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Recent Developments: Romer v. Evans: Colorado Referendum Barring Sexual Orientation as a Discrimination Cause of Action Is Violative of the Fourteenth Amendment's Equal Protection Clause

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Romer v. Evans

Colorado Referendum Barring Sexual Orientation As A Discrimination Cause Of Action Is Violative Of The Fourteenth Amendment's Equal Protection Clause

By Kevin M. Barner

In a controversial six to three decision, the Supreme Court of the United States, in *Romer v. Evans*, 116 S. Ct. 1620 (1996), held that "Amendment 2," a proposed amendment to the Colorado state constitution, violated the Equal Protection Clause of the Fourteenth Amendment. The Court found no legitimate state interest advanced by an amendment which denied homosexuals the pursuit of legal protections afforded to other groups. In so holding, the Court rejected morally based legislation burdening a particular class and created an uncertain future for legislation based on moral ideals.

In 1992, Colorado's state constitution was amended as the result of a statewide referendum. The impetus for the referendum stemmed from numerous municipal ordinances banning discrimination in areas such as housing, employment, education, public accommodations, and health and welfare services. Amendment 2 repealed these ordinances to the extent that they prohibited discrimination based on sexual orientation. In its explicit terms, Amendment 2 prohibited all legislative, executive and judicial action designed to protect homosexuals or bisexuals.

Shortly following its adoption, litigation to invalidate Amendment 2 began. In the District Court for the County of Denver, plaintiffs, many of whom were homosexual, argued that the enforcement of Amendment 2 would subject them to the immediate risk of discrimination. The court granted a preliminary injunction and an appeal was taken to the Supreme Court of Colorado. Colorado's highest court sustained the injunction and remanded the case for further consideration, holding that strict scrutiny was the proper standard of review and finding that Amendment 2 infringed the fundamental right of gays and lesbians to participate in the political process.

On remand, the district court found that the State failed to show that Amendment 2 had been narrowly tailored to meet a compelling governmental interest. The Supreme Court of Colorado affirmed the district court and the Supreme Court of the United States granted certiorari to decide whether Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.

The Court began its analysis by declaring as "implausible" the State's argument that Amendment 2 merely places gays and lesbians in the same position as all other persons. *Romer*, 116 S. Ct. at 1624. Pointing to the findings of the Colorado Supreme Court, the Court found that, since Amendment 2 repealed existing statutes and regulations barring discrimination based on sexual orientation, the "ultimate effect" of Amendment 2 was to limit all governmental bodies from adopting similarly protective measures "unless the state constitution is first amended to permit such measures." *Id.* at 1625 (citing *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993)). Homosexuals, according to the Court, were thus deprived of previously enjoyed legal protection from discriminatory injuries, and any hopes of the reinstatement of those protections would be quashed. *Id.*

The Court acknowledged that the Fourteenth Amendment does not grant Congress the power to prohibit discrimination in places of public accommodations. *Id.* (citing *Civil Rights Cases*, 109 U.S. 3 (1883)). For this reason, Colorado, like most other states, has enacted its own statutes to prevent such discrimination. *Id.* Such statutes often provide a broad definition of public accommodation which includes "hotels, restaurants, . . . insurance agencies, and 'shops and stores dealing with goods or services of any kind.'" *Id.* (quoting Denver Rev. Munici-

pal Code, Art. IV, § 28-92).

In admonishing the effect of Amendment 2, the Court pointed out that not only were homosexuals barred from the protections of public accommodation laws, but legislation that had been enacted to stem discrimination against homosexuals was repealed. *Id.* at 1626. For instance, a certain Colorado executive order which "forbids employment discrimination against all state employees . . . on the basis of sexual orientation," would have been repealed. *Id.* (citing Exec. Order No. D0035, 3 C.F.R. ___ (1990)).

According to the Court, the promise of equal protection of the laws must co-exist with the practical reality that most laws inevitably classify one group, resulting in a possible disadvantage to one or more other groups. *Id.* at 1627 (citing *Personnel Adm'r of Mass. v. Fenney*, 442 U.S. 256 (1979)). Therefore, if the legislation neither burdens a fundamental right nor targets a suspect class, it would be upheld as long as it bears a rational relation to a legitimate governmental purpose. *Id.* (citing *Heller v. Doe,* 113 S. Ct. 2637 (1993)).

According to the majority, Amendment 2 failed even this very deferential rational review test. *Id.* at 1627. The Court found that Amendment 2 imposed a "broad and undifferentiated" burden on homosexuals simply because the group is politically unpopular, and further, by its far reaching implications, could only be a result of "animus" toward the targeted class — homosexuals. *Id.* at 1628. For these reasons, the Court strongly rejected the notion that Amendment 2 satisfied a legitimate governmental interest and any rationale for it was equally nonexistent. *Id.* The Court summarized that it considered Amendment 2 to be simply a status based infringement on homosexuals' rights devoid of any "relationship to legitimate state interests," and as such, violated the Equal Protection Clause. *Id.* at 1629.

Justice Scalia, in a somewhat acerbic dissent, challenged the majority's decision from several perspectives. First, he found distasteful the majority's creation of the principle of law that a person or group is denied equal protection under the Fourteenth Amendment when they, in order to gain an advantage, are required to seek a more difficult avenue of recourse than others. *Id.* at 1630.

Assuming that Amendment 2, in fact, disadvantaged homosexuals instead of merely refusing to bestow special privileges upon them, the dissent next questioned how actions which disadvantage a group for conduct ruled criminal in many states could possibly be a violation of the Equal Protection Clause. *Id.* at 1631-32. Justice Scalia asserted that "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct." *Id.* at 1631 (citing the Court's approval of such laws in *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

Next, Justice Scalia attacked the majority opinion by analogizing homosexuality to polygamy. He pointed out that several states were required to permanently prohibit polygamy in order to be granted statehood, thus targeting polygamists for disfavored status. *Id.* at 1635. The majority would, therefore, suggest that the "perceived social harm of polygamy is a 'legitimate concern of government,' and the perceived social harm of homosexuality is not." *Id.* at 1636.

Finally, Justice Scalia took issue with the Court's position in what he perceived as the "culture wars." *Id.* at 1637. He stated that Amendment 2 was conceived to stay the decay of sexual morality and was sanctioned by a majority of Colorado residents. By striking it down, according to Justice Scalia, the Court acted out of "political will" as opposed to "judicial judgment." *Id.*

As a result of the decision in *Romer v. Evans,* groups that engage in a lifestyle that is apparently considered unacceptable by a majority of voters, yet possess a large and influential political lobby, will not be denied protections against discrimination which are in excess of those bestowed upon everyone else. The Court has declared that a duly enacted referendum to a state constitution, which denies special protections to homosexuals based on their sexual orientation, is invalid. It is apparent that the Court is attempting to protect a class which is largely unpopular. In the future,

however, courts will be free to strike down what they perceive as politically incorrect legislation regardless of its position with respect to moral ideals. The Court is of the opinion that there can be no legitimate governmental interest advanced by legislation which promotes the moral and religious attitudes of the constituency but also burdens an unpopular class. It would be interesting to see if the Court would be of the same opinion if confronted with an equally passionate constitutional challenge to legislation which similarly burdens such morally distasteful groups such as prostitutes and polygamists.