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## Democracy at Work: The Sixth Circuit Upholds The Right of the People of Cincinnati to Choose Their Own Morality in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997)

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**DEMOCRACY AT WORK: THE SIXTH CIRCUIT UPHOLDS THE RIGHT OF THE PEOPLE OF CINCINNATI TO CHOOSE THEIR OWN MORALITY IN *EQUALITY FOUNDATION OF GREATER CINCINNATI, INC. v. CITY OF CINCINNATI*, 128 F.3D 289 (6<sup>TH</sup> CIR. 1997)**

I. INTRODUCTION

The gay-rights movement, which has grown in power and influence over the last few decades, can no longer proclaim political powerlessness.<sup>1</sup> The great proliferation of gay-rights groups and anti-discrimination laws and policies demonstrate this.<sup>2</sup> Gay-rights organizations have had much success in promoting an agenda of tolerance and non-discrimination across America.<sup>3</sup> The gay-rights movement, however, has since changed its goals from societal *tolerance* of homosexuals to outright *acceptance*,<sup>4</sup> even to the extent of legalizing same-sex

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<sup>1</sup> In at least 18 states and 165 communities, gay-rights supporters have succeeded by convincing legislatures, or through popular referendums, to pass laws prohibiting discrimination aimed at gay, lesbian, and bisexual lifestyles in either the public or private sector, or both. Search of the Lambda Defense and Legal Education Fund Web site <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=185&record=217>> (visited Nov. 1998). See also Angela Gilmore, *Employment Protection for Lesbian and Gay Men*, 6 LAW & SEX. 83 (1996) (exploring the legal claims open to lesbians and gay men challenging employment discrimination on grounds of sexual orientation and concluding that emerging arguments such as those relying on “lifestyle protection” statutes are effective); Kevin M. Cathcart, *Welcome to Lambda 25! News & Views*, Feb. 2, 1998 (found on the Lambda Defense and Legal Education Fund Web site <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=203>> (visited Nov. 1998) (“[a]s we celebrate our 25th anniversary nationwide in 1998, we are proud that Lambda has become one of our community’s key institutions . . . . With state and local ordinances, constitutional interpretations, and an ever-growing body of civil rights case law, lesbians and gay men today have protections that were unimaginable in 1973.”)).

<sup>2</sup> The political successes of gay-rights groups counter the powerlessness argument. For a full discussion, see *supra* note 1.

<sup>3</sup> See, e.g., Robert F. Nagel, *Symposium: Romer v. Evans, Playing Defense*, 6 WM & MARY BILL RTS. J. 167 (1997) (determining that public perception of gay-rights success has led to a backlash by the more silent moral majority). For a discussion of anti-discrimination successes, see *supra* note 1.

<sup>4</sup> See, e.g., Jonathan Pickhardt, Note, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 952-64 (1998) (claiming it is encouraging that many homosexual activists are changing their strategy to arguments that support acceptance of the gay lifestyle, not just tolerance).

marriage.<sup>5</sup>

Supporters of traditional mores, however, have begun to fight back.<sup>6</sup> The public is responding to what it sees as an elitist court system that imposes its own liberal morality onto the populace against their will.<sup>7</sup> The opponents of such radical social engineering by an un-elected few have responded with successful grass-roots democratic efforts to thwart this attack on traditional morality and return this nation

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<sup>5</sup> See, e.g., Samuel A. Marcossou *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights To Their "Second Line of Defense,"* 35 U. LOUISVILLE J. FAM. L. 721 (1997) (arguing that opponents of same-sex marriage cannot successfully argue morality as a basis for their beliefs and that second-line defenses such as those used by the State of Hawaii in *Baehr v. Miike*, No. 91-1394-05, 1996 WL 694235 (Cir. Ct. Haw. Dec. 3, 1996), cannot succeed either). See also William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (attempting to justify the concept of same-sex marriage by examining its existence historically in some cultures); Nancy J. Knauer *Domestic Partnership and Same-Sex Relationships: a Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998) (arguing that the struggle for the recognition and protection of same-sex relationships is at the forefront of the contemporary gay and lesbian civil rights agenda and that some of the biggest successes of the gay-rights movement have come in gaining partnership benefits for same-sex partners in businesses, colleges, and other organizations).

<sup>6</sup> See, e.g., Nagel, *supra* note 3, at 177-79 (arguing that popular referendums against homosexual rights initiatives are a response of the public's perception of militant homosexual rights organizations activities); see also Rev. Raymond C. O'Brien, *Single-Gender Marriage: a Religious Perspective*, 7 TEMP. POL. & CIV. RTS. L. REV. 429 (1998) (arguing that it is time for religious opinions against same-sex marriage to be heard in the homosexual rights debate).

<sup>7</sup> Nagel, *supra* note 3, at 171, finding that:

[I]t is odd in the extreme that either justices or professors should write as if a sympathetic account of the people's purposes is either unimaginable or flimsy. The oddness arises from the fact that no one should know better than these constitutional lawyers what the voters in Colorado [or in this case Cincinnati] were doing. The voters were. . . playing defense. This was--or should have been--obvious to the legal establishment from the beginning, because no one plays offense more aggressively than legal commentators and jurists . . . . My position is not so much that the legal establishment has been blind to the concerns of a large segment of their fellow citizens, as that it has resolutely closed its eyes.

*Id.*

to its historic roots.<sup>8</sup>

This Note will examine one such effort by the citizens of Cincinnati and the litigation that resulted from it in the case *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.<sup>9</sup> The general question presented by this Note is the constitutionality of the public practicing democracy by popular referendum by amending a city charter to negate previous legislation protecting gay, lesbian, and bisexual persons from discrimination and prohibiting the city council from passing any similar protections in the future.<sup>10</sup> This particular issue has not yet been addressed or settled by the Supreme Court, and, because the Court has denied the final writ of certiorari filed in this case,<sup>11</sup> the Court may not decide this issue in the near future, either. The Supreme Court did examine somewhat similar concerns in *Romer v. Evans*, in which case the Court trumped popular will, overturning a *statewide* constitutional mandate that removed homosexuals from a protected class

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<sup>8</sup> Examples covered throughout this Note include the Colorado Amendment 2 initiative, *infra* Part II.C., and Cincinnati's issue 3 initiative, *infra* Part III.A. At the national level, Congress responded to the threat that Hawaii might recognize same-sex marriage with The Defense of Marriage Act, 28 U.S.C.A. § 1738C (1996), [hereinafter DOMA] which was signed by President Clinton and states that:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

*Id.* For a general analysis of this act, see, e.g., Diane M. Guillerman, Comment, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425 (1997) (examining both the struggle for same-sex marriage in the homosexual community, and the constitutionality of DOMA). See also Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841 (1998) (looking at Congressional use of narratives and rhetoric in the debate over DOMA); Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications For The Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175 (1997) (suggesting constitutional problems for DOMA due to the Supreme Court *Romer v. Evans* decision).

<sup>9</sup> 838 F. Supp. 1235 (S.D. Ohio 1993) (temporary injunction granted); *permanent injunction granted*, 860 F. Supp. 417 (S.D. Ohio 1994); *rev'd*, 54 F.3d 261 (6<sup>th</sup> Cir. 1995); *vacated and remanded for rehearing*, 518 U.S. 1001 (1996); *rev'd*, 128 F.3d 289 (6<sup>th</sup> Cir. 1997); *rehearing denied en banc*, 1998 WL 101701 (6<sup>th</sup> Cir. 1998); *cert. denied*, 119 S. Ct. 365 (1998).

<sup>10</sup> 128 F.3d at 295.

<sup>11</sup> 119 S. Ct. 365.

and prevented any such future designation.<sup>12</sup>

Section II of this Note provides background about the issues in question, examines the standards of review applied by the Federal Courts, and analyzes the impact of *Romer v. Evans* on *Equality*.<sup>13</sup> This Section will also review the major Supreme Court and Circuit Court decisions that are applicable to *Equality*.<sup>14</sup> Section III provides a case history of *Equality*.<sup>15</sup> Section IV provides an analysis of the decisions with respect to the background information provided in Section II and the analysis in the various courts.<sup>16</sup> Finally, Section V concludes that the courts should abandon their elitist usurpation of democracy and allow the popular will to determine the role of morality in the governance of a city, the political unit closest to the people themselves.<sup>17</sup>

## II. BACKGROUND

### A. *The Impetus:*

In 1991, the city of Cincinnati passed the Equal Employment Opportunity Ordinance (EEO),<sup>18</sup> which prohibited discrimination in city employment and appointments to city boards and commissions based on, among other things, sexual orientation.<sup>19</sup> In 1992, Cincinnati expanded these protections with the Human Rights Ordinance (HRO),<sup>20</sup> which prohibited discrimination based on sexual orientation in private employment, public accommodations, and housing.<sup>21</sup>

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<sup>12</sup> 517 U.S. 620 (1996) (analyzed *infra* Part II.C.)

<sup>13</sup> See *infra* notes 18-68 and accompanying text.

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

<sup>15</sup> See *infra* notes 69-82 and accompanying text.

<sup>16</sup> See *infra* notes 83-172 and accompanying text.

<sup>17</sup> See *infra* notes 173-181 and accompanying text.

<sup>18</sup> Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 421 (S.D. Ohio 1994) [hereinafter *Equality I*].

<sup>19</sup> *Id.* Discrimination based upon sexual orientation, whether it be heterosexual, gay, lesbian, or bisexual, is prohibited by the EEO. *Id.* The EEO also prohibits discrimination based on race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. *Id.*

<sup>20</sup> *Id.* at 421.

<sup>21</sup> *Id.* Discrimination based upon sexual orientation, whether it be heterosexual, lesbian, gay or bisexual, is prohibited by the HRO. *Id.* The HRO provides exemptions for fraternal and religious organizations and expressly prohibits use of the ordinance to create "affirmative action program eligibility." *Id.* Like the EEO, the HRO also prohibits

In response to these laws, the organization “Equal Rights Not Special Rights” began to gather the signatures of Cincinnati voters to place a Charter Amendment on the ballot.<sup>22</sup> This resulted in Issue 3, a voter referendum to amend the Cincinnati City Charter by adding Article XII,<sup>23</sup> which effectively rescinded the EEO and HRO with respect to gay, lesbian, and bisexual anti-discrimination and proscribed the re-enactment of any similar ordinances in the future.<sup>24</sup>

*B. Standard of Review:*

The standard of review used to evaluate cases of group discrimination depends upon the status of the group in question.<sup>25</sup> The courts have required strict scrutiny analysis for laws that impact a suspect class,<sup>26</sup> such as a racially defined group.

