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Romer v. Evans: A Positive Portent of the Future

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Note

Romer v. Evans: A Positive Portent of the Future

I. INTRODUCTION

> The mission of COLORADO FOR FAMILY VALUES is to proactively lead and assist those opposing the militant homosexual attack on traditional values; to act as a resource equipping grassroots efforts through education and training of like-minded organizations and individuals across America dedicated to preserving the fundamental freedoms of speech, association, assembly, belief and conscience protected by Colorado's Amendment Two; to preserve the right to disagree with and resist, in a civil and compassionate manner, the forced affirmation of the homosexual lifestyle.[1]

So began the battle in Colorado to pass an amendment to the Colorado State Constitution—Amendment 2 (the "Amendment").[2] Ultimately passed on November 3, 1992, Amendment 2 revoked the existing prohibitions against discrimination based upon sexual orientation.[3] Amendment 2 also forbade the reinstatement of any law which granted specific legal protections to homosexuals.[4] Moreover, Amendment 2 barred homosexuals from redressing the law, short of another constitutional amendment.[5]

"Colorado for Family Values" ("CFV"), a conservative Christian organization in Colorado, initiated and promoted Amendment 2[6] in

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1. Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 847 n.48 (citing COLORADO FOR FAMILY VALUES, AMENDMENT 2 & BEYOND (1993)).

2. COLO. CONST. art. II, § 30b (West Supp. 1996) (historical notes) (held unconstitutional in *Romer v. Evans*, 116 S. Ct. 1620 (1996)).

3. Romer v. Evans, 116 S. Ct. 1620, 1623 (1996) [hereinafter *Romer III*].

4. *Id.* at 1625. The Court noted that Amendment 2 prohibited all municipalities, as well as the Colorado State legislature itself, from enacting any protections based on sexual orientation. *Id.* at 1627.

5. *Id.* The majority opinion stated, "[homosexuals] can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution." *Id.*

6. Dirk Johnson, *I Don't Hate Homosexuals*, N.Y. TIMES, Feb. 14, 1993, at 24. Colorado for Family Values ("CFV") started Amendment 2 as part of their organization's mission to combat homosexuality at every opportunity. *See, e.g.*, Grauerholz, *supra* note 1, at 846-47.

response to a few Colorado municipalities that enacted laws barring discrimination based on sexual orientation.[7] After launching an extensive campaign to combat what they termed the "militant homosexual attack on traditional values," [8] CFV ultimately succeeded in its mission.[9] The Colorado electorate passed Amendment 2,[10] which nullified the municipal anti-discrimination laws,[11] by a fifty-three percent to forty-seven percent margin.[12]

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7. ASPEN, COLO., MUN. CODE § 13-98 (1977); BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-11 (1987); DENVER, COLO. REV. MUN. CODE art. IV, §§ 28-91 to 28-116 (1991).

Aspen's ordinance prohibits discrimination in the areas of employment, housing and public accommodations based on race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation. ASPEN, COLO., MUN. CODE § 13-98.

The Boulder ordinance prohibits religious institutions from refusing to hire someone or restrict access to public accommodations or housing due to that person's race, creed, color, gender, sexual orientation, marital or family status, pregnancy, national origin, ancestry, age, or mental or physical disability. BOULDER, COLO., REV. CODE § 12-1-1 to 12-1-4. Section 12-1-1 defines "sexual orientation" as the "choice of sexual partners, i.e. bisexual, homosexual or heterosexual." *Id.* Furthermore, the Boulder ordinance does not permit the owner of an owner-occupied, one-family dwelling or duplex to deny housing to an individual based on his or her sexual orientation. *Id.*

The Denver ordinance enacts many of the same policies as the other municipalities except that the Denver version exempts religious institutions, thus allowing these institutions to refuse to hire people or restrict access to public accommodations based on an individual's sexual orientation. DENVER, COLO., REV. MUN. CODE art. IV § 28-92 (1991). The Denver ordinance also exempts owners with rental spaces in their homes or duplexes in which they reside. *Id.* This statute defines a person's sexual orientation as their "status . . . as to his or her sexuality, homosexuality or bisexuality." *Id.*

8. *See* Grauerholz, *supra* note 1, at 847.

9. Johnson, *supra* note 6, at 24. According to Johnson, Will Perkins, the founder and chairman of CFV, spent $374,000 to promote Amendment 2. *Id.*

10. On November 3, 1992, the citizens of Colorado voted to adopt Colorado Constitutional Amendment 2. Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) [hereinafter, this Note refers to the Colorado Supreme Court decision as *Evans I(b)* and the trial court decision, Evans v. Romer, No. 92-CV-7223, 1993 WL 19678 (D. Colo. Jan. 15, 1993), as *Evans I(a)*].

11. Colorado Constitutional Amendment 2 stated:

> No protected status based on homosexual, lesbian or bisexual orientation:
> Neither the State of Colorado, through any of its branches or departments, not 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.

COLO. CONST. art. II, § 30b (held unconstitutional in *Romer III*, 116 S. Ct. 1620, 1629 (1996)).

12. *Evans I(b)*, 854 P.2d at 1272.

Immediately after the Amendment's passage, the *Evans* plaintiffs[13] sought to enjoin Amendment 2[14] and persuade the Colorado courts to declare Amendment 2 unconstitutional.[15] In 1996, nearly four years after the passage of the Amendment, and countless legal battles later,[16] Amendment 2 landed before the United States Supreme Court.[17] Holding that Amendment 2 effectively withdrew specific legally protected constitutional rights from homosexual Colorado citizens,[18] the Supreme Court invalidated Amendment 2.[19] This Note will

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13. The plaintiffs included:

> Richard G. Evans (gay man who worked for the city and county of Denver); Angela Romero (lesbian employed as a police officer for the city and county of Denver); Linda Fowler (lesbian employed as a contract administrator by a private employer); Paul Brown (Colorado State employee and gay man); Jane Doe (assumed name by lesbian employed by Jefferson county); Martina Navratilova (lesbian pro tennis player who resides in Aspen); Bret Tanberg (a heterosexual discriminated against because he suffers from Human Immunodeficiency Virus ("HIV"), and Acquired Immune Deficiency Syndrome ("AIDS") based on the perception he is gay); Priscilla Inkpen (lesbian and an ordained minister); John Miller (a gay Spanish Professor at the University of Colorado); the Boulder School District RE-2; the city and county of Denver; the city of Boulder; the city of Aspen; and the city council of Aspen.

Evans I(a), 1993 WL 19678, at *1, *aff'd on other grounds*, *Evans I(b)*, 854 P.2d 1270 (Colo. 1993). *See* Grauerholz, *supra* note 1, at 845 n.31.

14. *See Evans I(a)*, 1993 WL 19678, at *12 (granting plaintiff's motion for preliminary injunction). The plaintiffs wanted to prevent the enforcement of Amendment 2, so on November 12, 1992, they filed a suit in the Denver district court to enjoin Amendment 2 as unconstitutional. *Evans I(b)*, 854 P.2d at 1272.

15. *Evans I(a)*, 1993 WL 19678, at *4-*5. The Colorado district court granted the preliminary injunction enjoining the defendants from declaring Amendment 2 in force, but noted that it "may not at this time rule on the constitutionality of Amendment 2." *Id.* at *7. The defendant appealed and the Colorado Supreme Court upheld the injunction, but altered the lower court's decision by deciding the case on other grounds. *Evans I(b)*, 854 P.2d at 1282. The Colorado Supreme Court noted that the Equal Protection Clause protects the fundamental right to participate equally in the political process. *Id.* The Colorado Supreme Court also stated that a reviewing court should apply the strict scrutiny standard to Amendment 2 because it expressly "fenc[ed] out" homosexuals, an independently identifiable group, by infringing on the fundamental right. *Id.* See *infra* Part II.B.2 for a discussion of the strict scrutiny standard of review.

The Colorado Supreme Court then remanded the case back to the Colorado District Court to determine if Amendment 2 served any compelling state interest. Evans v. Romer, No. 92-CV-7223, 1993 WL 518586, at *1 (D. Colo. Dec. 14, 1993) [hereinafter *Evans II(a)*]. After the trial court ruling, the case again made its way back to the Colorado Supreme Court. Evans v. Romer, 882 P.2d 1335 (Colo. 1994) [hereinafter *Evans II(b)*]. In each decision, the courts found that the state failed to prove that it supported the Amendment with a narrowly tailored, compelling state interest. *Id.* at 1350.

16. See *infra* Part III for a discussion of the judicial history of the *Evans* cases.

17. *Romer III*, 116 S. Ct. 1620 (1996).

18. *Id.* at 1629.

19. *Id.*

examine the legal and factual issues that led up to *Romer v. Evans* and will critically analyze the decision.

First, this Note discusses historical legislation against traditionally scorned activities,[20] and it then examines the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[21] Specifically, the Note next addresses the standards of review commonly employed by the Court to determine the constitutionality of legislation like Colorado's Amendment 2.[22] This Note also explores the Fourteenth Amendment in relation to homosexuality[23] and highlights cases relating specifically to the Fourteenth Amendment and homosexual rights.[24] Next, this Note discusses the facts[25] of *Romer v. Evans*[26] and reviews the case's subsequent legal history.[27] This Note then critically analyzes the decision, arguing that the majority opinion, despite weaknesses in the rationale, was correct in principle.[28] Furthermore, this Note attacks the dissent by illustrating the weaknesses in that opinion.[29] Finally, this Note suggests that by providing pro-homosexual rights advocates with a favorable decision, the Supreme Court's holding in *Romer v. Evans* will help future pro-homosexual rights advocates advance their cause.[30]

II. BACKGROUND

A. The Constitutionality of Laws Prohibiting Traditionally Scorned Activities

Since the late 1800s, the United States Supreme Court has examined and upheld the constitutionality of laws that placed an outright ban on "social[ly] harm[ful]" activities[31] such as polygamy. In recent years, however, the Court has overruled many of these holdings by removing a variety of (but not all) punitive actions associated with the socially

20. *See infra* Part II.A.
21. *See infra* Part II.B.
22. *See infra* Part II.B.1-3.
23. *See infra* Part II.C.
24. *See infra* Part II.C.
25. *See infra* Part III.B.-D.
26. *Romer III*, 116 S. Ct. 1620 (1996).
27. *See infra* Part III.C.
28. *See infra* Part IV.
29. *See infra* Part IV.C.
30. *See infra* Part V.
31. *Romer III*, 116 S. Ct. at 1636 (Scalia, J., dissenting).

harmful behavior.[32] Today, the Court will most likely refuse to disenfranchise people merely because of their status.[33]

In the 1800s, the Court began its attack on socially harmful behavior by targeting polygamy.[34] In *Davis v. Beason*, a local government indicted a plaintiff for lying during his oath to become a registered elector.[35] Under oath, the plaintiff swore that he did not practice or advise in favor of polygamy.[36] In actuality, the plaintiff practiced Mormonism, a religion which taught, advised, counseled, and encouraged its members to commit bigamy and polygamy.[37]

In delivering the majority opinion, the Court decried the horrors of polygamy.[38] The majority suggested that polygamy destroyed society's fabric and that such a deleterious activity deserved punishment as much as any other crime.[39] The Supreme Court refused

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32. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). The First and Fourteenth Amendments do not permit a state to pass laws criminalizing "advocacy" of violence. *Id.* at 449. Rather, only conduct that "incite[s] . . . imminent lawless action" can be condemned. *Id.*

33. *Romer III*, 116 S. Ct. at 1628 (citing Dunn v. Blumstein, 405 U.S. 330, 337 (1972)).

34. Davis v. Beason, 133 U.S. 333, (1890), *rev'd in part*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

35. *Id.* The oath read in pertinent part:

> I do swear (or affirm) that I . . . am not a bigamist or polygamist; that I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association or which practises bigamy, polygamy or plural celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise. . . .

Id.

36. *Id.*

37. *Id.* at 334-35.

38. *Id.* at 341.

