactment.

As discussed above, the Court in *Romer* found Amendment 2's scope conscience-shocking due to the "limitless number of transactions and endeavors that constitute

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206. *Id.*

207. *See id.*

208. One commentator justified the Court's approach as a disapproval of enactments which stigmatize.

> After all, what matters is whether the enactment stigmatizes the disfavored group, not whether there is some high-minded reason for doing so. A statute based on or reflective of the view that some citizens are worth less than others will be stigmatizing, regardless of the subjective motives for its enactment.

Jackson, *supra* note 132, at 498.

209. Romer v. Evans, 517 U.S. 620, 635 (1996).

210. *See supra* text accompanying note 199.

211. Hughes, *supra* note 133, at 175.

212. *See Equality Found.*, 128 F.3d at 300 (declaring that the "passage of the Cincinnati Charter Amendment was not facially animated solely by an impermissible naked desire of a majority of the City's residents to injure an unpopular group of citizens, rather than to legally actualize their individual and collective interests and preferences").

ordinary civic life"[213] to which gays and lesbians would have no protection from discrimination. In other words, the Court emphasized the effects upon the horizontal components of the Equal Protection Clause that such enactments would have. In comparison, Issue 3 immediately impacts these horizontal components. Particularly, the passage of Issue 3 voided the EEO, which protected homosexuals from discrimination in city hiring practices, and invalidated the HRO, which prohibited private discrimination against gays and lesbians in employment, housing, or public accommodations.[214] When the Court in *Romer* stated, "laws of the kind now before us" give rise to the inference that the enactment was born of animosity,[215] the Court was speaking of those laws which specifically exclude an unpopular class of persons from protection against discrimination in those endeavors which make up ordinary civic life. Because Issue 3 is this kind of law, the Sixth Circuit's argument that Issue 3 was not motivated by animus because its scope of impact is less than that of Amendment 2 fails to hold water.

Moreover, the Sixth Circuit focused upon the scope of impact Issue 3 would have upon the vertical component of equal protection. It distinguished Issue 3 on the grounds that, unlike Amendment 2, an opponent of Issue 3 would not have to procure an amendment to the Ohio constitution as a precondition to changing the local law, but instead would only have to undertake the task of procuring an amendment to the city charter.[216] This distinction is not as compelling as it may initially seem. Although the Sixth Circuit argues that there is a great difference between a city charter provision and a state constitution, the district court concluded that they were in fact very similar. It asserted:

> The City Charter is the primary governance document of the city, akin to a constitution.... As such, any and all laws, regulations, ordinances or policies of the City of Cincinnati–with the exception of other charter provisions–are inferior, and any legislation or policy to the contrary is invalid....
>
> ...[A] provision of the City charter may not be repealed short of amending the charter itself.[217]

Moreover, the district court noted that the charter amendment process is a very difficult task requiring a city wide campaign, as well as the support of the majority of the voters.[218]

Again, the Sixth Circuit's distinction fails to hold much water. It is erroneous to assume that in all circumstances it would be easier for a group to seek an amendment to a city charter or pursue favorable legislation from county or other state agencies than it would be to seek an amendment to a state constitution. One can easily imagine a situation in which a group is an extremely small minority in a particular city or county, but constitutes a majority in the state. One can also

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213. *Romer*, 517 U.S. at 631; *see also supra* text accompanying note 169.

214. *See Equality Found.*, 128 F.3d at 291-92.

215. *Romer*, 517 U.S. at 634.

216. *See Equality Found.*, 128 F.3d at 297.

217. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 428 (S.D. Ohio 1994) (citations omitted), *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

218. *See id.*

imagine a circumstance in which a political minority in a particular state would have a more difficult time securing a favorable amendment to the state constitution than to secure a favorable amendment to the United States Constitution.[219]

Thus, using the logic of the Sixth Circuit, the Court in *Romer* would have been as equally wrong as the court in *Equality Foundation II* had it upheld Amendment 2 based on the fact that gays and lesbians could still pursue favorable legislation at the higher national level. This the *Romer* Court did not do. As a result, the constitutional implications of *Romer* must be that enactments motivated by animus towards homosexuals on a municipal level are no less repugnant to equal protection than enactments motivated by animus towards homosexuals on a statewide level. To hold otherwise is simply not logical, nor constitutional.

In sum, the Sixth Circuit failed to employ the same heightened level of the rational basis test employed by the Court in *Romer*, which focused upon the legitimate ends and not merely upon any conceivable justification. Additionally, the Sixth Circuit failed to significantly distinguish the scope of impact of Issue 3 from Amendment 2, and thus, failed to put forth any credible argument which distinguished the animosity out of which Issue 3 was born from the animosity which begot Amendment 2.

IV. CONCLUSION

"Whether or not we agree with the majority decision in *Romer*, we are of course obligated by law to give rulings of the Supreme Court full force and effect."[220] This Note has argued that the Sixth Circuit did not give the Supreme Court's ruling in *Romer* such full force and effect. Although *Romer* was somewhat confusing and ambiguous, the Sixth Circuit ultimately showed its displeasure with *Romer* in its attempt to undermine, distinguish, and limit it.

The debate over gay rights came to a pinnacle when the Supreme Court ruled in *Romer* that the Equal Protection Clause protected homosexuals. Clearly, the Court in *Romer* found Amendment 2 so repugnant to the Equal Protection Clause that the traditional equal protection analysis was not even necessary to strike the amendment down. Yet, even applying a heightened rational basis test, the Court struck Amendment 2 down because it declared that enactments begot from animosity for a singled-out group can serve no legitimate end. The Sixth Circuit in upholding Issue 3 displayed their reluctance to accept the Court's decision in *Romer*. The fallacious logic in the Sixth Circuit's attempt to distinguish the two cases was obvious. The Supreme Court cannot possibly be understood to support legislation at the municipal level which it so abhors at the state level. Therefore, in the end, *Equality Foundation II* stands as a misconstruction of the Supreme Court's landmark decision in *Romer*.

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219. This idea is indeed the very foundation upon which our federal government is built.

220. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, Nos. 94-3855, 94-3973, 94-4280, 1998 WL 101701, at *5 (6th Cir. Feb. 5, 1998) (Gilman, J., dissenting from denial of rehearing en banc).