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discrimination based on race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. *Id.* The HRO provides civil and criminal penalties for violators of its provisions. It also includes a severability clause. *Id.*

<sup>22</sup> *Id.* at 422.

<sup>23</sup> *Id.* The Cincinnati Charter Amendment is printed here in full:

**ARTICLE XII**

**No Special Class Status May Be Granted Based Upon Sexual Orientation, Conduct or Relationships.**

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

*Id.*

<sup>24</sup> *Equality I*, 860 F. Supp. at 422. This amendment was approved by 62% of the voting public. *Id.*

<sup>25</sup> *See, e.g.,* Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 210-11 (1993) (reviewing District Court and Circuit Court decisions and the analysis for their holdings in cases of claimed discrimination against homosexuals); *see also* Tracy T. Kenton, Note & Comment, *Quasi-Suspect Status for Homosexuals in Equal Protection Analysis: Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 12 GA. ST. U. L. REV. 873 (1996).

<sup>26</sup> Culverhouse & Lewis, *supra* note 25, at 210-11 (footnotes removed):

Strict scrutiny, the Court’s most exacting and searching review, occurs in two different situations involving separate criteria. In the first instance, strict scrutiny

Intermediate scrutiny is used for laws that impact a quasi-suspect class,<sup>27</sup> such as a group defined by gender. Homosexuals have never been given special class protection by the Supreme Court nor by any Circuit Court that has examined the issue.<sup>28</sup> Thus, analysis of a law affecting homosexuals has traditionally used the

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has protected individual interests from governmental interference when a fundamental right is involved . . . . When a fundamental right is infringed upon the Court must find that a compelling governmental interest is forwarded by the legislation, or it will be considered unconstitutional. In the second instance, strict scrutiny has been used when individuals are members of a class which forms a “discrete and insular minority” which has been historically disadvantaged. When a law discriminates against such politically powerless groups, the class is entitled to the highest standard of review. The United States Supreme Court has recognized race, alienage, and national origin as classifications deserving strict scrutiny . . . . Race is considered the model example, and the Supreme Court has dealt with race as a suspect classification on numerous occasions.

*Id.*

<sup>27</sup> *Id.* at 209-10 (footnotes omitted):

Intermediate level review, or heightened review, was first recognized in *Shapiro v. Thompson* [394 U.S. 618 (1969)] and requires that the governmental interest be substantial and important to pass constitutional muster. This intermediate level of review is most often found in two kinds of cases: (1) when a class of persons comes close to meeting the criteria to establish them as a suspect class but fails to meet fully the characteristics established by the Court; or (2) when persons assert an interest which is very important but does not rise to the height of a fundamental right. Classifications which do not receive the highest standard of review but involve heightened scrutiny are referred to as quasi-suspect classes and have included gender and illegitimacy . . . . Examples include cases involving women, men, hippies, children of illegal aliens, and the mentally retarded.

*Id.* The elements for analyzing quasi-suspect class status are discussed in detail in Kenton, *supra* note 25. The elements listed there are: 1) the group’s status as a discrete and insular minority; 2) the personal immutability of certain characteristics; 3) the risk that the classification serves to stereotype and stigmatize; and 4) the political powerlessness of the group. *Id.* at 877-78.

<sup>28</sup> Culverhouse & Lewis, *supra* note 25, at 206 (reviewing the various United States Circuit Court decisions regarding homosexual class status. Summarizing the various cases involving claims of both military and private employment, the authors state that “at best, cases involving sexual orientation are given active rational basis review . . . .”); *see also* Sandy D. Baggett, Note, *Constitutional Law--Suspect Class Status and Equal Access to the Political Process Under the Equal Protection Clause of the Fourteenth Amendment--Laws Precluding Anti-Discrimination Legislation for Homosexuals Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6<sup>th</sup> Cir. 1995), 63 TENN. L. REV. 239, 249 (1995) (“Circuit court decisions over whether to apply strict scrutiny to legislation

lowest scrutiny standard available: the default rational basis analysis.<sup>29</sup> However, the Supreme Court in *Romer v. Evans*<sup>30</sup> may have changed this analysis slightly when it found that homosexuals had been unconstitutionally targeted for special treatment based on their group status, and that such discrimination was unconstitutional.<sup>31</sup>

*C. Romer v. Evans:*

In a statewide referendum in 1992, the people of Colorado passed a state constitutional Amendment<sup>32</sup> which was purported to prevent any governmental body in the state from giving gays, lesbians, and bisexuals any *special rights* or *privileges*.<sup>33</sup> Supporters of this Amendment were attempting to counter what they viewed as the militant political power of homosexual groups by negating legislation and ordinances in Colorado that prohibited discrimination against homosexuals and by preventing any future re-implementation of similar legislation.<sup>34</sup>

The Supreme Court in *Romer* found that the Colorado Amendment's broad

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classifying by sexual orientation have uniformly declined to extend "suspect" class status to homosexuals . . .").

<sup>29</sup> See, e.g., *Culverhouse & Lewis, supra* note 25, at 209. ("Rational basis or rational relationship review is the lowest level of review. It is most often used in economic or social cases where the challenged regulation or law must be rationally related to the governmental purpose the law is intended to serve.").

<sup>30</sup> 517 U.S. 620 (1996).

<sup>31</sup> For an analysis of *Romer v. Evans*, 517 U.S. 620 (1996), see *infra* Part II.C.

<sup>32</sup> *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994). Amendment 2 provides:

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.

*Id.*

<sup>33</sup> *Id.*; see generally Nagel, *supra* note 3 (analyzing throughout as to the political atmosphere and distributed materials in support of the Amendment).

<sup>34</sup> See generally Nagel, *supra* note 3 (analyzing throughout as to why the people of Colorado may have been responding to a feeling of political powerlessness against the perceived threats of militant homosexuals when they passed Amendment 2, rather than responding to personal prejudice or animus against homosexuals).



language could be construed as prohibiting any government body in the state from supporting any claim under color of law if the victim was a homosexual, thus depriving homosexuals of rights aimed at the population in general.<sup>35</sup> Also, the Supreme Court found that the Amendment took away most of the political power of homosexuals as a group, preventing them from any possibility of success in lobbying city or state government bodies for protection based on their homosexual status.<sup>36</sup> To gain any legislation designed to benefit homosexuals, the Court claimed that homosexuals would have to mount a state-wide campaign to get their own constitutional amendment passed, or else resort to the Federal government to overcome the obstacles that the Colorado voters had put into their path.<sup>37</sup> Homosexuals were thereby deprived of any recourse at the municipal levels, the county levels, or even the state legislative and administrative levels of government.<sup>38</sup> In light of this, the Supreme Court found that this Constitutional Amendment did not serve any rational government purpose.<sup>39</sup>

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<sup>35</sup> *Romer v. Evans*, 517 U.S. 620, 630 (1996) (“[I]t is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies . . .”). However, the Colorado Supreme Court found no such threat in its analysis of the amendment. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). In his vigorous dissent, Justice Scalia takes issue with the majority’s contentions. Scalia, analyzing the Colorado Supreme Court decision, states that “general laws and policies that prohibit arbitrary discrimination would continue to prohibit discrimination on the basis of homosexual conduct.” *Romer*, 517 U.S. at 638 (Scalia, A., dissenting) (citations omitted). Justice Scalia further states that even the majority admits the only “denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the state constitution.” *Id.*

<sup>36</sup> *Romer*, 517 U.S. at 627. The Court relies on the Colorado Supreme Court analysis by quoting “[t]he ‘ultimate affect’ of Amendment 2 is to prohibit any government entity from adopting . . . protective statutes, regulations, ordinances, or policies [in future support of gays and lesbians] unless the state constitution is first amended to permit such measures.” *Evans v. Romer*, 882 P.2d 1335, 1284-85, n.26 (Colo. 1994).

<sup>37</sup> *Romer*, 517 U.S. at 627. For example, the Court states that gays and lesbians “can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution . . .” *Id.* at 631. The court finds that “[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexual, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.” *Id.* at 627.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 632-33, 635 (finding that the amendment itself was evidence of animus toward a particular group). The Court also finds that the amendment was “at once too broad and too narrow.” *Id.* at 621. The amendment “imposes a special disability” upon homosexuals

The *Romer* Court did not *explicitly* apply the traditional constitutional scrutiny analysis<sup>40</sup> to this case, claiming that it could not do so.<sup>41</sup> However, the Court appears to have implicitly used “rational basis” analysis.<sup>42</sup> By not explicitly following the traditional scrutiny analysis, the resulting confusion leads some commentators to claim that the court has ratified a new “fundamental right of gay men, lesbians, and bisexuals to participate equally in the political process.”<sup>43</sup>

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alone while “it lacks a rational relationship to legitimate state interests.” *Id.* at 631-32. The Supreme Court concludes that:

We cannot say that Amendment 2 is directed to any identifiable legitimate government purpose or discrete objective. It is a status-based enactment . . . . Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.

*Id.* at 635.

<sup>40</sup> See *supra* notes 26-28.

<sup>41</sup> *Romer*, 517 U.S. at 632. The Court states that “Amendment 2 fails, even defies [a] conventional inquiry.” *Id.* Yet, the court then states that the Amendment “lacks a rational relationship to legitimate state interests” applying the very analysis that the Court claimed it could not apply. *Id.*

<sup>42</sup> See *Romer*, 517 U.S. at 631- 33 (using the words “rational relationship” many times). The Court also uses the terminology “legitimate government purpose” and “legitimate purpose.” *Id.* at 632, 635. These words imply a rational basis analysis. See also Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 294 (6<sup>th</sup> Cir. 1997) [hereinafter *Equality III*] (“The . . . Supreme Court [didn’t use] strict . . . or intermediate scrutiny standards, but instead ultimately applied rational relationship . . .”).