39. *Id.* at 342. Justice Field deplored the evocation of religion to classify polygamy. *Id.* The Justice noted that the Framers did not intend to create the freedom to worship right to allow heinous and horrible crimes like polygamy. *Id.* Furthermore, the Justice contended that limits exist as to religious freedom and action in the name of religion. *Id.* at 343. Specifically, the Justice stated, "[T]he [free] exercise of religion . . . must be subordinate to the criminal laws of the country." *Id.* at 342-43. Justice Field cited Justice Matthews in another case, noting:

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization; the best

to classify polygamy as an act of religious freedom[40] and, instead, fortified the position that polygamy constituted a crime.[41] Further, the Court held the anti-polygamy laws valid because they did not discriminate against Mormons or any group in particular, but merely discriminated against the act of polygamy and its advocation.[42] As a result, the Supreme Court declared the Idaho law prohibiting polygamy in perfect congruence with the laws of the Constitution.[43]

Today, *Davis* is largely viewed as outdated law,[44] even though the Supreme Court still relies on *Davis* to some extent.[45] Specifically, a government may no longer deny the right to vote or punish people who merely advocate distasteful behavior.[46] For example, the Court in

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> guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Id. at 344-45 (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1880) (Matthews, J.)).

40. Justice Field noted, "[t]o permit [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Id.*

41. *Id.* at 343.

42. *Id.* at 344. The opinion stated, "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.*

43. *Id.* at 346. The Supreme Court stated that Idaho possessed the power to prescribe any reasonable qualifications of voters and for holding office, not inconsistent with the limitations set forth in the following paragraph, summarized by the Court from sections 1851 and 1859 of the *Idaho Revised Statutes*:

> First, that the right of suffrage and of holding office shall be exercised only by citizens of the United States and above the age of 21 or persons above that age who have declared their intention to become such citizens; second, that the elective franchise or the right of holding office shall not be denied to any citizen on account of race, color, or previous condition of servitude; third, that no soldier or sailor or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote unless he has made his permanent domicile in the territory for six months; and fourth, that no person belonging to the army or navy shall be elected to or hold a civil office or appointment in the territory.

Davis, 133 U.S. at 346 (quoting IDAHO REV. STAT. §§ 1851, 1859).

44. *See Romer III*, 116 S. Ct. at 1628 (commenting that "[t]o the extent that *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law"). Justice Scalia briefly mentioned *Davis* when he wrote, "[t]o the extent, if any, that this opinion permits the imposition of adverse consequences upon mere abstract advocacy of polygamy, it has of course been overruled by later cases." *Id.* at 1635 (Scalia, J., dissenting) (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

45. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 535 (1993) (citing *Davis v. Beason*, 133 U.S. 333 (1890), and noting that the negative effect of legislation on a particular group does not automatically invalidate the legislation nor imply that the legislature impermissibly targeted the specific group).

46. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

Brandenburg v. Ohio[47] struck down a law which punished a Ku Klux Klan leader for syndicalism.[48] Reporters had tape recorded the defendant and others making hate speeches and threatening violence if the "President, our Congress, [and] our Supreme Court continue[d] to suppress the white, Caucasian race."[49] The defendant challenged the constitutionality of the syndicalism statute under the First and Fourteenth Amendments to the United States Constitution.[50]

Declining to follow prior United States Supreme Court cases that upheld the constitutionality of syndicalism laws,[51] the *Brandenburg* Court invalidated the syndicalism statute.[52] According to the Court, the statute purported to punish mere advocacy and forbade, through criminal penalty, the assembly of people with common views.[53] Significantly, the Court refused to uphold laws which penalized people who followed and preached certain socially distasteful practices.[54]

Yet, despite its holding in *Brandenburg*, the Court again revisited the topic of socially distasteful sexual behavior in 1986.[55] This time the Court targeted sodomy.[56] In *Bowers v. Hardwick*,[57] the United States Supreme Court examined a Georgia law which criminalized sodomy and other types of intercourse, regardless of sexual

47. 395 U.S. 444 (1969).

48. *Id.* at 444-45. The actual charge under the Ohio statute, included, "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform . . . [for] voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* (citing OHIO REV. CODE ANN. § 2923.13 (1969)). In other words, the statute punished people who freely assembled and discussed violent actions, even in a peaceful manner. *Id.* at 449.

49. *Id.* at 446.

50. *Id.* at 445.

51. *See generally* Whitney v. California, 274 U.S. 357 (1927) (upholding the constitutionality of California's Criminal Syndicalism Act), *overruled in part by Brandenburg*, 395 U.S. 444; Fiske v. Kansas, 274 U.S. 380 (1927) (holding that advocating violent means to effect changes posed political and economic danger to the state).

52. *Brandenburg*, 395 U.S. at 449. The *Brandenburg* Court cited *Dennis v. United States*, 341 U.S. 494, 507 (1951), as a case which specifically discredited *Whitney*. *Id.* at 447. The Supreme Court commented that, "[t]hese later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy and the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 449.

53. *Brandenburg*, 395 U.S. at 449. The Court ruled that this type of statute "falls within the condemnation of the First and Fourteenth Amendments." *Id.*

54. *Id.*

55. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

56. *Id.* at 188.

57. 478 U.S. 186 (1986).

orientation.[58] In *Bowers*, the police charged a man with violating the anti-sodomy statute after they entered his home and found him engaged in the prohibited act with another man.[59] Admitting that he practiced homosexuality, the defendant argued that the sodomy statute violated his constitutional right to privacy.[60] The Supreme Court, however, held that the Constitution never recognized a fundamental right to engage in homosexual sex[61] and refused to invalidate the anti-sodomy laws.[62] Noting that many states had criminalized sodomy as early as the inception of the Bill of Rights,[63] the Supreme Court concluded that anti-sodomy legislation possessed a long, legitimate history which it declined to overturn.[64]

Thus, after nearly 100 years of attempted legislation, the Court still refused to unequivocally delineate the boundaries of regulation against traditionally scorned activities.[65] Because of the Court's historical

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58. *Id.* at 188 (citing GA. CODE ANN. § 16-6-2 (1984)). Georgia's statute provides in part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .

GA. CODE ANN. § 16-6-2 (1984).

59. *Id.*

60. *Id.*

61. *Id.* at 192-96. First, the Supreme Court disputed the defendant's contention that the Court's prior cases imbued homosexuals with a privacy protection under the Constitution. *Id.* at 190. The Court then refused to announce that the Constitution guaranteed homosexuals a fundamental right to engage in sodomy. *Id.* at 191. The Court reasoned that fundamental liberties only include liberties "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Id.* at 191-92 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

62. *Id.* at 196. The defendants asserted that the only support for the laws came solely from the majority's prejudice against homosexual sodomy. *Id.* The Petitioner suggested that this reasoning fails to substantiate such an unjust law. *Id.* The majority disagreed, noting that the Petitioner's argument failed to persuade the court to invalidate the Georgia law or any of the other 25 states' laws on such a basis. *Id.* at 192-96.

63. *Id.* at 192-94 nn.5 & 6 (listing the states with anti-sodomy laws since the inception of the Bill of Rights).

64. *Id.* at 196. Justice Blackmun's dissent, however, disputed the majority's logic. *Id.* at 199 (Blackmun, J., dissenting). The dissent argued that the Supreme Court should discuss the issue in light of the Constitutional right to privacy and noted that the law applied not only to homosexuals, but heterosexuals as well. *Id.* at 200 (Blackmun, J., dissenting). Blackmun argued that the states should not delve into fundamental, guaranteed constitutional rights and that this law violated the United States Supreme Court's decisions upholding the constitutionally guaranteed right to privacy. *Id.* at 207-14 (Blackmun, J., dissenting).

65. *See, e.g., supra* notes 34-43, 47-64 and accompanying text.

refusal to strike down any law dealing with traditionally scorned sexual practices, legislation against homosexuality continued.[66] Eventually homosexual plaintiffs sought to invoke the Equal Protection Clause to protect themselves against this discriminatory legislation.[67]

B. The Fourteenth Amendment Standards of Review

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution states, in pertinent part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[68] When initially passed, the Equal Protection Clause was thought to apply primarily to racial discrimination.[69] However, under the United States Supreme Court's guidance, the Equal Protection Clause evolved into a triumphant defender of traditionally stigmatized groups and fundamental liberties.[70] Currently, commentators refer to the Equal Protection Clause as "the single most important concept in the Constitution for the protection of individual rights."[71]

Because the Equal Protection Clause seeks to prevent certain types of class-based discrimination, the actual class designation plays an important role in any equal protection analysis.[72] The Supreme Court

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66. See *infra* Part II.C for a discussion of post-*Bowers* legislation.

67. See *infra* Part II.C for a discussion of post-*Bowers* legislation.

68. U.S. CONST. amend. XIV, § 1.

69. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). *See also* Richard F. Duncan & Gary L. Young, *Homosexual Rights & Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 101 (1995) (citing *Slaughter-House Cases* to illustrate the Court's historical view of the Equal Protection Clause).

70. *See* GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW PART II 70 (4th ed. 1986) (illustrating the evolution of the Fourteenth Amendment).

71. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989). According to the Supreme Court, the Equal Protection Clause protects suspect classes like racial minorities, resident aliens, and ethnic minorities from arbitrary and capricious legislation. Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938 (1991). *See also* Graham v. Richardson, 403 U.S. 365, 372 (1971) (holding that resident aliens constitute a suspect class); Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that race constitutes a suspect class); Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that the Equal Protection Clause shields people from discrimination based solely on ethnic origins or national ancestry). Other characteristics, such as gender and illegitimacy of birth, also receive a high level of protection from discrimination under the Fourteenth Amendment. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (holding that a law which discriminates based on gender must substantially relate to a sufficiently important governmental interest); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (ruling that illegitimacy cases require heightened protection under the Equal Protection Clause).

72. Daniel J. Garfield, Comment, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 705-06 (1995).

has set forth several standards of review, each dependent upon the class designation in the challenged legislation: (1) the rational basis test; (2) strict scrutiny; and (3) intermediate scrutiny.[73] The Court additionally maintains that the Equal Protection Clause staunchly guards fundamental rights[74] from legislation that attempts to override these guarantees.[75]

1. Rational Basis Review

Generally, where a piece of legislation negatively impacts a particular group with distinguished characteristics, a court seeks only to verify that the law bears a rational relationship to a compelling governmental purpose.[76] So long as the legislation is relevant and closely related to a state's valid interest,[77] the legislation's challenger has the burden of discrediting all rational justifications for the law.[78] For these reasons, the rational basis standard constitutes the least restrictive standard courts use when examining a law's constitutionality under the Equal Protection Clause.[79]

This minimal standard of review grants the states the latitude necessary to establish classifications[80] to meet a perceived problem, accommodate competing concerns regarding the problem, and deal with any practical limitations.[81] The courts allow much deference because they presume that "improvident [classifications] will eventually be rectified by the democratic process."[82] However, some

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The Court applies three different tiers of scrutiny based on the various classifications. *Id.* at 705. The degree of scrutiny varies among the different classes. *Id.* at 706.

73. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439-41 (1985).

74. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7, at 388 (4th ed. 1991) (defining fundamental rights as "having a value so essential to individual liberty in our society" that the Constitution guarantees them under the Fourteenth Amendment's Equal Protection Clause).

75. *See* Williams v. Rhodes, 393 U.S. 23, 31 (1968) (holding that the Court must apply strict scrutiny when a state's law violates the Equal Protection Clause by interfering with the fundamental right).

76. *See* Plyler v. Doe, 457 U.S. 202, 217 (1982).

77. *See Cleburne*, 473 U.S. at 441-42.

78. *See* Heller v. Doe, 509 U.S. 312, 319-21 (1993).

79. *See Plyler*, 457 U.S. at 216. Historically, courts apply this minimal standard to gay rights cases. See *infra* Part II.C.1 for a discussion of homosexual rights and the Fourteenth Amendment of the United States Constitution.