Some commentators have indeed found that the court implicitly used traditional analysis without specifically saying so, most finding that the court used a rational basis test. See, e.g., Andrea M. Kimball, Note, *Romer v. Evans and Colorado’s Amendment 2: The Gay Movement’s Symbolic Victory in the Battle for Civil Rights*, 28 U. TOL. L. REV. 219, 223 (1996) (“The Court found Amendment 2 violated the lowest level of equal protection scrutiny--the rational basis test.”). But at least one commentator has found an implication of quasi-suspect class status. Jerald W. Rogers, Note, *Romer v. Evans: Heightened Scrutiny Has Found a Rational Basis—is the Court Tacitly Recognizing Quasi-Suspect Status for Gays, Lesbians, and Bisexuals?*, 45 U. KAN. L. REV. 953, 953 (1997) (claiming that “while the Court purported to apply rational basis review, it instead applied a form of heightened scrutiny because the Court has tacitly recognized--or is preparing to recognize--gays and lesbians as a quasi- suspect class.”). However, the extensive use of the word “rational” in the *Romer* Court’s analysis implies that a “rational basis” standard was used.

<sup>43</sup> *Evans v. Romer*, 882 P.2d 1335, 1343 (Colo. 1994). For a detailed, pre-*Romer* analysis of the Colorado Supreme Court’s reliance in *Evans* of a fundamental right to participate in the political process, see Stephanie L. Grauerholz, Comment, *Colorado’s*

However, the Supreme Court makes it clear that it does not rely on such a new fundamental right to decide this case,<sup>44</sup> and most commentators agree.<sup>45</sup> Still, the Supreme Court gives us little guidance on how to analyze similar cases.<sup>46</sup> The reality seems to be that the Court did apply the traditional class status analysis, jumping right to the “rational basis” argument because, if the Amendment fails there, the Court has no need to find a suspect or quasi-suspect class in order to apply heightened scrutiny to invalidate the Amendment.<sup>47</sup> The Court seems desperate to invalidate this Amendment, finding it offensive on its face.<sup>48</sup> The

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*Amendment 2 Defeated: the Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841 (1995); see also Micah R. Onixt, Note, *Romer v. Evans: A Positive Portent of the Future*, 28 LOY. U. CHI. L.J. 593, 610 (1997) (stating that “[a]lthough the Court has never expressly announced such a right, a series of cases appear to demonstrate that the Equal Protection Clause guarantees a fundamental right to participate equally in the political process” while at the same time ignoring the *Romer* Court’s explicit rejection of just such an argument).

<sup>44</sup> *Romer v. Evans*, 517 U.S. 620, 626 (1996) (affirming the judgement on different grounds).

<sup>45</sup> See, e.g., Mark E. Papadopoulos, Note, *Inkblot Jurisprudence: Romer v. Evans as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL’Y 165, 194-95 (1997) (finding that the *Romer* Court found no fundamental right to participate fully in the political process); see also Teresa M. Bruce, Note, *Neither Liberty nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law*, 5 CORNELL J.L. & PUB. POL’Y 431, 433 (1996). (“The Court had an opportunity in *Romer* to affirm the Colorado Supreme Court’s finding that the [U.S.] Constitution protects a fundamental interest in equal participation in the political process. But it declined to do so.”).

<sup>46</sup> The lack of guidance is apparent from the confusion among authorities in exactly how to apply the *Romer* analysis to future cases. See, e.g., Papadopoulos, *supra* note 45, at 168 (saying that after *Romer* we are left with something of a paradox); see also Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343, 1635-36 (1997) (suspecting that *Romer* will be of little significance to future cases). But see Onixt, *supra* note 43, at 596 (arguing that despite weaknesses in its rationale, *Romer* will help homosexual rights advocates advance their cause).

<sup>47</sup> See, e.g., Onixt, *supra* note 43, at 626 (the *Romer* Court used a rational basis review); see also Papadopoulos, *supra* note 45, at 169 (courts will construe *Romer* as little more than a rational basis review).

<sup>48</sup> *Romer*, 517 U.S. at 632-35. The court focuses on the existence of a “broad and undifferentiated disability on a single named group” stating that the amendment’s “shear 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 . . .” *Id.* at 632. The court also states 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

Court also short-cuts its analysis,<sup>49</sup> concluding that the state has exceeded its bounds by implementing this Amendment.<sup>50</sup> Unfortunately, the *Romer* Court gives us no guidance on how to apply its novel analysis to the issue at hand.<sup>51</sup>

In a vigorous dissent,<sup>52</sup> Justice Scalia makes it clear that one-third of the Court finds that the Colorado Amendment easily passes the rational basis test,<sup>53</sup> and that this is the proper test for analyzing this situation.<sup>54</sup> He decries the majority's novel

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protection of the laws in the most literal sense." *Id.* at 633. And later the court remarks that "Amendment 2 [makes] a general pronouncement that gays and lesbians shall not have any particular protections from the law [thus inflicting] on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.* at 635.

<sup>49</sup> At least one commentator feels that the Supreme Court's terse admonitions did not show the Colorado population the respect that they deserved. Stating that "[e]specially if the majority were inclined to avoid or minimize moral condemnation, it would have been natural to canvas all ostensibly benign possibilities before concluding that an enactment endorsed by more than half a million diverse citizens was motivated by animosity." Nagel, *supra* note 3, at 169. Finally, he warns that:

[T]he national judiciary may be one of the significant causes of the kinds of anxiety that prompted Amendment 2 . . . these are all matters for which the courts and the legal elite have some specific responsibility. Indeed, the *Romer* decision itself is a rather direct indication of how lawyers help to make people feel cut-off from government. Here is a decision that sets aside a popular initiative with hardly a thought about the nature of the fears that drove it . . . .

*Id.* at 187-88. See also Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV., 345, 369 (1997) ("In one of the most candid assessments of the Court and the legal system ever written in a Supreme court opinion, Scalia [in his dissent] implied that traditionalists cannot receive a fair hearing in litigation raising issues such as those in *Romer*").

<sup>50</sup> The majority uses such descriptives as "its sheer breadth is discontinuous with the reasons offered for it that the amendment seems inexplicable . . ." *Romer*, 517 U.S. at 632. "It is at once too narrow and too broad." *Id.* at 634. "It is a status based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests." *Id.* at 635.

<sup>51</sup> See *supra* notes 46-50.

<sup>52</sup> *Romer*, 517 U.S. at 636 (Scalia, A., dissenting).

<sup>53</sup> *Id.* at 642. (comparing *Romer* to *Bowers v. Hardwick*, Justice Scalia writes that "If it is rational to criminalize the conduct [of homosexuals], surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.").

<sup>54</sup> *Id.* at 640-41.

approach to this case<sup>55</sup> and states that the Amendment would not result in any dire consequences beyond its stated objective to prevent giving homosexuals “favored status because of their homosexual conduct.”<sup>56</sup>

Analysis in this Note will show that the Cincinnati Charter Amendment, in contrast to the Colorado Constitutional Amendment, is much narrower in its political constraints, limiting homosexual groups’ ability to get favorable anti-discrimination support only at the municipal level.<sup>57</sup> Thus, the two amendments can be distinguished.<sup>58</sup>

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<sup>55</sup> *Id.* at 640. Dissenting Justice Scalia states that:

there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court’s entire novel theory rests upon the proposition that there is something very special—something that cannot be justified by normal ‘rational basis’ analysis—in making a disadvantaged group . . . resort to a higher decisionmaking level. That proposition finds no support in law or logic.

*Id.*

<sup>56</sup> *Id.* at 643.

<sup>57</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 269 (6<sup>th</sup> Cir. 1995) (citations omitted) (hereinafter *Equality II*). The Sixth Circuit, reviewing the political impact of the Charter Amendment, concludes that:

The instant Amendment deprived no one of the right to vote, nor did it reduce the relative weight of any person’s vote. Pursuant to the Amendment, homosexuals remained empowered to vote for City Council members and to lobby those Council members concerning issues of interest. The only effect of the Amendment upon Cincinnati citizens was to render futile the lobbying of Council for preferential enactments for homosexuals qua homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council’s authority . . . . The Amendment does not impair homosexuals and other interested parties from seeking to repeal the Amendment on another day through the same political process by which Issue 3 became law . . . . In addition, gays, lesbians, and bisexuals may seek relief through other political avenues and fora, such as the Ohio state legislature or the United States Congress.

*Id.* See also *Equality III*, 128 F.3d 289, 297 (6<sup>th</sup> Cir. 1997).

<sup>58</sup> See *infra* Parts III.B. and IV.B.

*D. Bowers v. Hardwick:*

The Supreme Court discussion in *Bowers v. Hardwick*<sup>59</sup> is important whenever one analyzes legislation that impacts homosexuals.<sup>60</sup> The *Bowers* Court unambiguously held that a state had the power to criminalize a behavior that was deeply embedded in the homosexual identity.<sup>61</sup> The court held that the state of Georgia had the constitutional and historical authority to criminalize homosexual sodomy,<sup>62</sup> that there was no fundamental right to engage in such behavior,<sup>63</sup> and that there was no privacy protection preventing the state from prosecuting such activities occurring in a homosexual's own home.<sup>64</sup> The *Bowers* decision has been used as a prime authority to justify the withholding of suspect or quasi-suspect status from homosexuals.<sup>65</sup>

*E. The Circuit Courts:*

The United States Circuit Courts, which have consistently applied traditional scrutiny analysis, have unanimously found that homosexuals comprise neither a

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<sup>59</sup> 478 U.S. 186 (1986). Practicing homosexual brought an action challenging the constitutionality of Georgia's sodomy statute after he had been charged under that statute. The United States District Court for the Northern District of Georgia granted defendant's motion to dismiss for failure to state claim upon which relief could be granted, and plaintiff appealed. The Court of Appeals reversed and remanded. 760 F.2d 1202 (11<sup>th</sup> Cir. 1985). After rehearing was denied defendants petitioned for certiorari. The Supreme Court held that Georgia's sodomy statute did not violate the fundamental rights of homosexuals. *Bowers*, 478 U.S. at 186.

<sup>60</sup> *See, e.g.,* Kenton, *supra* note 25, at 887-98 (stating that most courts have held that the decision in *Bowers* bars any equal protection claim by homosexuals); *see also* Culverhouse & Lewis, *supra* note 25, at 218-39 (examining the reliance of the Circuit Courts on *Bowers* for their denial of quasi-suspect class status for homosexuals).

<sup>61</sup> *Bowers*, 478 U.S. at 190-92 (no constitutional right for homosexual to engage in homosexual sodomy); *Id.* at 194 (the criminalization of sodomy is deeply rooted in our nations history); *see also* Romer v. Evans, 517 U.S. 620, 640 (1996) (Scalia, A., dissenting). Justice Scalia states that "in *Bowers v. Hardwick* we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years-- making homosexual conduct a crime." *Id.* (citations omitted).

<sup>62</sup> *Bowers*, 478 U.S. at 189-96.

<sup>63</sup> *Id.* at 191 ("respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

<sup>64</sup> *Id.* at 195 (finding no support for a constitutional protection for the act of sodomy in the privacy of one's home).

<sup>65</sup> *See generally* Culverhouse & Lewis, *supra* note 25.

suspect nor a quasi-suspect class.<sup>66</sup> Although much commentary concludes that homosexuals should be considered at least a quasi-suspect class,<sup>67</sup> the authority is lengthy and clear that, with no exceptions, homosexuals are entitled only to a rational basis review of suspect, discriminatory legislation.<sup>68</sup>

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<sup>66</sup> See, e.g., *Culverhouse & Lewis*, *supra* note 25, at 218-40.

<sup>67</sup> See, e.g., *Culverhouse & Lewis*, *supra* note 25, at 239-49; see also Baggett, *supra* note 28, at 252.

<sup>68</sup> *Culverhouse & Lewis*, *supra* note 25, at 218-39 (analyzing many Circuit Court decisions all of which deny homosexuals any special class status); see, e.g., *Pruitt v. Cheney*, 963 F.2d 1160 (9<sup>th</sup> Cir. 1991) (holding that a discharge based on an officer's acknowledged status as a homosexual did not run afoul of the First Amendment even though the acknowledgment came in newspaper article); *United States Information Agency v. Krc*, 905 F.2d 389 (D.C. Cir. 1990) (affirming the dismissal of a case challenging the discharge of a homosexual from the United States Information Agency for security concerns based on the employee's homosexuality); *Dubbs v. Central Intelligence Agency*, 866 F.2d 1114 (9<sup>th</sup> Cir. 1989) (holding that there was evidence supporting the district court's conclusion that an employee's discharge due to homosexuality was rationally related to a legitimate government security interest in collecting foreign intelligence and protecting the nation's secrets); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (holding that an officer's homosexuality was not protected by a constitutional right to privacy and that the Navy's practice regarding homosexual discharges was rationally related to a permissible government end); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (holding that the FBI's refusal to hire lesbian plaintiff did not violate equal protection because homosexuality is not a suspect or quasi-suspect classification and the FBI's conclusion that homosexual conduct could adversely affect agency's responsibilities was rational); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (holding that the Navy's policy of mandatory discharge for homosexual conduct does not violate constitutional rights to privacy or equal protection). However, the District Courts decisions aren't quite so unanimous, although any counter holdings have been reversed by the Circuit Courts. See, e.g., *Ben-Shalom v. Marsh*, 489 F. Supp. 964 (E.D. Wis. 1980), *rev'd*, 881 F.2d 454 (7<sup>th</sup> Cir. 1989) (holding that the First Amendment rights of a sergeant were not violated by application of regulation making admitted homosexuality a disqualification to a sergeant's re-enlistment, that the deferential rational basis standard of review was applicable and that the regulation did not violate equal protection rights of sergeant) *cert. denied sub nom.* 494 U.S. 1004 (1990); *High Tech Gays v. Defense Indust. Security Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in part, vacated in part* 895 F.2d 563 (9<sup>th</sup> Cir. 1990) (holding that homosexuals do not constitute a suspect or quasi-suspect class and are not entitled to greater than rational basis scrutiny under equal protection, that denial of a secret security clearance based on applicant's disclosures regarding his homosexual activity did not violate free association rights, and that the policy was rationally related to Government's legitimate interest in protecting national secrets). *But see* *Watkins v. United States Army*, 875 F.2d 699 (9<sup>th</sup> Cir. 1989) (holding that the Army was stopped from barring re-enlistment solely because of serviceman's acknowledged homosexuality where the serviceman had been completely

## III. STATEMENT OF THE CASE

A. *Statement of the Facts:*

On November 8, 1993, six days after the passage of Issue 3 by a 62% voter majority in the city of Cincinnati, the Plaintiffs<sup>69</sup> made a motion for the issuance of a preliminary injunction, which was granted.<sup>70</sup> The plaintiffs also filed a lawsuit in the District Court,<sup>71</sup> challenging the constitutionality of Issue 3.<sup>72</sup> After hearing the case, the court made findings of fact,<sup>73</sup> found the Charter Amendment

candid about his homosexuality from the start of his Army career, and the Army, with full knowledge of his homosexuality, had repeatedly permitted serviceman to re-enlist in the past).

<sup>69</sup> The Plaintiffs were: Equality Foundation of Greater Cincinnati, Inc., (an Ohio not-for-profit corporation whose purpose is the achievement of “equality” for all individuals’); Richard Buchanan (a gay man residing in Cincinnati); Chad Bush (a gay man who has a pending charge of discrimination in public accommodations under the Cincinnati HRO); Edwin Greene (an African-American gay man who is a resident of the City of Cincinnati); Rita Mathis (an African-American lesbian who resides in the City of Cincinnati); Roger Asterino (a gay man employed by the City of Cincinnati who has a pending charge of discrimination under the City’s EEO); and Housing Opportunities Made Equal (H.O.M.E.) (civil rights organization with diverse membership). *Equality I*, 860 F. Supp. 417, 423-24 (S.D. Ohio 1994).

<sup>70</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993). The District Court found that the plaintiffs met the burden required for the issuance of a preliminary injunction, namely 1) a strong or substantial likelihood or probability of success; 2) a showing of irreparable harm; 3) the lack of substantial harm to others; and 4) that the public interest would be served by issuing this preliminary injunction. *Id.* at 1238. The question of how it was in the public’s best interest to issue this injunction when the public had just made their interests known by city-wide referendum was not addressed by the court. Also, the court based its likelihood of success on the existence of a right “to participate equally in the political process” a right that had never been recognized by the Supreme Court of the United States, nor any circuit court. *See infra* Part IV.A.3.

<sup>71</sup> *Equality I*, 860 F. Supp. 417.

<sup>72</sup> *See infra* Part IV.

<sup>73</sup> *Equality I*, 860 F. Supp. at 426-27. The relevant findings of fact by the District Court, many of which are challenged in this Note using a number of reliable authorities, are:

- 1) Homosexuals comprise between 5% and 13% of the population.
- 2) Sexual orientation is a characteristic which exists separately and independently from sexual conduct or behavior.
- 3) Sexual orientation is a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and/or the same gender.
- 5) Sexual behavior is not necessarily a good predictor of a person’s sexual orientation.
- 6) Gender non-conformity such as cross-dressing is not indicative of homosexuality.
- 8) Sexual



unconstitutional on all grounds raised by the plaintiffs,<sup>74</sup> and permanently enjoined the implementation and enforcement of the proposed Charter Amendment known as Article XII.<sup>75</sup>

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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. 10) There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals. 11) There is no correlation between homosexuality and pedophilia. Homosexuality is not indicative of a tendency towards child molestation. 12) Homosexuality is not a mental illness. 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. 14) Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals. 15) Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic. 16) Gays, lesbians and bisexuals are often the target of violence by heterosexuals due to their sexual orientation. 17) In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless. 18) Coalition building plays a crucial role in a group's ability to obtain legislation in its behalf. Gays, lesbians and bisexuals suffer a serious inability to form coalitions with other groups in pursuit of favorable legislation. 19) No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved. 20) The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible. 21) The inclusion of protection for homosexuals does not detract form the City's ability to continue its protection of other groups covered by the City's anti-discrimination provisions. 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; it requires a city wide campaign and support of a majority of voters. City Council requires a bare majority to enact or adopt legislation.

*Id.*

<sup>74</sup> See *infra* Part IV.

<sup>75</sup> *Equality I*, 860 F. Supp at 449.

*B. The Appeals:*

The result was appealed to the Sixth Circuit Court of Appeals,<sup>76</sup> which vacated the injunction, reversing the District Court on all grounds.<sup>77</sup> The plaintiffs appealed to the Supreme Court, which vacated and remanded to the Circuit Court for further consideration in light of *Romer v. Evans*.<sup>78</sup> On reconsideration, the Sixth Circuit distinguished the Cincinnati Charter Amendment from the Colorado Constitutional Amendment,<sup>79</sup> again vacating and reversing on all grounds.<sup>80</sup> Subsequently, the

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<sup>76</sup> *Equality II*, 54 F.3d 261 (6<sup>th</sup> Cir. 1995).

<sup>77</sup> *Id.* The court found that: (1) neither the First Amendment nor equal protection applied to private discrimination; (2) gays, lesbians, and bisexuals constitute neither a suspect class nor quasi-suspect class; (3) there is no fundamental right to equal participation in the political process; (4) the charter amendment did not unconstitutionally reduce the relative weight of person's vote nor impair any right to petition the government; (5) the charter amendment was rationally related to permissible public purposes; and (6) the charter amendment was not unconstitutionally vague. *Id.*

<sup>78</sup> 518 U.S. 1001 (1996). Justice Scalia, in a dissent joined by two other Justices, strongly distinguishes the two cases when he writes that:

*Romer* involved a state constitutional amendment prohibiting special protection for homosexuals. The consequence of its holding is that homosexuals in a city (or other electoral subunit) that wishes to accord them special protection cannot be compelled to achieve a state constitutional amendment in order to have the benefit of that democratic preference. The present case, by contrast, involves a determination by what appears to be the lowest electoral subunit that it does not wish to accord homosexuals special protection. It can make that determination effective, of course, only by instructing its departments and agencies to obey it—which is what the Cincinnati Charter Amendment does. Thus, the consequence of holding this provision unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals. Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are concerned, be permitted to do what they please. This is such an absurd proposition that *Romer*, which did not involve the issue, cannot possibly be thought to have embraced it.