80. *See Plyler*, 457 U.S. at 216. The *Plyler* Court noted that differences exist between people, and sometimes, to combat a specific problem, a government may classify the various groups by these distinguishing traits. *Id.*

81. *Id.* (stating that since a legislature may face a nebulous problem, the Court requires only "[t]he assurance that the classification at issue bears some fair relationship to a legitimate public purpose").

82. *See* Ben-Shalom v. Marsh, 881 F.2d 454, 463 (7th Cir. 1989) (quoting *Cleburne*,

legislation might exceed these perimeters and impinge upon citizens' exercise of their fundamental rights,[83] or disadvantage an entire "suspect" class.[84] In these cases, the state must meet a higher standard to prove that the legislation reflects a precisely tailored state interest.[85]

2. Strict Scrutiny Standard of Review

Courts apply a strict standard of review when a state enacts legislation that tends to abuse "elemental constitutional premises."[86] Specifically, the legislation may not infringe upon a fundamental right[87] or disadvantage a "suspect class."[88] The United States Supreme Court defined fundamental rights as those rights "implicit in the concept of ordered liberty"[89] or "deeply rooted in this Nation's history and tradition."[90] For example, fundamental rights include (among others) access to the judicial system,[91] the right to vote,[92] the right to have one's vote counted equally,[93] the right to free speech,[94] and the right to interstate migration.[95]

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473 U.S. at 440).

83. See *infra* notes 89-95 and accompanying text for a discussion of fundamental rights.

84. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971). *See also* Schweiker v. Wilson, 450 U.S. 221, 230 (1981) ("Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights . . . this Court properly exercises only a limited review power over Congress . . . ."). See *infra* notes 96-100 and accompanying text for a definition of a suspect class.

85. *See Plyler*, 457 U.S. at 217.

86. *Id.* at 216. The *Plyler* Court did not directly define "elemental constitutional premises," but noted that examples include: the right to receive equal justice under the law, regardless of race, and the right to cast a vote equal to every other citizen. *Id.* at nn.14-15. *See generally Cleburne*, 473 U.S. at 439-41.

87. See *infra* notes 89-95 and accompanying text for a discussion of fundamental rights.

88. *See Plyler*, 457 U.S. at 217. See also *infra* notes 96-100 and accompanying text for the definition of "suspect class."

89. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled in part by* Benton v. Maryland, 395 U.S. 784 (1969).

90. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

91. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963) (holding that an indigent convict has the right to counsel on appeal).

92. *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (holding that a law which deprives a citizen of the right to vote must pass the strict scrutiny standard of review).

93. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (ruling that the government must count every vote equally).

94. *See* San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 35 (1973) (finding that public education is not a fundamental right guaranteed by the Constitution, unlike the right to free speech which does constitute a fundamental right, and therefore deserves the protection of the strict scrutiny review under the Equal Protection Clause).

95. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

A court considers classes "suspect" or "quasi-suspect" when the court decides that the group exhibits the following characteristics: (1) a history of discrimination; (2) an obvious, immutable or distinguishing characteristic that defines it as a discrete group; and, (3) a lack of political power.[96] Courts have historically designated suspect classifications based on race,[97] alienage,[98] and national ancestry or ethnic origin.[99] Under the strict scrutiny test, a court must reject a law if the legislature failed to narrowly tailor the law to support a compelling state interest with the least restrictive means possible.[100]

3. Intermediate Scrutiny

Under the intermediate standard of scrutiny, courts examine whether the classification in question provides equal protection of law for all citizens, while also maintaining a substantial relation to an important governmental interest.[101] Generally, courts apply this intermediate standard to legislation that offends a "quasi-suspect"[102] class or infringes on an important, but not fundamental, right.[103]

The Supreme Court has never established exact factors to determine a quasi-suspect status.[104] Rather, the Court has relied on various

96. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (noting that homosexuals possess a history of discrimination, but fail to meet either of the other two characteristics).

97. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that race constitutes a suspect class).

98. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (ruling that states could not deny welfare benefits to aliens).

99. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that a law that segregated a whole group, Japanese-American citizens, survived strict scrutiny and was constitutional, but also noting that national ancestry constituted a suspect class).

100. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Plyler v. Doe, 457 U.S. 202, 217 (1982); Graham v. Richardson, 403 U.S. 365 (1971); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

101. *Plyler*, 457 U.S. at 217. The *Plyler* Court stated, "in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Id.* at 217-18.

102. *See generally* Craig v. Boren, 429 U.S. 190 (1976) (Powell, J., concurring) (defining quasi-suspect class as a class that does not receive the same protection as a suspect class or a fundamental right, but nevertheless, receives heightened scrutiny).

103. Courts determined that they must protect certain rights even though those rights fail to constitute fundamental rights. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33, at 1612 & n.15 (2d ed. 1988). *See, e.g.*, *Cleburne*, 473 U.S. 432 (shelter); *Plyler*, 457 U.S. 202 (education); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (medical services); United States Dept. of Agric. v. Murray, 413 U.S. 508 (1973) (food); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits).

104. *See* TRIBE, *supra* note 103, §§ 16-33, at 1614.

factors, such as: (1) a group's lack of political clout;[105] (2) the immutability of certain personal traits of each member within the group;[106] (3) whether the group constitutes a "discrete and insular minority;"[107] and (4) whether the classification stereotypes or stigmatizes the group.[108]

Courts usually employ intermediate scrutiny to review legislation that demonstrates a bias against gender[109] or illegitimately born children.[110] Although courts realize that some groups require more stringent protection than that afforded by intermediate scrutiny,[111] the Supreme Court and the federal circuit courts remain reluctant to expand the suspect or quasi-suspect class status.[112]

C. *Equal Protection, Fundamental Rights, and Homosexuality*

1. Homosexuality and Equal Protection of the Law

As with all equal protection challenges, those challenges predicated upon homosexuality focus on the target class.[113] Prior to *Romer v. Evans*, courts consistently held that homosexuals did not constitute a suspect class.[114] Likewise, courts refused to establish homosexuality

105. *Cleburne*, 473 U.S. at 443.

106. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 176 (1972) (noting that legislation which discriminates based on one's "status of birth" deserves heightened scrutiny review).

107. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (holding that a group's status as a "discrete and insular minority" implies quasi-suspect status).

108. Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (finding that a classification which serves to stigmatize and stereotype grants the identifiable class quasi-suspect status).

109. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (holding that intermediate review requires a showing that the law in question substantially relates to a sufficiently important governmental interest).

110. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978).

111. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-42 (1985); Plyler v. Doe, 457 U.S. 202, 218-20 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976).

112. *See, e.g.*, Equality Found. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2519 (1996); *Cleburne*, 473 U.S. at 440-42; Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1015-16 (1985) (Brennan, J., dissenting from denial of certiorari); *Plyler*, 457 U.S. at 218-20; High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 463 (7th Cir. 1989).

113. *See generally Hogan*, 458 U.S. at 724 (finding gender classifications constitute an equal protection challenge); Loving v. Virginia, 388 U.S. 1, 11 (1967) (equal protection challenge based on race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (person may bring an equal protection challenge based upon national ancestry classifications).

114. *See, e.g.*, *Ben-Shalom*, 881 F.2d at 464 (denying homosexuals suspect class

as a fundamental right.[115] Thus, courts historically applied the rational basis test to homosexuals' equal protection challenges.[116] Under this most deferential standard, the courts refused to override any legislation that targeted homosexuals.[117]

A court first applied the rational basis test to a homosexual's equal protection claim in *Beller v. Middendorf*.[118] In *Beller*, the Ninth Circuit Court of Appeals held that the military's regulatory goals outweighed the rights of homosexuals to engage in consensual, private homosexual conduct.[119] In *Beller*, the Navy informed the homosexual plaintiff that it intended to grant him security clearance and access to secret information.[120] Upon learning of the plaintiff's sexual orientation, however, the Navy, instead of offering the plaintiff a promotion, sought his honorable discharge.[121] The court reasoned that it must respect the Navy's laws and policies since the military constitutes a specialized society.[122] The court also determined that the Navy possessed several important interests that eclipsed the rights of homosexual plaintiffs.[123] Thus, the appellate court upheld the Naval policy,[124] although it did recognize that in certain instances, some forms of governmental regulation of private, consensual homosexual behavior may face a "substantial constitutional challenge."[125]

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status). *See also* Tracey 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, 896 (1996) (noting that every circuit court that addressed the issue of whether the court should grant homosexuals suspect or quasi-suspect status decided against doing so).

115. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (no fundamental right to engage in homosexual acts).

116. *See, e.g.*, *Ben-Shalom*, 881 F.2d at 464 (denying homosexuals suspect class status and applying rational basis test).

117. *See* Kenton, *supra* note 114, at 896. *See infra* text accompanying notes 118-44 (discussing the deferential rational relation standard and homosexual rights litigation).

118. 632 F.2d 788 (9th Cir. 1980).

119. *Id.* at 810.

120. *Id.* at 794.

121. *Id.* at 795.

122. *Id.* at 810.

123. The appellate court cited a few examples of legitimate interests that the Navy must protect to the detriment of homosexuals' privacy rights. *Id.* at 811-12. Legitimate Naval interests included: the Navy's desire to protect the fabric of military life; the Navy's desire to preserve the integrity of the recruiting process; its desire to maintain discipline; and the Navy's goal of insuring the acceptance into different cultures of the men and women in the Naval service around the world. *Id.* at 811.

124. *Id.* at 812.

125. *Id.* at 810.

Following *Beller*, the courts continued to allow government bureaucracies outside the military to legislate against homosexuals.[126] In *Padula v. Webster*,[127] the court applied the rational basis test to uphold the Federal Bureau of Investigation's ("FBI") decision not to employ a homosexual female.[128] The plaintiff urged the court to apply a strict scrutiny standard and grant homosexuals the status of a suspect or quasi-suspect class.[129] The court noted that preceding case law foreclosed the *Padula* plaintiff's argument[130] but added that "[this] does not mean . . . that any kind of negative state action against homosexuals would be constitutionally authorized."[131] Further, the court explained that a law discriminating against homosexuals must

126. *See* Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987). *See generally* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990). In *High Tech Gays*, the plaintiffs challenged the Department of Defense's ("DOD") policy of refusing to grant security clearance to known or suspected gay applicants under the First and Fifth Amendments. *Id.* at 565. The Court of Appeals for the Ninth Circuit, citing *Bowers* rejected the district court's finding that the sexual orientation classifications warranted "quasi-suspect" status under the Equal Protection Clause. *Id.* at 573-74. The appellate court noted that a suspect class: (1) suffered a history of discrimination; (2) exhibits obvious, immutable or distinguishing characteristics that define them as a distinct group; and (3) shows that they constitute a minority which lacks political power or shows that the statutory classification at issue burdened a fundamental right. *Id.* at 573. The appellate court found that homosexuality failed to constitute an immutable characteristic even though the court admitted homosexuals had suffered a history of discrimination. *Id.*

But see Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009 (1985). In *Rowland*, a school fired a teacher shortly after learning about her bisexuality. *Id.* at 1010 (Brennan, J., dissenting). The Supreme Court denied the writ of certiorari. *Id.* at 1009 (Brennan, J., dissenting). However, Justice Brennan, in his dissenting opinion, suggested that homosexuals deserve suspect or quasi-suspect class status. *Id.* at 1014 (Brennan, J., dissenting). The Justice found that homosexuals lose political power once society identifies them publicly and, therefore, since homosexuals lose power simply based on their status as members of the particular group, the Court should grant homosexuals suspect or quasi-suspect class status. *Id.* (Brennan, J., dissenting).

127. 822 F.2d 97 (D.C. Cir. 1987).

128. *Id.* at 98.

129. *Id.* at 102.

130. *Id.* at 103. Specifically, the Ninth Circuit Court of Appeals referred to *Bowers v. Hardwick*, 478 U.S. 186 (1986), in support of its position. *Padula*, 822 F.2d at 103. The court claimed that

> [i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Id. See *supra* text accompanying notes 55-64 for a discussion of *Bowers*.