*Id.* at 1001 (Scalia, A. dissenting).

<sup>79</sup> *Equality III*, 128 F.3d 289, 297-98 (6<sup>th</sup> Cir. 1997). The Sixth Circuit distinguishes the Cincinnati amendment from the Colorado amendment:

At bottom, the Supreme Court in *Romer* found that a state constitutional proviso which deprived a politically unpopular minority, but no others, of the political ability to obtain special legislation at every level of state government, including within local jurisdictions having pro-gay rights majorities, with the only possible recourse available through surmounting the formidable political obstacle of securing a rescinding amendment to the state constitution, was simply so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated

Sixth Circuit denied a petition to rehear the case en banc.<sup>81</sup> The Supreme Court has denied the plaintiffs' *writ of certiorari*.<sup>82</sup>

#### IV. ANALYSIS

##### A. *Traditional (pre-Romer) Analysis:*

###### 1. Introduction:

This section will show that the District Court's opinion lacked any critical analysis of the plaintiff's positions,<sup>83</sup> and that the court's opinion blatantly ignores legal precedent and dismisses out of hand the defendants' arguments.<sup>84</sup> The Sixth

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basic equal protection values. Thus, the Supreme Court directed that the ordinary three-part equal protection query was rendered irrelevant . . . .

This "extra-conventional" application of equal protection principles can have no pertinence to the case sub judice. The low level of government at which Article XII 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.

Moreover, unlike Colorado Amendment 2, which interfered with the expression of local community preferences in that state, the Cincinnati Charter Amendment constituted a direct expression of the local community will on a subject of direct consequences to the voters. Patently, a local measure adopted by direct franchise, designed in part to preserve community values and character, which does not impinge upon any fundamental right or the interests of any suspect or quasi-suspect class, carries a formidable presumption of legitimacy and is thus entitled to the highest degree of deference from the courts . . . .

As the product of direct legislation by the people, a popularly enacted initiative or referendum occupies a special posture in this nation's constitutional tradition and jurisprudence. An expression of the popular will expressed by majority plebiscite, especially at the lowest level of government (which is the level of government closest to the people), must not be cavalierly disregarded.

*Id.* See also *supra* note 78 (where three Supreme Court Justices, dissenting from the grant of certiorari in this case, also distinguish the Colorado Amendment from the Cincinnati Amendment).

<sup>80</sup> *Equality III*, 128 F.3d 289 (6<sup>th</sup> Cir. 1997).

<sup>81</sup> 1998 WL 101701 (6<sup>th</sup> Cir. 1998).

<sup>82</sup> *Application for writ*: 66 USLW 3749 (May 4, 1998) *denied by* 119 S. Ct. 365 (1998).

<sup>83</sup> See *infra* Part IV.

<sup>84</sup> *Id.*

Circuit obviously agrees with this assessment in its thorough chastisement of the District Court by completely and summarily reversing every single ground on which the District Court bases its decision.<sup>85</sup> This Note will examine the findings of the District Court in turn.<sup>86</sup>

## 2. Strict Scrutiny:

Strict Scrutiny has been applied by the Supreme Court and the Circuit Courts only to cases of racial discrimination or where a fundamental right is involved.<sup>87</sup> The District Court, therefore, creates a new “fundamental right to equal participation in the political process”<sup>88</sup> to justify its application of strict scrutiny to the Amendment. The District Court fashions this new innovative right<sup>89</sup> by erroneously reading *Washington v. Seattle School Dist.*,<sup>90</sup> *Hunter v. Erickson*,<sup>91</sup> and *Gordon v. Lance*.<sup>92</sup> The court improperly analogizes that since those cases involved interference with political rights of a minority group, this then implies a *general prohibition against ever implicating those rights for any identifiable minority*

<sup>85</sup> *Equality II*, 54 F.3d 261, 266 (6<sup>th</sup> Cir. 1995), *vacated and remanded for rehearing*, 518 U.S. 1001 (1996). The Sixth Circuit describes the District Court’s rulings in an incredulous tone as “novel” and “misconstru[ing],” that “courts should resist tailoring novel rights.” *Id.* The court also found that the District Court “erroneously fashioned [an] innovative right.” *Id.* See also *Equality III*, 128 F.3d at 292.

<sup>86</sup> See *infra* Part IV.

<sup>87</sup> See *supra* note 25.

<sup>88</sup> *Id.*

<sup>89</sup> *Equality II*, 54 F.3d at 268; see also *Equality III*, 128 F.3d at 292.

<sup>90</sup> 458 U.S. 457 (1982) (holding that a statute, adopted through initiative, which prohibits school boards from requiring any student to attend a school other than the school geographically nearest or next nearest his place of residence, but which contains exceptions permitting school boards to assign students away from their neighborhood schools for virtually all purposes required by their educational policies except racial desegregation violates the equal protection clause because it uses the racial nature of an issue to define the governmental decision making structure, thus imposing substantial and unique burdens on racial minorities).

<sup>91</sup> 393 U.S. 385 (1969) (holding that an amendment of city charter to provide that any ordinance enacted by city council which regulates use, sale, advertisements, transfer, listing assignment, lease, sublease, or financing of realty on basis of race, color, religion, national origin, or ancestry must first be approved by majority of electors violates the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution).

<sup>92</sup> 403 U.S. 1 (1971) (holding that requiring 60% of voters in referendum election to approve bonded indebtedness or tax increases does not violate the equal protection clause merely because votes of those who favor issuance of bonds have proportionately smaller impact on outcome of election than votes of those who oppose issuance of bonds).

group.<sup>93</sup> If such a fundamental right existed, the District Court could apply strict scrutiny to the Amendment and bypass the traditional class status analysis altogether.<sup>94</sup> The District Court conveniently overlooks that all of the cited cases involve a minority that *has already been granted special protections* by the courts, namely racial minorities.<sup>95</sup> The District Court erroneously creates this new fundamental right despite clear precedent to the contrary.<sup>96</sup> The Supreme Court has also subsequently rejected any such fundamental right in *Romer v. Evans*.<sup>97</sup>

### 3. Heightened Scrutiny:

The District Court determined that gays, lesbians, and bisexuals meet the criteria for quasi-suspect group status, and, thus, are entitled to heightened (intermediate) scrutiny whenever the government potentially infringes on any of their rights,<sup>98</sup> despite clear precedent to the contrary from every Circuit Court that has addressed the issue.<sup>99</sup> The District Court attempted to overcome this obstacle by evaluating the elements used to determine the existence of quasi-suspect group status in a way at odds with the very same analysis of the Circuit Courts.<sup>100</sup> The five elements that

<sup>93</sup> *Equality I*, 860 F. Supp. 417, 433-34 (S.D. Ohio 1994) (“We therefore conclude that Issue 3 implicates the Plaintiffs’ Fundamental Right to equal participation in 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. As we conclude that Issue 3 implicates a Fundamental Right, it must be narrowly tailored to serve a compelling state interest or it must fall.”).

<sup>94</sup> See *supra* note 26.

<sup>95</sup> See *supra* notes 26, 90-92.

<sup>96</sup> See *infra* Part II.C. The Sixth Circuit says:

[I]n *Hunter*, the Court strictly scrutinized, and struck down, a voter- adopted amendment to the Akron City Charter which foreclosed the city council from legislating any race-based prohibition against discrimination in private housing without the prior authorization of a majority of the voters. The *Hunter* opinion was anchored in the “suspect classification” of race, not in any averred fundamental right to lobby the city council for favorable legislation . . . . Likewise, *Washington*, in which the high Court invalidated a state voter approved initiative which was designed to preclude bussing of students to achieve racial desegregation, turned upon a suspect racial classification . . . . Finally, *Gordon* involved the recognized fundamental right to vote, not an all-inclusive asserted right to participate fully in the political process.

*Equality II*, 54 F.3d at 268 (citations omitted).

<sup>97</sup> See *infra* Part II.C.

<sup>98</sup> *Equality I*, 860 F. Supp. at 434-40.

<sup>99</sup> See generally *Culverhouse & Lewis*, see *supra* note 25 (providing a list of cases and their holdings).

<sup>100</sup> See *infra* Part II.E.

the District Court chooses to evaluate quasi-suspect status are consistent with the traditional analysis<sup>101</sup> and will be evaluated in turn.<sup>102</sup>

(a) *Whether an individual's sexual orientation bears any relationship to his or her ability to perform, or to participate in, or contribute to, society.*<sup>103</sup> There is no doubt that gays, lesbians, and bisexuals can contribute to society; however, what must be shown is that there is no evidence that being gay, lesbian, or bisexual has any negative bearing on an individual's ability to function in society.<sup>104</sup> The District Court concludes that homosexuality has no impact on an individual's societal performance.<sup>105</sup> Yet, there are numerous studies that imply that homosexuals as a group are at an increased risk for a number of physical and mental disabilities.<sup>106</sup> For example, homosexuals are more likely than the general population to get AIDS,<sup>107</sup> to commit suicide,<sup>108</sup> they live shorter lives<sup>109</sup> and they suffer to a greater extent from drug and alcohol abuse.<sup>110</sup> The very act of anal sodomy, common

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<sup>101</sup> See *supra* note 17.

<sup>102</sup> *Equality I*, 860 F. Supp. at 436. The elements are covered individually, see *infra* Parts IV.A.3.(a)-(c).

<sup>103</sup> *Equality I*, 860 F. Supp. at 436; see also *supra* note 73, findings of fact 9, 10, 11 & 12.

<sup>104</sup> *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 310-11 (1976) (where the court declined to apply heightened scrutiny because it found that "there is a general relationship between advancing age and decreasing physical ability . . .").

<sup>105</sup> *Cammermeyer v. Aspin*, 850 F. Supp. 910, 922 (W.D. Wash. 1994) ("[T]here is no study showing [homosexuals] to be less capable or more prone to misconduct."). This case deals with a specific individual in a military job, as differentiated from the situation in *Equality* where the impact of homosexuality in general must be evaluated across a wide range of circumstances and employments. Thus the cases are distinguishable.

<sup>106</sup> See *supra* notes 107-110.

<sup>107</sup> JEFFREY SATINOVER, M.D., *HOMOSEXUALITY AND THE POLITICS OF TRUTH* 15-16 (1996) (Acquired Immune Deficiency Syndrome [AIDS] was first known as "Gay Related Immune Disorder" because of its predominance in male homosexual populations. Eighty-five percent of AIDS patients in the United States are either homosexuals or IV drug users). See also CHARLES W. SOCARIDES, M.D. *HOMOSEXUALITY, A FREEDOM TOO FAR* 236 (1995).

<sup>108</sup> *Id.* at 294 (finding that "a U.S. task force on Youth Suicide reported in 1989 that gay adolescents may account for as many as 30 percent of youth suicides each year . . . [But] the actual figure may be closer to ten percent.").

<sup>109</sup> *Id.* at 273 (stating that one U.S. Study places the number of male homosexuals that reach the age of 55 at only 3 percent).

<sup>110</sup> SOCARIDES, *supra* note 107, at 68 (finding that "[h]omosexual males are three times as likely to have alcohol or drug problems as the general male population.").

practice among gays, is likely to lead to a number of diseases and disabilities.<sup>111</sup> Therefore, it may be fair and prudent that an employer take a person's sexual orientation into account in determining whether that person qualifies for a particular job. The Sixth Circuit Court did not, however, address this particular issue.<sup>112</sup>

**(b) Whether the members of the group have any control over their sexual orientation.**<sup>113</sup> This element can be easily confused with the "immutability" element examined next, and they are indeed similar.<sup>114</sup> The District Court differentiates sexual activity from sexual orientation,<sup>115</sup> and makes the outrageous claim that sexual activity is not even a good predictor of sexual orientation.<sup>116</sup> However, the

<sup>111</sup> See, e.g., *id.* at 24 (noting that [Anal sex] causes bleeding lacerations of the intestine and tearing of the sphincter muscle and anal mucosa. Sometimes anal sex reaches all the way up into the sigmoid colon, which can lead to a fatal infection of the peritoneum.); see also SATINOVER, *supra* note 107, at 67 (determining that "gay males have a disproportionate incidence of acute rectal trauma as well as of rectal incontinence and anal cancer . . . . Comparable tears in the vagina are not only less frequent because of the relative toughness of the vagina [thicker], but the environment of the vagina is vastly cleaner than that of the rectum . . . . As a result, homosexual men are disproportionately vulnerable to a host of serious and sometimes fatal infections caused by the entry of feces into the bloodstream.").

<sup>112</sup> *Equality II*, 54 F.3d 261 (6<sup>th</sup> Cir. 1995); see also *Equality III*, 128 F.3d 289 (6<sup>th</sup> Cir. 1997). The Sixth Circuit only pays cursory attention to the elements of the District Court's quasi-suspect status analysis because the Sixth Circuit relies primarily on the holdings of other Circuit Courts and on *Bowers* to deny heightened review.

<sup>113</sup> *Equality I*, 860 F. Supp. 417, 436 (S.D. Ohio 1994). See also findings of fact 2, 3, 6 & 8, *supra*, note 73.

<sup>114</sup> This Note will assume that by this element the court means that a person does not choose his or her sexual orientation. Therefore, the discussion, *infra* Part IV.A.3.c, applies.

<sup>115</sup> The District Court credits the testimony of witnesses with establishing this point, stating that "[c]redible and un rebutted testimony established that sexual orientation sets in at an early age, around 3-5 years, and is simply a matter of development beyond that stage . . . ." *Equality I*, 860 F. Supp. at 437. The court claims that the "evidence amply established, and we conclude, that there is a broad distinction between sexual orientation, and sexual conduct . . . . Sexual orientation, as Dr. Gonsiorek put it, 'is a predisposition toward erotic, sexual, affiliation or affection relationship towards one's own and/or the other gender,' and is not simply defined by any conduct." *Id.* at 424.

<sup>116</sup> *Id.* ("In fact, evidence demonstrated that sexual activity is not even necessarily a good predictor of one's sexual orientation . . . . Thus, while sexual conduct may be a matter of volition, sexual orientation is not. Sexual orientation is therefore not simply a matter of who one chooses to have sex with, but rather is a much deeper, more complex and involuntary state of being."). *Contra, see, e.g.,* Pickhardt, *supra* note 6, at 954 ("Adopting choice-affirming arguments instead of choice-denying arguments would not only affect the attitudes of non-gay people toward people who are gay, it would also affect how gay people

argument as to whether homosexuality is defined by conduct has been extensively examined by the courts, with the courts deciding that the behavior is an integral part of the identity.<sup>117</sup> As a matter of practical application, there can be no difference between the two because a homosexual is usually identified by his behavior<sup>118</sup> and because there are no consistent distinguishing characteristics or traits.<sup>119</sup> The concepts of sexual “desires” and “fantasies,” devoid of behavior to anchor them into a sexual “orientation,” are much too ethereal for a meaningful legal discussion, and the courts have largely ignored any difference.<sup>120</sup> The Sixth Circuit takes the view, as do most courts, that homosexuality and bisexuality are defined by behavior, and,

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themselves view being gay . . . . In addition to perpetuating bigoted attitudes outside our community, the claims of having no choice in our sexual orientation exact a great cost on our own community’s self-esteem.”).

<sup>117</sup> *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (stating that homosexuality is primarily behavioral in nature and as such is not immutable); *see also* Pickhardt, *supra* note 6, at 943:

Even if it were scientifically proven that sexual orientation is fixed and unchangeable, such orientation could arguably only be manifested through conscious action, and conscious action as a product of volition can never be immutable. Thus, the description of sexual orientation as “primarily behavioral in nature” becomes impossible to disprove since the only means of identifying someone as gay is through his or her behavior.

*Id.* *But see* *Cammermeyer v. Aspin*, 850 F. Supp. 910, 919 (W.D. Wash. 1994) (“[P]laintiff has also provided the Court with substantial uncontroverted evidence that a distinction between homosexual orientation and homosexual conduct is well grounded in fact.”).

<sup>118</sup> *Woodward*, 871 F.2d at 1076 (“Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature.”). *See also* *High-Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9<sup>th</sup> Cir. 1990).

<sup>119</sup> Nan D. Hunter, Comment, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993) (“Self-identifying speech . . . is a major factor in constructing identity. . . . That is even more true when the distinguishing group characteristics are not visible, as is typically true of sexual orientation. Therefore, in the field of lesbian and gay civil rights . . . expression is a component of the very identity”). *See also* *Equality II*, 54 F.3d 261, 267 (6<sup>th</sup> Cir. 1995).

<sup>120</sup> *See, e.g., Equality II*, 54 F.3d at 267 (“The reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent [sic] characteristics such as innate desires, drives, and thoughts.”). *See also* *Equality III*, 128 F.3d 289, 292(6<sup>th</sup> Cir. 1997). *But see* *Equality I*, 860 F. Supp. at 424 (“Sexual orientation is distinct from, and exists wholly independently of, sexual behavior or conduct.”).



because a person can choose whether or not to engage in such behavior, sexual orientation is a choice as well.<sup>121</sup>

There are authorities who believe that sexual orientation is, in some cases, a choice,<sup>122</sup> and a number of homosexuals have confirmed that they consciously chose their sexual orientation.<sup>123</sup> Because it cannot be generally said that homosexuals have no control over their sexual orientation, the District Court was in error to conclude that homosexuality is not a choice.<sup>124</sup>

(c) *Whether sexual orientation is an immutable characteristic.*<sup>125</sup> The District Court concludes that homosexuality is an immutable characteristic, despite contrary findings by Circuit Courts across the country.<sup>126</sup> The District Court basis its results on a number of faulty conclusions, such as homosexuals cannot be converted to heterosexuality<sup>127</sup> and homosexuality is not behavioral.<sup>128</sup> The Sixth Circuit,

<sup>121</sup> *Equality II*, 54 F.3d at 267. See also *Equality III*, 128 F.3d at 292; *Woodward*, 871 F.2d at 1076; and *Ben-Shalom v. Marsh*, 881 F.2d 454, 463-64 (7th Cir.1989) (finding that a lesbian orientation is compelling evidence that the plaintiff has engaged in homosexual conduct and likely will do so again).

<sup>122</sup> See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 516-28 (1994) (arguing that gay rights litigators should abandon choice-denying arguments based on biological causation in favor of arguments that take no stance on causation at all). See also Pickhardt, *supra* note 6, at 943 (arguing that it is time that the gay rights movement take up a “choice affirming” strategy in legal arguments and discrediting much of the scientific basis for a genetic basis of sexual orientation, stating that “even if it were scientifically proven that sexual orientation is fixed and unchangeable, such orientation could arguably only be manifested through conscious action, and conscious action as a product of volition can never be immutable . . . the only means of identifying someone as gay is through his or her behavior.”); SOCARIDES, *supra* note 107, at 18-19 (arguing that some fraction of male homosexuals, which he calls ‘optional homosexuals,’ chooses his homosexuality because he ‘likes it.’).

<sup>123</sup> See, e.g., VERA WHISMAN, *QUEER BY CHOICE: LESBIANS, GAY MEN, AND THE POLITICS OF IDENTITY* (1996) (including testimonials of homosexuals who claim their sexual orientation was their choice).

<sup>124</sup> See *supra*, notes 119-123.

<sup>125</sup> *Equality I*, 860 F. Supp. at 436; see also *supra* note 73, findings of fact 2, 3, 5, & 8.

<sup>126</sup> See, e.g., *Woodward*, 871 F.2d at 1076 (quotation *supra* note 118).