131. *Padula*, 822 F.2d at 103-04.

still pass a rational basis test and identify a legitimate government purpose.[132] Ultimately, the court upheld the law and concluded that, because the FBI possessed a legitimate interest to secure information, it did not violate the plaintiff's constitutional rights.[133]

The Sixth Circuit Court of Appeals also applied the rational basis test when it examined whether a publicly enacted law which targeted homosexuals violated the Constitution.[134] In *Equality Foundation v. City of Cincinnati*,[135] a city council passed several ordinances to prevent discriminatory hiring practices against homosexuals, as well as other groups.[136] In opposition, the voters ratified an amendment which prevented the city council from granting special protections based on sexual orientation.[137] The Sixth Circuit Court of Appeals reversed the district court and upheld the constitutionality of the

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132. *Id.* at 104.

133. *Id.*

134. *See, e.g.*, Equality Found. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2519 (1996).

135. 116 S. Ct. 2519 (1996) (cert. granted, judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Romer III*).

136. *Equality Found.*, 54 F.3d at 263. The city council enacted two ordinances. *Id.* Ordinance No. 79-1991, commonly known as the "Equal Employment Opportunity Ordinance," states that the city of Cincinnati could not discriminate in hiring on the basis of "classification factors such as race, color, sex, handicap, religion, national or ethnic origin, age, *sexual orientation*, HIV status, Appalachian regional ancestry, and marital status." *Id.* (emphasis added). The council then adopted Ordinance No. 490-1992, commonly known as the "Human Rights Ordinance." *Id.* The "Human Rights Ordinance" prohibits "[u]nlawful discriminatory practices in the city of Cincinnati based on race, gender, age, color, religion, disability status, *sexual orientation*, marital status, or ethnic, national or Appalachian regional origin, in *employment, housing, public accommodations* . . . ." *Id.* (emphasis added).

137. *Id.* at 264. A group of Cincinnati citizens calling themselves "Equal Rights Not Special Rights" ("ERNSR") sponsored Issue 3 as an amendment to the city constitution. *Id.* Issue 3 ultimately appeared on the ballot as:

> 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. The electorate voted on Issue 3 and passed it by a margin of 62% to 38%. *Id.*

Amendment.[138] The court noted that no law can be so narrowly drawn to protect groups which are defined by subjective, innate characteristics such as desires, sexual drives, and thoughts.[139] Because homosexual characteristics defy ordinary classifications, the court concluded that homosexuals do not deserve suspect class status protection.[140] Accordingly, the appellate court applied the rational basis test to the Amendment.[141] The court held the Amendment rationally related to a number of legitimate state interests:[142] the freedom from a mandate forcing people to associate with homosexuals; government neutrality on the issue of respecting homosexuals; and increased freedom to maintain one's own personal beliefs regarding

138. *Id.* at 271. At the district court level, the court held:

> [W]e conclude that there is a strong likelihood that under the . . . [a]mendment, all citizens, with the express exception of [homosexuals], have the right to appeal directly to the members of city council for legislation, while only [homosexuals] must proceed via the exceptionally arduous and costly route of amending the city charter before they may obtain any legislation bearing on their sexual orientation.

Equality Found. v. City of Cincinnati, 838 F. Supp. 1235, 1241 (S.D. Ohio 1993).

139. *Equality Found.*, 54 F.3d at 267.

140. *Id. But see* Equality Found. v. City of Cincinnati, 860 F. Supp. 417, 436-38 (S.D. Ohio 1994), *aff'd in part, vacated in part*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2519 (1996). The district court found that homo-, hetero-, and bisexual orientations constitute a characteristic beyond an individual's control. *Id.* at 437. According to the district court, to determine whether homosexual individuals constitute a suspect or quasi-suspect class, a court must consider the following factors: (1) whether the person's sexual orientation affects their ability to perform; (2) whether the members of a group possess any control over their orientation; (3) whether sexual orientation constitutes an immutable characteristic; (4) whether the people discriminated against that group based on their sexual orientation; and (5) whether the class lacks political power. *Id.* at 436. In its discussion of these factors, the court found, through "credible and unrebutted" testimony at trial, that sexual orientation develops in people around ages 3-5 and simply matures through adulthood. *Id.* The court also distinguished between sexual orientation and sexual conduct. *Id.* To make the distinction, the court referred to trial testimony from Dr. Gonsiorek, and stated, "[s]exual orientation '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 conduct." *Id.* at 437 (quoting Dr. Gonsiorek). Subsequently, the district court found that sexual orientation consists of "characteristics, not only beyond the control of the individual, but also ones existing independently of any conduct that the individual, hetero-, homo- or bisexual, may choose to engage in." *Id.* The court added that the evidence presented revealed that people cannot change their sexual orientation. *Id.* at 438. The court concluded that homosexuals constituted a quasi-suspect class based on the factors. *Id.* at 440.

141. *See Equality Found.*, 54 F.3d at 270.

142. *Id.*

other's actions.[143] Therefore, the court upheld the amendment's constitutionality.[144]

2. A Fundamental Right to Participate Equally in the Political Process

The right to vote constitutes a core principle of the United States democratic system.[145] The United States Supreme Court has rejected various legislative attempts to unbalance the equality that all voters maintain.[146] Although the Court has never expressly announced such a right,[147] a series of cases appear to demonstrate that the Equal Protection Clause guarantees a fundamental right to participate equally in the political process.[148] At the very least, the Supreme Court has demonstrated that the Equal Protection Clause does not permit legislation to affect unreasonable biases upon a specific voting block or to unjustly disempower that group's vote.[149]

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143. *Id.* at 270-71.

144. *Id.* at 271. The defendants, after losing in the appellate court, petitioned the Supreme Court to grant certiorari. *Id.* The Court granted certiorari, and vacated the judgment and remanded the case to the Sixth Circuit for further consideration in light of its *Romer III* ruling. Equality Found. v. City of Cincinnati, 116 S. Ct. 2519 (1996). Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas joined, dissented from the majority's holding. *Id.* (Scalia, J., dissenting). In the dissent, Justice Scalia rejected the majority's decision to remand the case because he contended that *Romer III* and *Equality Foundation* dealt with distinctly different issues which the Court could not so easily reconcile. *Id.* (Scalia, J. dissenting). The Justice asserted that *Romer III* entitled cities to pursue special protections for homosexuals without having to persuade the legislature to amend the state constitution, while *Equality Foundation.* considered a city charter amendment which prohibits granting homosexuals special protections. *Id.* (Scalia, J. dissenting). Further, the opinion hypothesized that if the Court held the *Equality Foundation* amendment unconstitutional, it would effectively bar all citizens from ever democratically voting to deny homosexuals special protections. *Id.* (Scalia, J. dissenting). The dissent found this proposition absurd and claimed that *Romer III* never addressed this issue and certainly did not support it. *Id.* (Scalia, J., dissenting). Thus, the dissent argued that the Court should either deny certiorari altogether or set the case for argument to determine the "ultra-Romer" issue *Equality Foundation* presented. *Id.* (Scalia, J., dissenting).

145. *See Evans I(b)*, 854 P.2d 1270, 1276 (Colo. 1993) (citing Note, *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1114 (1975) ("'no institution is more central to the United States' system of representative democracy than the election'").

146. *See* Hunter v. Erickson, 393 U.S. 385 (1969); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); and Reynolds v. Sims, 377 U.S. 533 (1964).

147. *See, e.g., Evans I(b)*, 854 P.2d at 1294 (Erickson, J., dissenting). According to the Colorado Supreme Court dissent, the United States Supreme Court identified the fundamental right that everyone's vote counts equally, but never explicitly established a fundamental right to participate equally. *Id.*

148. *See Evans I(b)*, 854 P.2d at 1276.

149. *See infra* text accompanying notes 150-76 (discussing the Supreme Court's use

For example, the Supreme Court used the Equal Protection Clause to invalidate legislation that disempowered a specific segment of voters based on property ownership.[150] In *Kramer v. Union Free School District No. 15.*,[151] non-property owners challenged a statute which afforded the right to vote in school board elections only to owners or lessees of taxable realty or parents or guardians of public school children.[152] The *Kramer* Court held that the legislation unfairly restricted a fundamental right—the right to effectively participate in governmental affairs.[153] Thus, the United States Supreme Court applied strict scrutiny to the legislation since the Act impaired the non-owners' and non-lessees' ability to effectively participate in school board elections.[154] The *Kramer* Court concluded that, under this statute, many people lost the power to control government affairs which substantially affected their lives.[155]

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of the Equal Protection Clause to prevent unreasonable biases against minority groups' voting power).

150. *See, e.g.*, *Kramer*, 395 U.S. at 621.

151. 395 U.S. 621 (1969). *See also* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding that any state violates the Fourteenth Amendment when it requires prospective voters to pay a fee to vote or attempts to impose a poll tax of any sort); Dunn v. Blumstein, 405 U.S. 330 (1972) (examining Tennessee's durational residence requirement act). In *Dunn*, the Court applied the strict scrutiny standard to the Tennessee law since the Supreme Court stated that the Tennessee law deprived persons of a "fundamental political right"—the right to vote. *Id.* at 335-36 (citing *Reynolds*, 377 U.S. at 562). The Court noted that Tennessee's argument for "ballot box purity" and "knowledgeable voters" failed to constitute compelling state interests. *Id.* at 345, 354, 358-59. Thus, the Court rejected the legislation on Equal Protection grounds. *Id.* at 360.

152. *Kramer*, 395 U.S. at 622-23.

153. *Id.* at 626-27. The Court noted that statutes which only allow residents to vote on a restrictive basis, pose the danger of denying some citizens an effective voice in the governmental affairs which affect them. *Id.* Thus, the Court must determine whether the exclusions are necessary to promote a compelling state interest if a challenged state statute grants the right to vote to some bona fide residents and denies the franchise to others. *Id.* at 627.

154. *Id.* at 627-28.

155. *Id.* at 630-32 ("The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.").

Following the *Kramer* holding, the Colorado Supreme Court applied *Kramer* in *Evans I(b)*, and, like the United States Supreme Court, used a strict scrutiny standard to hold that Amendment 2 curbed homosexuals' fundamental voting rights. *Evans I(b)*, 854 P.2d 1270, 1285 (Colo. 1993). The United States Supreme Court, however, chose not to examine Amendment 2 in the same manner. *Romer III*, 116 S. Ct. at 1624. The Court instead employed the rational relation standard under the Equal Protection Clause when it ruled on Amendment 2, but it neglected to expand on its reasons for disregarding *Kramer*. *Id.* at 1627. See *infra* Part IV for a comparison of the Colorado Supreme Court's and the United States Supreme Court's logic.

In addition to rejecting property-ownership classifications as criteria for voting rights, the Court has overturned legislation that effectively disenfranchises voters based on ethnic or cultural groupings.[156] In *Hunter v. Erickson*,[157] the United States Supreme Court struck down an Akron, Ohio, charter amendment that required a majority of the electorate's approval for any housing ordinances based on religion, race, or ancestry.[158] The Court applied the strict scrutiny standard because the law explicitly and unfairly impacted racial minorities—a suspect class.[159]

Although the *Hunter* Court initially applied an equal protection analysis to the legislation in question since it "place[d] special burdens on racial minorities within the governmental process" by preventing minorities from receiving the same treatment as non-minorities,[160] the Supreme Court also held that the legislation unfairly weakened the plaintiff's vote in comparison to the vote of other citizens.[161]

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156. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969).

157. 393 U.S. 385 (1969).

158. *Id.* at 386-87.

159. *Id.* at 391-92

160. *Id.* at 391. In one instance, a real estate agent refused to show the plaintiff, Nellie Hunter, a house in a neighborhood because the owners signed a letter that prohibited the agent from showing the house to "negroes." *Id.* at 387. In its decision, the Court noted that even though the electorate adopted the policy through popular referendum, the Equal Protection Clause still applied to the "sovereignty of the people." *Id.* at 392-93. The Court stated, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393.