<sup>127</sup> *Equality I*, 860 F. Supp. at 424. For example, witness Dr. John Gonsiorek provided testimony that “sexual orientation is an involuntary status, that it sets in at an early age, that it is unamenable to techniques designed to change it (which he described as unethical), and also that sexual orientation is distinct from, and exists wholly independently of, sexual behavior or conduct.” *Id.* But see SOCARIDES, *supra* note 107, at 113-55 (claiming that his

however, declined to find homosexuality immutable; instead it relied on extensive Circuit Court precedent.<sup>129</sup> The Sixth Circuit determined that “[b]ecause homosexuals generally are not identifiable ‘on sight’ unless they elect to be so identifiable by conduct,<sup>130</sup> they cannot constitute a suspect class or a quasi-suspect class because ‘they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.’”<sup>131</sup> Many commentators have examined this issue, but there is no consensus on the immutability of homosexuality.<sup>132</sup> In addition, many sources claim that because, at least occasionally, homosexuality is a choice, it is not generally immutable.<sup>133</sup> Finally, arguments that homosexuality is genetically based, and thus immutable, have proven less than convincing.<sup>134</sup> The scientific studies that the press has portrayed as proving a “gay gene” have been derided by some authorities as based on imperfect science and have, therefore, been rejected by many in the scientific community.<sup>135</sup> Thus, the evidence has not proven that sexual orientation is

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success rate in treating homosexuals so that they live heterosexual lifestyles is as good as, or better, than the psychiatric professions success rate at treating any mental disorder). See also SATINOVER, *supra* note 107, at 168-209 (discussing the success rates of both secular and Christian treatments which convert homosexuals to a heterosexual lifestyle).

<sup>128</sup> See *supra* notes 117-127.

<sup>129</sup> *Equality II*, 54 F.3d 261, 266 (6<sup>th</sup> Cir. 1995). See also *Equality III*, 128 F.3d 289, 293 (6<sup>th</sup> Cir. 1997).

<sup>130</sup> This includes public displays of homosexual affection or self-proclamation of homosexual tendencies.

<sup>131</sup> *Equality II*, 54 F.3d at 267 (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602, (1987)). See also *Equality III*, 128 F.3d at 293.

<sup>132</sup> See SATINOVER, *supra* note 107, at 22 (“[A]s the recent survey *The Social Organization of Sexuality* makes clear, the vast majority of youngsters who at some point adopt homosexual practices later give them up.” See also *supra* note 127.

<sup>133</sup> See *supra* notes 122-123.

<sup>134</sup> Pickhardt, *supra* note 6, at 946-48 (“[T]he scientific studies, on their own terms, are not proof that being gay is not a choice”). See also Halley, *supra* note 122, at 529-46 (critiquing both the manner that the scientific studies were done and the results thus inferred).

<sup>135</sup> See *supra* note 134. See also SATINOVER, *supra* note 107, at 37-38 (“Recent articles in the media create the mistaken impression that scientific closure on the subject of homosexuality soon will be reached . . . but the scientific consensus [that homosexuality is immutable] that the press touts is a fiction . . . . In contrast to the widely promoted claims, many eminent scientists disagree with the media’s conclusions about the ‘biology of homosexuality’”).

immutable.<sup>136</sup> This is, in fact, the finding of those Circuit Courts that have examined the issue.<sup>137</sup>

(d) *Whether that group has suffered a history of discrimination based on their sexual orientation.*<sup>138</sup> The District Court concludes that “gays, lesbians and bisexuals have suffered a history of invidious discrimination based on their sexual orientation.”<sup>139</sup> However, a history of discrimination alone has never been sufficient to implicate heightened scrutiny.<sup>140</sup> The existence of discrimination merely starts the analytical process.<sup>141</sup>

(e) *Whether the class is “politically powerless.”*<sup>142</sup> The district court determined that gays, lesbians, and bisexuals are politically powerless by finding that “it is crucial for political minorities to form coalitions in order to achieve legislative success”<sup>143</sup> concluding that “[p]laintiffs, while not a wholly politically powerless group, do suffer significant political impediments.”<sup>144</sup> The Sixth Circuit does not specifically address this issue.<sup>145</sup> However, homosexuals actually have very powerful political advocates, and they have, in fact, succeeded in forming successful coalitions with other minority groups to their mutual political benefit.<sup>146</sup>

<sup>136</sup> See *supra* notes 115-134.

<sup>137</sup> See *supra* note 68.

<sup>138</sup> *Equality I*, 860 F. Supp. 417, 436 (S.D. Ohio 1994). See also *supra* note 73, findings of fact 13, 14, 15 & 16.

<sup>139</sup> *Equality I*, 860 F. Supp. at 436.

<sup>140</sup> See, e.g., *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“[A]fter *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm”). See also David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997) (examining the legally protected discrimination against polygamists in comparison to prohibitions against same-sex marriage).

<sup>141</sup> See *supra* note 27.

<sup>142</sup> *Equality I*, 860 F. Supp. at 436. See also *supra* note 73, findings of fact 17, 18, 19 20, 21 & 22.

<sup>143</sup> *Equality I*, 860 F. Supp. at 438.

<sup>144</sup> *Id.* at 437. See the testimony of John Burlew (an attorney with local political experience) and Kenneth Sherrill (a professor of political science at Hunter College). *Id.* at 425. See also the testimony of Professor James Woodward (professor of political science at Clemson University). *Id.* at 426.

<sup>145</sup> See generally *Equality II*, 54 F.3d 261 (6<sup>th</sup> Cir. 1995); See also *Equality III*, 128 F.3d 289 (6<sup>th</sup> Cir. 1997).

<sup>146</sup> For example, homosexual rights are supported by the American Civil Liberties Union [ACLU], <<http://www.aclu.org/issues/gay/hmg1.html>> (visited Nov. 1998). The ACLU web site also shows that the ACLU was active in supporting the effort to overturn the Cincinnati Charter Amendment. <<http://www.aclu.org/news/w112197c.html>> (visited Nov. 1998).

The District Court concludes that the plaintiffs had met the requirements of quasi-suspect class status.<sup>147</sup> The Sixth Circuit subsequently reversed and held that the plaintiffs were not a member of a quasi-suspect group.<sup>148</sup>

#### 4. First Amendment Vagueness.

The District Court accepts the plaintiffs' arguments that the Charter Amendment violates their First Amendment rights to free speech and association,<sup>149</sup> as well as impinges on their right to petition the government for a redress of grievances.<sup>150</sup> The District Court assumed that Issue 3 would "hinder the 'unfettered interchange of ideas for the bringing about of political and social change'"<sup>151</sup> and, thus, infringe upon the First Amendment.<sup>152</sup> However, the Sixth Circuit rejects this conclusion,

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The National Organization for Women [NOW] also supports homosexual rights, as a search of their web site shows. See <<http://www.now.org/issues/lgbi/index.html>> (visited Nov. 1998). The NOW site also states that "NOW is the largest feminist organization in this country working for lesbian rights" <<http://www.now.org/issues/lgbi/lesbian.html>> (visited Nov. 1998).

Even the Democratic National Committee supports gay rights, as a search of their web site reveals. See <<http://www.democrats.org/dnews/98preleases/pr080498.html>> (visited Nov. 1998) (criticizing the Republican party for its lack of support for gay & lesbian rights). With the support of these and other powerful lobbying and political organizations, it is difficult to argue that gays, lesbians, and bisexuals are politically powerless. In fact, the opposite is shown.

<sup>147</sup> *Equality I*, 860 F. Supp. at 435-37.

<sup>148</sup> *Equality II*, 54 F.3d at 266. There, the court states:

In declaring [that homosexuals were entitled to quasi-suspect status], the lower court in the instant case misconstrued *Bowers v. Hardwick*, 478 U.S. 186 (1986). The *Bowers* Court directed that the courts should resist tailoring novel fundamental rights. *Id.* at 195. Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected.

*Id.* See also *Equality III*, 128 F.3d at 292.

<sup>149</sup> *Equality I*, 860 F. Supp. at 444-45.

<sup>150</sup> *Id.* at 440.

<sup>151</sup> *Id.* at 445 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>152</sup> *Id.* at 446. The District court states that:

The consequences of attempting to supersede Issue 3 are prohibitive of any attempt to do so, carrying with defeat--a likely consequence due to the Plaintiffs' numerical inferiority and unpopularity--the exorbitant risk of employment and housing discrimination. The social and political stakes associated with requiring an unpopular group to seek anti-discrimination legislation from the majority, therefore, are unique and patently unfair. Such a situation will chill political expression in a way and to a degree not inherent in other subjects properly relegated to the initiative

finding that there was no infringement of First Amendment rights.<sup>153</sup> Likewise, the Supreme Court in *Romer* did not rely on any First Amendment violations in its analysis.<sup>154</sup>

### 5. Rational Basis:

The District Court does little to analyze any possible rational basis for the Amendment, instead issuing a terse conclusion that “[a]fter carefully considering the asserted governmental interests articulated by the Defendants, and any other possible justifications, we conclude that Issue 3 is not rationally related to any

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process. This will have the “inevitable effect of reducing the total quantum of speech on a public issue.”

*Id.* (citations omitted).

<sup>153</sup> *Equality II*, 54 F.3d at 270. The court states that:

First Amendment rights of free speech and association, and their right to petition the government for redress of grievances. *Equality I*, 860 F. Supp. at 444-47. This reviewing court rejects that conclusion. The Amendment erected no official obstacle to the exercise of anyone’s free speech or free association rights. The Amendment’s forbearance from prohibiting private citizen discrimination against homosexuals for public homosexually oriented speech or association is constitutionally nonproblematic because the First Amendment prohibits only governmental burdens upon speech and association; it does not command the government to insulate any person from the effects of private action resulting from the exercise of free speech or association rights.

*Id.* See also *Equality III*, 128 F.2d at 297:

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

*Id.*; see also *Ben-Shalom v. Marsh*, 881 F.2d 454 (7<sup>th</sup> Cir. 1989):

*Ben-Shalom* is free under the regulation to say anything she pleases about homosexuality and about the Army’s policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes. What *Ben-Shalom* cannot do, and remain in the Army, is to declare herself to be a homosexual. Although that is, in some sense speech, it is also an act of identification. And it is the identity that makes her ineligible for military service, not the speaking of it aloud. Thus, if the Army’s regulation affects speech, it does so only incidentally, in the course of pursuing other legitimate goals.

*Id.* at 462.