161. *See id.* In his concurrence, Justice Harlan stressed maintaining equality in the electorate. *Id.* (Harlan, J., concurring) (stating that "the diverse political groups in our society may fairly compete"). Later courts followed this sentiment. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982). In *Washington*, the voters adopted an initiative which prohibited school boards from requiring any student to attend a school other than the one geographically nearest to his home. *Id.* at 462. However, the initiative made exceptions for almost all purposes except for racial integration. *Id.* The United States Supreme Court relied on its decision in *Hunter* to strike down the Act and stated that the Equal Protection Clause "guarantee[d] racial minorities the right to full participation in the political life of the community." *Id.* at 467-70. See also *infra* notes 212-23 and accompanying text for a discussion regarding the Colorado Supreme Court's use of *Hunter*.

See also Gordon v. Lance, 403 U.S. 1 (1971). In *Gordon*, a West Virginia statute required state and local governments to put a referendum vote on all bond indebtedness and tax increases. *Id.* at 2. The proposals became law only if 60% of the majority voted for them. *Id.* The plaintiffs sought a declaratory judgment that the 60% requirement violated the Equal Protection Clause of the Constitution. *Id.* at 3. The United States Supreme Court rejected the challenge and upheld the statute. *Id.* Moreover, the *Gordon* Court distinguished *Hunter* by noting that the Act in *Hunter* concerned an identifiable group of voters, independent of the statute. *Id.* at 5. See *infra* text accompanying notes

In addition to promoting voter equality, the Court has also held that the electorate cannot limit the voting rights of certain groups by unevenly distributing power within the electorate itself.[162] Specifically, the Court has held that a government may not create laws which unjustly keep candidates off the ballot.[163] In *Williams v. Rhodes*,[164] Ohio enacted legislation which made it extremely difficult for certain political parties to place themselves on the state election ballot.[165] Without establishing a fundamental right to participate in the voting process, the Court applied strict scrutiny to strike down the

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220-23 for a discussion regarding the Colorado Supreme Court's use of *Gordon*.

See also Reitman v. Mulkey, 387 U.S. 369 (1967). In *Reitman*, the United States Supreme Court held the California Constitution Amendment Proposition 14 unconstitutional. *Id.* at 373. The Amendment essentially allowed owners and lessors to discriminate among those to whom they sold or leased property. *Id.* at 374, 377. Also, the Amendment repealed a number of fair housing statutes the California legislature previously passed. *Id.* The *Reitman* Court adopted the California Supreme Court's finding that the Act authorized racial discrimination in the housing market and would significantly involve the state in private discrimination and thereby violate the Equal Protection Clause. *Id.* at 374-76.

But see James v. Valtierra, 402 U.S. 137 (1971). In *James*, the California voters passed an article to the state constitution which provided that nobody should build low-rent housing until the local voting majority approved the project. *Id.* at 139. The United States Supreme Court upheld the referendum and distinguished *Hunter* by noting that the *Hunter* Act placed special burdens on racial minorities. *Id.* at 140-42. According to the *James* Court, the California article applied across the board to any low-rent housing, not solely to special minority projects or any "independently identifiable group." *Id.* at 141-42.

The dissenting opinion in *Evans I(b)* relied heavily on *James*. *See Evans I(b)*, 854 P.2d at 1295-1300 (Erickson, J., dissenting). *See infra* note 227 (discussing Justice Erickson's dissenting opinion). *But see* Garfield, *supra* note 72, at 726 (discussing Justice Harlan's concurring opinion and why *James* may serve to support the Colorado Supreme Court majority rather than diminish it as Judge Erickson's dissenting view suggests).

162. *See* Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (holding that courts should apply the strict scrutiny standard to laws which prevent candidates from getting on the election ballot). See *infra* note 344 and accompanying text, which questions why the majority ignored *Williams*, even though the text of Amendment 2 implicitly prohibited gay candidates because Amendment 2 allows gay candidates' opponents and other critics to discriminate against homosexuals, thereby preventing them from running. *See also Romer III*, 116 S. Ct. at 1626 (noting that Amendment 2 "operates to repeal and forbid all laws" protecting homosexuals from discrimination at every level of Colorado government).

163. *See Williams*, 393 U.S. at 31.

164. 393 U.S. 23 (1968).

165. *Id.* at 24-25. To acquire a place on the ballot, the Ohio legislation required the political party to "obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election." *Id.* Additionally, at the primary election, the party had to elect a "state central committee" and "delegates and alternates to a national convention." *Id.* at 25 n.1.

act.[166] The Court reasoned that the election laws effectively limited the ballot to the two major parties by making it virtually impossible for a new political party to get on the ballot.[167] The *Williams* Court reasoned that the act denied equal protection to some citizens since it prevented them from exercising the right to express political ideas.[168]

In another voting rights case, the Court held that government legislation may not unjustly disempower a specific group by attempting to redesign voting districts in a discriminatory manner.[169] In *Reynolds v. Sims*,[170] Alabama attempted to restructure its legislature by reapportioning the number of seats each district received.[171] The Supreme Court employed the strict scrutiny test because, it reasoned, equal protection requires that the Constitution guarantee to citizens the right to vote, and the Court must protect that right.[172] According to the Court, "the overriding objective must be substantial equality of population among the various districts so that [the] vote of any citizen is approximately equal in weight to that of any other citizen in the State."[173] Thus, the Court held that the

166. *See id.* at 30-31.

167. *Id.* In *Williams*, only the Republican and Democratic candidates qualified for the ballot. *Id.* at 25.

168. *Id.* at 34.

169. *See* Reynolds v. Sims, 377 U.S. 533 (1964). *See also* Davis v. Bandemer, 478 U.S. 109 (1986). In *Bandemer*, the Court upheld an Indiana apportionment plan against a gerrymandering challenge. *Id.* at 129-30. In the plurality opinion, Justice White noted that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence in the political process." *Id.* at 132. But see Garfield, *supra* note 72, at 721-22, for a compact discussion of *Bandemer*. In Garfield's opinion, the Indiana reapportionment plan effectively disadvantaged the Democratic candidate in favor of the Republican, although the *Bandemer* Court suggests that the Equal Protection Clause protects a political group's rights to participate equally in elections. *Id.* at 723. Indeed, Garfield notes that in *Bandemer*: "The [United States Supreme Court] strongly suggest[ed] that the right to an equal vote works to promote equal political participation." *Id.*

170. 377 U.S. 533 (1964).

171. *Id.* at 543-45.

172. *See id.* at 565-66. The Supreme Court in *Gray v. Saunders*, concluded that "[t]he conception of political equality . . . can only mean one thing—one person, one vote." 372 U.S. 368, 381 (1963). In *Reynolds*, Chief Justice Warren stated:

> Legislators represent people, not trees or acres . . . . And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

Reynolds, 377 U.S. at 562.

173. *Id.* at 579. Similarly, the Colorado Supreme Court recognized that Amendment 2 restricted homosexuals' voting power. *Evans I(b)*, 854 P.2d at 1285. The United States Supreme Court agreed that Amendment 2 eliminated many rights of homosexuals

reapportionment plan lacked rationality since the legislature did not base it on the number of people in each district.[174] However, the Court once again did not explicitly establish a fundamental right to participate equally in the political process.[175] The Court's lack of clarity leaves open the argument that legislation which inhibits equal participation in the political process violates the Equal Protection Clause.[176]

III. DISCUSSION

A. Amendment 2's Political History

Prior to the passage of Amendment 2,[177] some Colorado municipalities sought to extend general, anti-discriminatory protections to its citizens.[178] Like many public officials across the country,[179] lawmakers in some cities, such as Aspen, Denver, and Boulder, thought that homosexuals deserved the same protections as other identifiable groups.[180] So as not to unfairly advantage one favored minority group over another, the cities designed the legislation to protect numerous defined groups (including, but not limited to, homosexuals) from discrimination in both the work place and public

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and limited their voting power, but the Court did not adopt *Reynolds* to sustain its argument. *Romer III*, 116 S. Ct. at 1625-27. See *infra* note 344 for a discussion of how the United States Supreme Court could have used *Reynolds* effectively.

174. *Reynolds*, 377 U.S. at 568-69. The voting regulation discriminated against residents who lived in populous areas in favor of those residents in rural sections. *Id.* at 569-70. The Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568.

175. *See id.* at 566.

176. *See, e.g.*, *Evans I(b)*, 854 P.2d at 1284-86 (arguing that Amendment 2 violated the plaintiff's right to participate equally in the political process).

177. The Colorado electorate passed Amendment 2 on November 3, 1992. COLO. CONST. art. II, § 30(b) (West Supp. 1996) (historical notes).

178. See *supra* note 7 for a discussion of the various Colorado municipality ordinances protecting homosexuals from discrimination.

179. *See generally* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905 (1993) (discussing the increasing use of legislation to protect against discriminatory actions based on sexual orientation). In the recent past, more than 130 jurisdictions enacted legislation to protect people with different sexual orientations. *Id.* at 1905, 1908. This increase in gay right activism provoked fundamental religious groups to rally supporters and attempt to repeal the anti-discrimination measures. *Id.* at 1905.

180. *See generally Romer III*, 116 S. Ct. at 1623 (noting that statewide controversy erupted because the ordinance extended protections to persons discriminated against based on their sexual orientation).

areas.[181] Thus, the cities attempted to further establish their platform against discrimination by protecting homosexuals, along with other disadvantaged groups.[182]

Some of the general Colorado electorate, however, found these ordinances intrusive.[183] In addition, some notably conservative groups led a drive to eradicate these ordinances.[184] Specifically, CFV began a campaign against the municipality initiatives and assembled enough Colorado voters' signatures to place Amendment 2 on the November 1992 ballot.[185] CFV argued against "special protections" for homosexuals, claiming that homosexuals do not face the same problems as other identifiable groups, such as racial or ethnic minorities.[186] Moreover, CFV used right-wing rhetoric, usually culminating in scripture quoting,[187] to inflame the Colorado citizens.[188]

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181. See *supra* note 7 for a description of ordinances in Aspen, Denver, and Boulder.

182. The Colorado Supreme Court recognized that "[t]he immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation." *Evans I(b)*, 854 P.2d at 1284.

183. Romer v. Evans, No. 94-1039, 1995 WL 605822, at *21 (U.S. Oral. Arg., Oct. 10, 1995) (citing the oral argument of Timothy M. Tymkovich, Solicitor General of Colorado, Denver, Colorado on behalf of the Petitioners). In response to a question, Tymkovich stated, "[t]he purpose of this statute was to preempt State and local laws that extended special protections. It was a response to political activism by a political group that wanted to seek special affirmative protections under the law." *Id.* at *20. Later in the argument, Tymkovich commented, "I think the problem . . . that the voters saw, they were presented with an opportunity to preempt and make a decision at the statewide level for laws that raise particular and sensitive liberty concerns." *Id.* at *24.

184. Brief in Support of Plaintiff's Motion for Preliminary Injunction at *2, Evans v. Romer, No. 92-CV-7223, 1993 WL 19678 (D. Colo. Jan. 15, 1993), *aff'd on other grounds*, *Romer III*, 116 S. Ct. 1620 (1996).

185. *See Evans I(b)*, 854 P.2d at 1272; *Evans I(a)*, 1993 WL 19678, at *6. *See also* Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33 (1994). Russell stated that:

> [R]ight-wing conservative groups, such as Colorado for Family Values, the Traditional Values Coalition, the National Legal Foundation, and the Free Congress Foundation, chose the apparently "liberal" state of Colorado as their first major target for an anti-gay rights initiative in 1992, many observers were surprised . . . . However, Colorado proved to be an optimal testing ground for a number of reasons, not the least of which was precisely its record as a state very much in the vanguard of establishing legal protections for lesbians, gays and bisexuals.

Id. at 42.

186. *See* Johnson, *supra* note 6, at 24 (highlighting CFV's argument in favor of Amendment 2 and against any extra protections for homosexuals).

187. *See* Russell, *supra* note 185, at 44 n.38 (citing Tony Marco, SPECIAL GAY RIGHTS LEGISLATION 42 (1991) (position paper of CFV). Marco decried, "Gay behavior is what the Bible calls 'sin' because sin defines any attempt to solve human problems or meet human needs without regard to God's wisdom and solutions as found in Scripture and in His saving grace and mercy." *Id. See also* Jean Hardisty, *Constructing*

Their arguments played upon and "exploit[ed] fears of employment quotas and affirmative action."[189] In addition, CFV attempted to establish Amendment 2's purpose as being that of a concerned, helpful legislation that would protect people from the evil homosexuality wrought.[190]

CFV's efforts culminated in their official sponsorship of the Amendment 2 legislation.[191] On November 3, 1992, Colorado voters decided to officially adopt Amendment 2 by a vote of 813,966 to 710,151 (fifty-three percent to forty-seven percent).[192] On November 12, 1992, Amendment 2's critics initiated an action to have Amendment 2 declared unconstitutional on its face and to enjoin its enforcement.[193]

Homophobia, PUBLIC EYE, Mar. 1993, at 9 (quoting Kevin Tebedo, Executive Director of CFV). Tebedo claimed

> [Amendment 2] is about whose authority takes precedence in the society in which we live . . . [The] authority of God? The authority of the supreme King of Kings and Lord of Lords? You see, we say we should have the separation of church and state, but you see, Jesus Christ is the King of Kings and the Lord of Lords. That is politics; that is rule; that is authority."

Id.

188. *See* Daniel A. Batterman, Comment, Evans v. Romer: *The Political Process, Levels of Generality and Perceived Identifiability in Anti-Gay Rights Initiatives*, 29 NEW ENG. L. REV. 915, 933-34 (1995) (commenting that CFV attempted to garner support for Amendment 2 through the use of broader "civil rights" rhetoric).

189. *Id.* at 934 (quoting Will Perkins, chairman of CFV, who appeared on *Crossfire* stating "[y]ou know very well . . . that affirmative action is just a logical progression of civil rights.") (CNN television broadcast, Dec. 22, 1992 (*available in* LEXIS, Nexis Library, CNN File)).

190. *See* Grauerholz, *supra* note 1, at 848. Grauerholz quoted CFV campaign material, which described the purpose of Amendment 2 as "protecting 'traditional family values and structures,' safeguarding children from sexual molestation, protecting 'individuals' rights to view homosexuality as immoral,' preventing dissolution of civil rights protection for 'authentic minorities,' diminishing the cost for treatment of AIDS and its 'deadly consequences,' and furthering the view that homosexuality is curable." *Id.* (citing Plaintiffs-Appellees' Answer Brief, at 10-11, *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (No. 93SA17)). Grauerholz also remarked that CFV further supported these purposes by maintaining that "gays and lesbians 'threaten[ed] . . . to undermine traditional family values and structures' because if homosexuals were allowed to marry, the traditional family structure would dissolve, insurance rates increase, and children, as 'wretched victims of such marriages' would become miserable." *Id.*

191. *See* Johnson, *supra* note 6, at 24 (identifying CFV as Amendment 2's sponsor).

192. *See Evans I(b)*, 854 P.2d at 1272.

193. *See id.*

B. Evans I(a) and (b)

1. *Evans I(a)*: The Trial Court

On November 12, 1992, Richard G. Evans led a group of plaintiffs[194] in filing suit in a Colorado district court for the County of Denver to enjoin the enforcement of Amendment 2.[195] The petitioners claimed that Amendment 2 violated their Fourteenth Amendment right to equal protection[196] because it failed to "rationally advance a legitimate governmental interest and because it place[d] unique burdens" on the ability of gays, lesbians, and bisexuals "to participate equally in the political process."[197]

While the trial court initially rejected the plaintiff's request for an expedited hearing on the merits, the plaintiffs quickly moved for a preliminary injunction.[198] Granting the injunction, the court recognized that Amendment 2 unfairly burdened the rights of an identifiable group—homosexuals.[199] The court also found that Amendment 2 violated a fundamental right which forbids states from

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194. See *supra* note 13 for a complete list of the plaintiffs.

195. *See Evans I(a)*, 1993 WL 19678.

196. *Evans I(b)*, 854 P.2d at 1272-73 n.2. *See also supra* Part II.B (discussing equal protection and the Fourteenth Amendment).

197. *Evans I(b)*, 854 P.2d at 1272-73 n.2. *See also Evans I(a)*, 1993 WL 19678, at *4 (plaintiffs argues that they would be denied 'the right to vote and the right to petition the government for redress of grievances").

198. *See Evans I(b)*, 854 P.2d at 1273. In making its ruling on the injunction, the trial court applied the six-part test set forth in *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982), to determine whether the plaintiffs had met the burden required for the preliminary injunction. *Evans I(a)*, 1993 WL 19678, at *7-8. Under the *Rathke* test, a court may grant a preliminary injunction only if the moving party demonstrates that it needs the injunctive relief to protect property rights or an existing fundamental constitutional right. *Rathke*, 648 P.2d at 652. The judge must also find: (1) the movants possess a legitimate chance to win the case on the merits; (2) the plaintiffs may suffer irreparable injury which injunctive relief may prevent; (3) no adequate legal remedy exists; (4) the injunction would not disserve the public interest; (5) the "balance of equities" favors granting the injunction; and (6) "the injunction will preserve the status quo pending a trial on the merits." *Id.* at 653-54. If the judge does not find the movant satisfied these criteria, the judge should refuse to grant injunctive relief. *Id.* at 654.

In light of *Rathke*, the trial court found the *Evans* plaintiffs sufficiently supported their claim. *Evans I(a)*, 1993 WL 19678, at *12.

The *Evans I(a)* court specifically recognized that the plaintiffs had satisfied the *Rathke* test by demonstrating that Amendment 2 infringed upon the fundamental Fourteenth Amendment rights of homosexuals. *Id.* at *11-*12. The trial court found that Amendment 2 burdened the fundamental constitutional right of an "independently identifiable group . . . not to have the State endorse and give effect to private biases" under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at *9, *11.

199. *See Evans I(a)*, 1993 WL 19678, at *11-*12.

endorsing and giving effect to private biases.[200] According to the court, the petitioners possessed "a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt."[201] The court concluded that a trial on the merits of Amendment 2 requires application of the strict scrutiny standard.[202]

2. *Evans v. Romer I(b)*: The Colorado Supreme Court

The Supreme Court of Colorado affirmed the trial court's decision to grant the injunction.[203] The Colorado court examined Amendment 2 in light of whether it infringed upon an existing constitutional right.[204] The Colorado Supreme Court based its *de novo* review upon two principles: (1) that "the Equal Protection Clause . . . applies to all citizens, and not simply those who are members of traditionally 'suspect' classes such as racial or ethnic minorities;"[205] and (2) that

200. *Id.* at *11. *But see Evans I(b)*, 854 P.2d at 1288-89 (Erickson, J., dissenting) (arguing that "the district court [*Evans I(a)*] erred in issuing a preliminary injunction based on a fundamental right not to have the State endorse and give effect to private biases," since no such fundamental right was ever recognized by the United States Supreme Court).

201. *Evans I(a)*, 1993 WL 19678, at *7.

202. *Id.* at *12. See *supra* Part II.B for an explanation of the standards of review under the Equal Protection Clause.

203. *Evans I(b)*, 854 P.2d at 1272. On appeal to the Supreme Court of Colorado, the State (representing the defendants) argued that the trial court erroneously based its decision on an incorrect application of *Rathke*. *Id.* at 1274. The defendants disputed the trial court's finding that "injunctive relief is necessary to protect [an] existing fundamental constitutional right[]." *Id.* Further, the defendants contended that the trial court extrapolated from, and extended the holdings of, several federal court cases to create the right that Amendment 2 allegedly violated. *Id.* at 1274. The defendants contended that the trial court did not rely on direct precedent, and merely extended the federal cases to create the particular Constitutional right. *Id.*

The plaintiffs maintained that the trial court, for the most part, held correctly. *Id.* Recognizing some weaknesses in the trial court's analysis, however, the plaintiffs urged the Colorado Supreme Court to acknowledge that Amendment 2 violated the plaintiff's fundamental right to political participation. *Id.* The Colorado Supreme Court commented that:

> [The plaintiffs] do not urge that we base our decision on the precise right identified and relied on by the trial court in rendering its decision. To the contrary, they have argued to this court that the right identified by the trial court, when 'read in light of the arguments actually presented to [it] . . . is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation . . . .' In short, plaintiffs urge us to rely only on the equal protection arguments which they have relied on, and that the trial court's ruling should be construed to have done the same.

Id. (citation omitted).

204. *Id.*

205. *Id.* at 1275. However, the Colorado Supreme Court majority did note that, "gay men, lesbians, and bisexuals have not been found to constitute a suspect class." *Id.* (citing High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th

"[t]he right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of [the] Republic up to the present time."[206]

The court first emphasized several voting rights cases, such as *Kramer v. Union Free School District No. 15*,[207] *Williams v. Rhodes*[208] and *Reynolds v. Sims*,[209] all of which illustrated the value placed upon participation in the political process.[210] According to the Colorado Supreme Court, these cases enunciated one unifying principle: "[L]aws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest."[211]

The court next highlighted cases involving legislation which prevented political institutions from enacting "legislation desired by an identifiable group of voters."[212] According to the court, these cases applied to *Evans* because they stood for the proposition that the Equal Protection Clause affords all identifiable groups the fundamental

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Cir. 1990) (asserting that homosexuals constituted neither a suspect nor quasi-suspect class)). The Colorado court also noted that the plaintiffs never asserted homosexuals composed such a class. *Id.*

206. *Id.* at 1276.

207. 395 U.S. 621 (1969). See *supra* text accompanying notes 151-55 for a summary of *Kramer*. In *Evans I(b)*, the majority commented that *Kramer* "clearly demonstrate[d] the danger presented by such restrictive legislation [in] that it may deny [citizens] 'any effective voice in the governmental affairs which substantially affect their lives.'" *Evans I(b)*, 854 P.2d at 1277 (quoting *Kramer*, 395 U.S. at 627). Using this idea, the majority concluded that, "to the extent that legislation impairs a group's ability to effectively participate (which is not to be confused with successful participation) in the process by which the government operates, close judicial scrutiny is necessitated." *Id.*

208. 393 U.S. 23 (1968). See *supra* notes 162-68 and accompanying text for a summary of *Williams*. The *Evans I(b)* court noted that the United States Supreme Court in *Williams* concluded that only a compelling interest could justify "Ohio statutes which 'made it virtually impossible,' for new political parties with widespread support, or an old party which enjoyed very little support, to be placed on the state ballot . . . ." *Evans I(b)*, 854 P.2d at 1278 (quoting *Williams*, 393 U.S. at 24).

209. 377 U.S. 533 (1964). See *supra* text accompanying notes 169-76 for a discussion of *Reynolds*. According to the Colorado Supreme Court, *Reynolds* "reflects the [United States Supreme Court's] judgment that dilution in the effectiveness of certain voters' exercise of the franchise violates the guarantee of equal protection of the laws not simply because citizens are guaranteed the right to vote, but because that right must be preserved in a meaningful and effective manner." *Evans I(b)*, 854 P.2d at 1278.

210. *Id.* at 1276.

211. *Id.* at 1279.