<sup>154</sup> The *Romer* Court never even cites the First Amendment, and the dissent cites the First Amendment once, as background material, and only in reference to religion. *Romer v. Evans*, 517 U.S. 620, 637 (1996) (dissent). The author could find no article reviewing *Romer* that even referenced the First Amendment with respect to the case.

legitimate governmental purpose.”<sup>155</sup> The Sixth Circuit analysis makes it clear, however, that there are rational government and societal interests involved here, such as associational liberties, freedom from government coercion, and savings to taxpayers.<sup>156</sup> In addition to the objectives the defendants argued before the courts, commentators and authorities have identified other legitimate purposes that legislation like the Cincinnati Charter Amendment would serve, such as protection for the nuclear family, restricting marriage to male/female couples, and upholding traditional moral values.<sup>157</sup> For example, current research makes clear that children

<sup>155</sup> *Equality I*, 860 F. Supp. 417, 441 (S.D. Ohio 1994).

<sup>156</sup> *Equality II*, 54 F.3d at 270-71. The Sixth Circuit concludes that:

The trial court also erroneously ruled that the Amendment did not rationally relate to any permissible public purpose. However, to the contrary, the Amendment potentially furthered a litany of valid community interests. It encouraged enhanced associational liberty on the part of Cincinnati residents respecting the sexual orientation issue by eliminating exposure to the punishment mandated by the Human Rights Ordinance against certain persons who elected to disassociate themselves from homosexuals . . . [T]he measure reduced governmental regulation of the private social and economic conduct of Cincinnati residents, and augmented the degree of personal autonomy and collective popular sovereignty legally permitted concerning deeply personal choices and beliefs which are necessarily imbued with questions of individual conscience, private religious convictions, and other profoundly personal and deeply fundamental moral issues. In turn, this public dichotomy decreased municipal supervision of private conduct, which necessarily may result in some cost savings for the City’s taxpayers. These values, and others, were at least arguably advanced by the Amendment . . . this court cannot say that the Amendment was not rationally related to a legitimate state objective.

*Id.* (citations omitted). See also *Equality III*, 128 F.2d at 293-294.

<sup>157</sup> See generally O’Brien, *supra* note 6 (arguing that same-sex marriage is one of the current goals of the gay-rights movement and that religions should play a role in the battle against same-sex marriage.). Traditional moral values have a strong basis in logic:

[m]an’s nature, undisciplined by values, will allow sex to dominate his life and the life of society . . . . Societies that did not place boundaries around sexuality were stymied in their development. The subsequent dominance of the Western world can, to a significant extent, be attributed to the [original] sexual revolution, initiated by Judaism and later carried forward by Christianity.

SATINOVER, *supra* note 107, at 17-18 (quoting Dennis Prager, *Judaism, Homosexuality, and Civilization*, *Ultimate Issues* 6, no.2 (1990) p.2). Some liberal activists directly deride traditional moral values held by the majority of Americans, protesting their use in developing public policy: “[l]iberal theorists such as John Rawls . . . demand that notions regarding values based on assessments of what is a good and decent life be excluded from the formulation of public policy, and more importantly, from the definition of a right.” Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond*, 85 GEO L.J. 1871, 1877 (1997). See also Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 189-90, 203-07 (1998) (calling the

are suffering from the breakup of the nuclear family, and that this is negatively impacting society as a whole.<sup>158</sup>

*B. Post Romer Analysis:*

Because of the lack of guidance given by the *Romer* court in its opinion, it is difficult to predict precisely what affect the *Romer* decision will have on the analysis of legislation that impacts specific groups.<sup>159</sup> Yet, it is clear that *Romer* has neither defined new rights nor a new protected class.<sup>160</sup> Rather, *Romer* seems to stand for the proposition that a state has no rational basis for excluding homosexuals from political recourse at all levels of state government for leaving as the only resort an amendment to the state constitution.<sup>161</sup>

The Cincinnati Charter Amendment, in contrast, is aimed at the lowest form of government in a state, the municipal level.<sup>162</sup> There is far less interference in the political process, and homosexual groups have recourse to county and state levels of government to petition for special preferences.<sup>163</sup> In addition, homosexuals can resort to a public referendum as the supporters of the Charter Amendment did.<sup>164</sup> Federal remedies are also available.<sup>165</sup> Thus, the intrusiveness of the Charter Amendment is minimized because it affects only the lowest level of government and allows homosexuals recourse at many higher levels of government.<sup>166</sup>

The Sixth Circuit Court agrees, distinguishing the Cincinnati Charter Amendment with the Colorado State Constitutional Amendment.<sup>167</sup> The Sixth

heterosexual sexual relationship “selfish” and “boring” and full of “discomfort” for the woman, determining that “[m]ost heterosexual relationships continue to be relationships of injustice and inequality” and generally concluding that lesbian relationships are superior to heterosexual relationships).

<sup>158</sup> See, e.g., Nancy Garland, *Report Finds Half Nation’s Kids at Risk; Panel Stresses Importance of Two Parent Families*, Bangor Daily News, (Oct. 17, 1996) (reviewing the U.S. Commission on Child and Family Welfare Report: *Parenting Our Children: In the Best Interest of the Nation*—finding that the breakup of the traditional family is harming the nation’s children, and thus harming society as well).

<sup>159</sup> See *infra* Part II.C.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See *supra* notes 78-79; *infra* notes 167-172.

<sup>163</sup> *Id.*

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

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Equality III*, 128 F.3d 289, 296-301 (6<sup>th</sup> Cir. 1997) (stating that the Cincinnati

Circuit did not find *Romer* applicable to a city charter amendment, and stuck to its original analysis.<sup>168</sup> The court found that the Cincinnati Amendment was more narrowly tailored, and, thus, it did not have the potential to be construed as prohibiting homosexuals from exercising legal protections of a general nature.<sup>169</sup> Such was a definite worry of the *Romer* Court about the Colorado Amendment.<sup>170</sup> The Sixth Circuit also found that the Cincinnati Amendment was rationally related to legitimate government interests.<sup>171</sup>

The dissenting Justices in *Romer* agree that the Cincinnati Amendment is not affected by the *Romer* decision.<sup>172</sup> Therefore, it seems clear that the Cincinnati Amendment is far less intrusive than the Colorado Amendment, and the *Romer* decision should not be construed as preventing a city, or the residents of a city, from implementing an ordinance or charter amendment that restricts the city government from implementing anti-discrimination policies against homosexuals.<sup>173</sup> Finally, the Supreme Court has denied the plaintiffs' writ of certiorari for *Equality*.<sup>174</sup>

## V. CONCLUSION

A City Charter Amendment, passed by the residents of the City of Cincinnati in the exercise of their democratic rights, which prohibits the city from passing any ordinances or implementing any policies that prohibit discrimination against homosexuals, is rationally related to legitimate government purposes and does not infringe upon the right of any protected group.<sup>175</sup>

amendment did not disempower homosexuals from attaining special protection from all levels of state government, but merely removed municipally enacted special legislation).

<sup>168</sup> *Id.* at 298-99. *Romer* should not be construed to forbid local, municipal electorates from withholding special rights or privileges from homosexuals. *Id.*

<sup>169</sup> *Id.* at 296. The Cincinnati Charter Amendment, by merely preventing homosexual from obtaining special privileges and preferences, has a more restricted reach than the Colorado Amendment, which could be construed to exclude homosexuals from the protection of every Colorado State law. *Id.*

<sup>170</sup> *Romer v. Evans*, 517 U.S. 620, 630 (1996).

<sup>171</sup> *Equality III*, 128 F.3d at 293-94 (“[T]he Cincinnati Charter Amendment advanced a variety of valid community interests, including enhanced associational [sic] liberty for its citizenry, conservation of public resources, and augmentation of individual autonomy imbedded in personal conscience and morality. Thus, Article XII satisfied minimal constitutional requirements”).

<sup>172</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).

<sup>173</sup> *Equality III*, 128 F.3d 289 (6<sup>th</sup> Cir. 1997).

<sup>174</sup> 119 S. Ct. 365 (1998).

<sup>175</sup> *See infra* Part IV.



*Romer v. Evans* does not provide a rationale to invalidate such an amendment because the Cincinnati Charter Amendment affects only the lowest form of government, and, thus, it allows homosexuals to resort to county, state, and national levels of government for relief.<sup>176</sup> Therefore, the Amendment passes constitutional scrutiny and should stand.<sup>177</sup>

The citizens of Cincinnati, as well as those of other cities, should be allowed to practice grass-roots democracy through public referendums.<sup>178</sup> The People have the right to uphold the traditional mores that this nation was founded on without court interference.<sup>179</sup> As Alexander Hamilton proclaimed: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."<sup>180</sup> Federal courts should not unconstitutionally usurp the legislative functions of governments,<sup>181</sup> and popular democracy deserves a special deference from the courts in a democratic nation such as ours, if democracy itself is to survive.

**Robert F. Bodi**

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<sup>176</sup> *Id.*

<sup>177</sup> *Equality III*, 128 F.3d 289 (6<sup>th</sup> Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998); *see also supra* Part IV.

<sup>178</sup> *See Equality*, 518 U.S. at 1001 (Scalia dissenting) (supporting the concept of popular democracy restricting the exercise of special privileges and rights). *See also Romer*, 517 U.S. at 636 (dissent) (calling the Colorado voter's exercise of their democratic rights "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.").

<sup>179</sup> *See supra* note 178. *See also supra* notes 79, 156, 158 and 171.

<sup>180</sup> Hamilton, quoted from Federalist #78, found at <[http://www.the-federalist-society.org/Documents/Federalist Papers/federalist-78.htm](http://www.the-federalist-society.org/Documents/Federalist%20Papers/federalist-78.htm)> (visited Jan. 1999).

<sup>181</sup> *See, e.g., Jenkins v. Missouri*, 639 F. Supp. 19, 44-45 (W.D. Mo. 1986) (finding that "this Court has the necessary authority to order a tax increase to finance that portion of the desegregation plan"). *But see* U.S. CONST. Art. I §7. (giving sole authority to raise revenue to the United States Congress) *and see* U.S. CONST. amend. X (reserving to the States or the people those powers not granted to the Federal Government).