212. *Id.* These cases included: *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Gordon v. Lance*, 403 U.S. 1 (1971); and *Hunter v. Erickson*, 393 U.S. 385 (1969). See *supra* notes 156-61 and accompanying text for a discussion of *Hunter*. See *supra* note 161 for a discussion of *Washington* and *Gordon*.

constitutional right to participate equally in the political process.[213] The Colorado Supreme Court first cited *Hunter v. Erickson*[214] to demonstrate the fundamental right to participate equally in the political process.[215] Second, the *Evans I(b)* court recognized that *Washington v. Seattle School District No. 1*[216] held that certain democratically enacted legislation "impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secure public benefits."[217] According to the *Evans I(b)* court, *Washington* effectively meant that courts should view laws that allocate power based on something other than "general principle[s]" as constitutionally suspect.[218] Thus, the *Evans I(b)* majority concluded that both *Hunter* and *Washington* applied outside purely racial contexts and directly to Amendment 2.[219] Third, the *Evans I(b)* court discussed *Gordon v. Lance*,[220] since it specifically invoked *Hunter*[221] as further proof that the United States Supreme Court never intended for *Hunter* to stand solely for racial issues.[222] *Gordon*, along with *Hunter* and *Washington*, led the *Evans I(b)* majority to decide that "these facts clearly support the conclusion that *Hunter* applies to a broad spectrum of discriminatory legislation."[223]

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213. *Evans I(b)*, 854 P.2d at 1279-81.

214. 393 U.S. 385 (1969).

215. *Evans I(b)*, 854 P.2d at 1279-80 (noting the Court in *Hunter* concluded that a government could neither make it more difficult for a particular group to enact legislation nor could the government weaken or dilute the vote of an individual).

216. 458 U.S. 457 (1982).

217. *Evans I(b)*, 854 P.2d at 1280 (citing *Washington*, 458 U.S. at 467-70).

218. *Id.* at 1281. *See also* Robert J. Wagner, Evans v. Romer*: Colorado Amendment 2 and the Search for a Fundamental Right for Groups to Participate Equally in the Political Process*, 38 ST. LOUIS U. L.J. 523, 536 (Winter 1993/1994) (claiming that the Colorado Supreme Court used *Washington* to support its idea that Amendment 2 unfairly allocated voting power).

219. *See Evans I(b)*, 854 P.2d at 1281. The Colorado court reasoned:

> Thus, while *Washington*, like *Hunter* involved an initiative that affected a racial minority, and while this fact weighed heavily in the [United States Supreme] Court's consideration of this case, it would be erroneous to conclude that the 'neutral principle' precept is applicable only in the context of racial discrimination. Indeed, such a reading of *Hunter* and *Washington* would be antithetical to the neutral principle itself . . . .

Id.

220. 403 U.S. 1 (1971).

221. *Id.* at 5.

222. *Evans I(b)*, 854 P.2d at 1282. In support of its belief that *Hunter* applies beyond purely racial issues, the Colorado court claimed that the Supreme Court would not have mentioned *Hunter* in *Gordon* if the Supreme Court intended to limit *Hunter* to race issues. *Id.*

223. *Id.* The *Evans I(b)* court stated, "[T]he Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political

Consequently, the *Evans I(b)* court rejected the defendants' argument that it should refuse to compare homosexual rights with other minority rights, even though homosexuals did not compose a suspect class.[224] The *Evans I(b)* court ruled that, to a reasonable probability, Amendment 2 infringed upon the plaintiffs' fundamental right to participate equally in the political process because it "expressly fence[d] out an independently identifiable group"[225] and because it "prohibit[ed] this class of persons from seeking governmental action favorable to it [by barring homosexual rights from legislation]."[226] Thus, the Colorado Supreme Court, despite a vigorous dissent,[227] ultimately held that courts should examine Amendment 2 under the standard of strict scrutiny.[228] The Colorado Supreme Court then remanded the *Evans I(b)* case to the trial court to determine whether the government crafted Amendment 2 narrowly enough to meet a compelling state interest.[229]

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process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Id.*

224. *See id.* at 1284.

225. *Id.* at 1285.

226. *Id.*

227. *See generally id.* at 1286-1302 (Erickson, J., dissenting). In the dissent, Justice Erickson asserted that homosexuals failed to constitute a "suspect class." *See id.* at 1291 (Erickson, J., dissenting). Moreover, Justice Erickson rejected the Colorado Supreme Court majority's holding that Amendment 2 infringed upon a fundamental constitutional right by relying on a philosophy of judicial restraint instead of expansion. *Id.* (Erickson, J., dissenting). Using the United States Supreme Court cases *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) and *James v. Valtierra*, 402 U.S. 137 (1971), to support his position, Justice Erickson claimed that the Colorado Supreme Court should read *Hunter* in a narrow race-related context. *Evans I(b)*, 854 P.2d at 1300 (Erickson, J., dissenting). The *James* case distinguished *Hunter* by stating that *Hunter* applied to a "constitutionally suspect class" which did not exist in *James*. *James*, 402 U.S. at 141 (citing *Hunter*, 393 U.S. at 391-92). Similarly, Justice Erickson contended, in *EvansI(b)* that homosexuals failed to constitute a "suspect class," so the Colorado court should treat *James* as dispositive. *Evans I(b)*, 854 P.2d at 1298 (Erickson, J., dissenting). In addition, Justice Erickson distinguished both *Gordon* and *Washington* as cases which again dealt with issues outside the scope of those the Colorado court considered. *Id.* at 1299-1301 (Erickson, J., dissenting). The *Evans I(b)* majority, therefore, improperly found a fundamental right to participate equally in the political process since the United States Supreme Court has never articulated such a right. *Id.* at 1298 (Erickson, J., dissenting). Amendment 2 thus did not infringe upon any of the plaintiffs' fundamental rights and did not deserve strict scrutiny review. *Id.* at 1301 (Erickson, J., dissenting). Justice Erickson concluded by stating that the trial court incorrectly granted the preliminary injunction. *Id.* at 1302 (Erickson, J., dissenting).

228. *Id.* at 286.

229. *Evans II(a)*, 1993 WL 518586, at *2. *See also Evans II(b)*, 882 P.2d at 1339.

C. *Evans II(a) and (b)*

1. *Evans v. Romer II(a)*: The Trial Court

On remand, the state offered six "compelling" state interests.[230] The trial court examined each interest.[231] In regard to the first interest, the trial court concluded that a government desire to deter "factionalism" merely masked "an attempt to impede the expression of a 'difference of opinion on a controversial political question. . . .'"[232] Next, the state argued that it maintained a compelling interest in preserving the integrity of its political functions.[233] Because the defendants' argument lacked any clear precedent to support the allegation, the trial court again rejected the defendants' contention.[234] Moreover, the trial court expressed doubt about the fiscal concerns the defendants enunciated as to the extra cost incurred in enforcing these types of new homosexual anti-discriminatory laws.[235] According to the trial court, both preventing government interference in personal lives and protecting religious liberty did constitute compelling state interests.[236] However, the trial court stated that Amendment 2 failed to narrowly "tie-in" these interests, while also unfairly burdening homosexuals.[237]

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230. *Evans II(a)*, 1993 WL 518586, at *2. The defendants listed six state interests met by Amendment 2:

> (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado children.

Id. at *2-*9.

231. *See id.* at *2-*9.

232. *Evans II(b)*, 882 P.2d at 1340.

233. *Evans II(a)*, 1993 WL 518586, at *3.

234. *Id.* at *5.

235. *Id.* at *6. The trial court concluded that the "defendants' offered evidence of lack of fiscal ability [was] unpersuasive in all respects." *Id.*

236. *Id.* at *7.

237. *Id.* at *8. The trial court suggested a more limited approach to protecting religious liberty than the one offered by Amendment 2: "The narrowly focused way of addressing [anti-discrimination protections for gay men, lesbians and bisexuals] is to add to it a religious exemption such as is found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process." *Id.* at *7. In regard to a personal issue, the defendants failed to define the term "family." *Id.* at *8. Furthermore, the trial court rejected the personal privacy interest by stating that "[t]he general issue of whether personal privacy is a compelling state interest was not adequately established." *Id.* The court stated it could only speculate as to what defendants meant by personal privacy and how Amendment 2 protected such a right. *Id.* The court also denied the interest concerning the subsidizing of a special interest group since that argument lacked any tangible support or credible defenses. *Id.*

Consequently, the trial court permanently enjoined Amendment 2.[238]

2. *Evans v. Romer II(b)*: The Colorado Supreme Court

On appeal, the Colorado Supreme Court supported the lower court's evidentiary findings and upheld the permanent enjoinment of Amendment 2.[239] Like the trial court, the Colorado Supreme Court noted that the defendants failed to narrowly tailor Amendment 2 to support the alleged compelling state interests.[240] Thus, the court affirmed the trial court's permanent injunction barring Amendment 2s enforcement.[241]

D. Romer v. Evans: Romer III—United States Supreme Court

1. Majority Opinion

In 1996, when *Romer v. Evans* came before the United States Supreme Court, the Court framed the issue before it as an issue of first impression:[242] Is a law which disqualifies "a class of persons from the

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Finally, the court dismissed the protection of children component because the defendants never presented evidence in support of this compelling state interest. *Id.* at *9.

238. *Id.* at *13.

239. *Evans II(b)*, 882 P.2d at 1350. In *Evans II(b)*, the defendants maintained that: (1) the Colorado Supreme Court should reconsider the legal standard it set forth in the first Evans case for assessing the constitutionality of Amendment 2; (2) several compelling state interests support Amendment 2 and the Amendment is narrowly tailored to meet these interests; (3) the Colorado Supreme Court could sever the unconstitutional portions of the Amendment from the remainder; and (4) Amendment 2 constitutes a valid exercise of state power under the Tenth Amendment to the United States Constitution. *Id.* at 1341.

240. *Id.* at 1342-50. The Colorado Supreme Court adopted much of the lower court's rationale and affirmed the trial court's permanent enjoinment of Amendment 2 without any significant modifications to the ruling. *Id.* at 1350. However, Justice Erickson, again the lone dissenter, felt that the Colorado Supreme Court should have used a rational basis standard of review for Amendment 2. *Id.* at 1366 (Erickson, J., dissenting). Moreover, Justice Erickson disagreed with the majority by finding that the defendants adequately demonstrated and supported their arguments concerning how Amendment 2 protected religious freedom, encouraged statewide uniformity in the law (discouraged factionalism) and eased the state's fiscal burdens. *Id.* (Erickson, J., dissenting). Justice Erickson asserted that the trial court erred in its decision and that the Colorado Supreme Court should have vacated the injunction. *Id.* (Erickson, J., dissenting).

241. *Id.* at 1350.

242. Prior to the Amendment 2 question, the United States Supreme Court had previously recognized the need to balance Fourteenth Amendment protections against the fact that much legislation incidentally disadvantages various groups. *Romer III*, 116 S. Ct. at 1627. *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). These cases demonstrated that the Court would uphold legislation which neither burdens a fundamental right nor

right to seek specific protection[s] from the law" constitutional?[243] Amendment 2 posed such a unique challenge that the Court decided to review Amendment 2 with "careful consideration to determine whether . . . [it is] obnoxious to the [C]onstitution[]."[244] Holding that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Court cited much of the Colorado's Supreme Court's opinion.[245] Ultimately, however, the United States Supreme Court affirmed the Colorado Supreme Court's ruling based on a different rationale.[246]

The United States Supreme Court held that Amendment 2 denied equal protection of the laws in the most "literal sense"[247] because it imposed a broad disability on one particular group—homosexuals.[248] However, the Court did not choose to explicitly classify homosexuals as a suspect class.[249] Thus, unlike the Colorado Supreme Court, the United States Supreme Court did not apply strict scrutiny.[250] Rather, the Court fashioned its analysis of Amendment 2 around the rational basis test.[251]

a. Amendment 2 Has No Rational Relationship to a Legitimate State Interest

Demonstrating that the rational basis test is not a foregone conclusion of the constitutionality of state legislation, the Court held that Amendment 2 failed the rational basis test.[252] First, the majority

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targets a suspect class as long as the legislation bears a rational relation to some legitimate end. *Romer III*, 116 S. Ct. at 1627. To support its conclusion, the Supreme Court cited *Heller v. Doe*, 509 U.S. 312 (1993) for the proposition that it will uphold a law that bears a rational relation to a legitimate state interest as long as the law does not burden a fundamental right or target a suspect class. *Romer III*, 116 S. Ct. at 1627 (citing *Heller*, 509 U.S. at 319-21).

243. *Romer III*, 116 S. Ct. at 1628.

244. *Id.* (citing Louisville Gas & Elec. Co. v. Coleman, 227 U.S. 32, 37-38 (1928)).

245. See generally *id.* at 1624-29 for the majority's opinion and its partial use of the Colorado Supreme Court's reasoning.

246. *Id.* at 1624.

247. *Id.* at 1628.

248. *Id.* at 1626-27.

249. *See id.*

250. *See id.* at 1627.

251. *Id.*

252. *Id.* The Court commented that Amendment 2 "fails, indeed defies, even this [rational relations] conventional inquiry." *Id.* To amplify its point, the Court cited a plethora of cases in which it upheld controversial laws that demonstrated a rational relationship to a governmental interest. *Id.* at 1627. The Court cited the following cases: *New Orleans v. Dukes*, 427 U.S. 297 (1976) (ruling that tourism benefits justified a classification favoring pushcart vendors of certain longevity); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (assuming health concerns justified law

held that the Amendment imposed a disability on a "single, named group."[253] Second, the Court held that Amendment 2 lacked a rational relation to any legitimate governmental interest.[254] In support of its opinion, the Court rejected the State's argument that Amendment 2 legitimately protected a citizen's right to freedom of association, particularly of those citizens who possessed a personal or religious objection to homosexuality.[255] In addition, the Court rejected the State's assertion that the Court should conserve resources to battle discrimination against other truly suspect classes.[256]

According to the Court, Colorado drafted Amendment 2 based on animosity toward homosexuals.[257] The Court reasoned that a bare desire to harm a politically unpopular group does not constitute a legitimate state interest.[258] As a result, the majority concluded that

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favoring optometrists over opticians); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (holding that potential traffic hazards justified an exemption of vehicles advertising the owner's products from a general advertising ban); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (reasoning that a licensing scheme that disfavored persons unrelated to current river boat pilots was justified by possible efficiency and safety benefits of a closely knit pilotage system). *Romer III*, 116 S. Ct. at 1627. The Court also stated that the legislatures drew the laws in these cases narrowly and closely tied them to a rationally related, legitimate governmental purpose. *Id.* By ensuring that the legislation maintained a close relation to a compelling interest, the Court prevented legislatures from creating classifications designed solely to disadvantage the specific group burdened by the law. *Id.* at 1627.

253. *Romer III*, 116 S. Ct. at 1627.

254. *Id.* According to the majority opinion, Amendment 2 imposed a broad and undifferentiated disability on a single group, and the Amendment's "sheer breadth" failed to fit within the state's proffered interests, thereby suggesting that animus served as the actual motivation for the Amendment. *Id.*

255. *Id.* at 1629.

256. *Id.*

257. *Id.* at 1628. The majority noted that the Amendment seemed inexplicable by anything but animus toward the class it affects. *Id.* The Court relied on *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), for the proposition that legislation created to harm a particular politically unpopular group fails to constitute a legitimate governmental interest. *Romer III*, 116 S. Ct. at 1628. The Court suggested that "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 1628 (quoting *Moreno*, 413 U.S. at 534). By making a general retraction of specific protections for gays and lesbians, the Court determined the Amendment would inflict real injuries that "outrun and belie any legitimate justifications" the government may claim for it. *Id.* at 1628-29. Consequently, the majority reiterated that Amendment 2 lacked any rational relation to a legitimate governmental interest. *Id.* at 1629. The majority stated: "[A] law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not." *Id.* (citing Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 462 (1988) (noting the proposition that a law must rationally relate to a legitimate governmental purpose) (citation omitted)).

258. *Romer III*, 116 S. Ct. at 1628 (quoting *Moreno*, 413 U.S. at 534 (1973)).

Amendment 2 violated the Equal Protection Clause by subordinating homosexuals' interests to those of other citizens, while also failing to further a legitimate state interest.[259]

To further support its holding, the Court emphasized that *Davis v. Beason*[260] cannot be looked to as good law.[261] Although *Davis* upheld as constitutional a law which discriminated against polygamists,[262] the Court argued that it was substantially overruled by the *Brandenburg* decision.[263] Thus, the Court focused its inquiry on whether Amendment 2 improperly prevented homosexuals from participating in the political process.[264]

b. The Effect of Amendment 2 on Homosexuals' Participation in the Political Process

The United States Supreme Court asserted that Amendment 2 broadly prohibited all legislative action, by state and local governments, designed to protect the named class—homosexuals.[265] In addition, according to the Court, the Amendment did more than merely deny homosexuals special protections.[266] In the Court's interpretation, Amendment 2 actually withdrew "legal protection[s] from the injuries caused by discrimination" from only homosexuals and no others.[267]

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259. *Id.* at 1629.

260. 133 U.S. 333 (1890).

261. *See Romer III*, 116 S. Ct. at 1628. See generally *id.* at 1635-36 (Scalia, J., dissenting) for the dissent's reliance on *Davis*. See *supra* text accompanying notes 34-45 for a discussion of *Davis*.

262. See *supra* notes 34-46 and accompanying text for a discussion of *Davis*.

263. *Romer III*, 116 S. Ct. at 1628 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)). The Court asserted that *Brandenburg* overruled *Davis* by holding that governments may not deny the right to vote to persons who advocate a certain practice (polygamy in *Davis*). *Id.* Further, the Court noted that regardless of the holding in *Davis*, a statute depriving a person of the right to vote based on their status will likely not survive a strict scrutiny challenge. *Id.* (citing Dunn v. Blumstein, 405 U.S. 330 (1972) (stating that the right to vote is a fundamental right)).

264 . *Id.*

265. *Id.* The United States Supreme Court relied on findings from the Colorado Supreme Court to validate its opinion. *Id.* In delivering its opinion, the Supreme Court quoted the Colorado court as stating: "The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances and policies of state and local entities that barred discrimination based on sexual orientation . . . . The 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances or policies in the future unless the state constitution is first amended to permit such measures." *Id.* at 1624-25 (quoting *Evans I(b)*, 854 P.2d at 1284-85 & n.26) (citations omitted) (footnotes omitted).

266. *Id.*

267. *Id.*

The Court then reviewed Amendment 2's effect on the private sector.[268] The majority noted that the laws which Amendment 2 nullified protected "enumerated" groups,[269] to whom the Court had not yet granted heightened equal protection scrutiny.[270] Amendment 2, according to the Court, applied unfairly because it: (1) barred legislatures from enacting specific protections for homosexuals from discrimination,[271] and (2) invalidated legal protections for homosexuals in all transactions dealing with "housing, sale of real estate, insurance, health and welfare services, private education, and employment."[272]

The Court explained that Amendment 2 also affected the public sphere by repealing and prohibiting all laws which protected homosexuals from discrimination by the state government.[273] In addition to the Amendment clearly nullifying the specific laws that protected homosexuals, the Court noted that a "fair, if not necessary" inference regarding the Amendment's broad language demonstrated that the Amendment also stripped homosexuals of any protections provided by general laws which prohibited arbitrary discrimination in both the public and private sectors.[274]

The Supreme Court rejected the notion that Amendment 2 merely repealed "special protections."[275] To the contrary, the Court held that Amendment 2 actually imposed special disabilities upon homosexuals.[276] While others enjoyed safeguards against

268. *Id.* See *supra* note 7 for a summation of the local municipalities' laws and ordinances in regard to the protections they grant homosexuals within the housing, employment, and general commercial industry.

269. *Romer III*, 116 S. Ct. at 1625. In describing the ordinances, the Court emphasized the importance of the municipalities actually enumerating the protections granted by commenting that "[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply." *Id.*

270. *Id.*

271. *Id.* at 1626.

272. *Id.* The majority opinion further ruled that Amendment 2 also effectively repealed all laws and policies that provided specific protection for homosexuals from discrimination at every level of the Colorado government. *Id.*

273. *Id.*

274. *Id.* In Amendment 2's defense, the State principally argued that Amendment 2 placed homosexuals in the same position as other people and merely denied them special rights. *Id.* at 1624. Also, the Petitioner contended that Amendment 2 merely safeguarded citizens' "freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality." *Id.* at 1629. The Petitioner further suggested that enforcing protections for homosexuals would limit the resources which the government could allocate to battle discrimination against truly "suspect classes." *Id.*

275. *Id.* at 1628.

276. *Id.* at 1626-27.

discrimination,[277] homosexuals could only receive protection by rallying the general electorate to repeal Amendment 2.[278] The Court held that this option constituted an extremely daunting task which effectively limited homosexual voting power.[279] Thus, the Court upheld the permanent enjoinment of Amendment 2 on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[280]

2. The Dissent

a. The Political Battle Surrounding Amendment 2

The dissent, led by Justice Scalia, opened by stating that the majority erred because it failed to recognize that the battle over Amendment 2 constituted a "Kulturkampf"[281]—a conflict between civil government and religious authorities.[282] Moreover, the dissent rejected the Court's analysis of Amendment 2 as the "manifestation of a 'bare . . . desire to harm' homosexuals."[283] Rather, the dissent viewed the Amendment as 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."[284]

The dissent strongly disagreed with the Court's position that opposition to homosexuality is tantamount to religious or racial prejudice.[285] The dissent further claimed that the majority lacked the right to condemn and label opposition or "animosity" to homosexuality

277. *Id.* at 1627. The Court reasoned that Amendment 2 restricted protections taken for granted by most people either because they already possessed them or did not need them. *Id.* Moreover, these protections constituted critical measures which defended against exclusion from a large number of transactions and endeavors that occurred in ordinary civic life in a free society. *Id.*

278. *Id.*

279. *See id.*

280. *See generally id.* at 1627-29.

281. *Id.* at 1629 (Scalia, J., dissenting).

282. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 667 (1983).

283. *Romer III*, 116 S. Ct. at 1629 (Scalia J., dissenting).

284. *Id.* (Scalia, J., dissenting). Instead of a mere equal protection issue, the dissent viewed *Romer* as a political battle between a minority that attempted to change society's opinions versus a tolerant majority that desired to maintain the status quo. *Id.* (Scalia, J., dissenting). The dissent also claimed that Colorado enacted Amendment 2 using "unimpeachable" methods validated by both the Court and Congress. *Id.* (Scalia, J., dissenting). According to the dissent, this is why the majority needed to rely mostly on "principles of righteousness rather than judicial holdings" to discredit the Amendment. *Id.* (Scalia, J., dissenting).

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

as evil.[286] According to the dissent, the Constitution never expressly protected homosexual rights, unlike those of other minorities.[287] Consequently, the dissent suggested that the general electorate should determine whether to protect these rights.[288] In its opinion, the dissent stated that the Colorado electorate did not violate the Equal Protection Clause when it enacted Amendment 2.[289]

b. Equal Protection Under Amendment 2

The dissent attacked the majority's rejection of the State's contention that Amendment 2 merely "put[] gays and lesbians in the same position as all other persons" by denying them special rights.[290] Citing to the Colorado Supreme Court's opinion in *Evans II(b)*,[291] the dissent reasoned that "'general laws and policies that prohibit arbitrary discrimination' would continue to prohibit discrimination on the basis of homosexual conduct as well."[292] According to the dissent, therefore, Amendment 2 did, in fact, preclude homosexuals from receiving special treatment.[293]

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

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

288. *Id.* (Scalia, J., dissenting). Justice Scalia commented:

> Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality . . . is evil.

Id. (Scalia, J., dissenting).

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

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

291. *Id.* at 1630 (Scalia, J., dissenting). To support its contention that Amendment 2 will only affect special homosexual protections, the dissent quoted the Colorado Supreme Court from *Evans II(b)* as follows: "'[I]t is significant to note that Colorado law currently proscribes discrimination against persons who are not suspect classes. *Of course Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.*'" *Id.* (Scalia, J., dissenting) (quoting *Evans II(b)*, 882 P.2d at 1346 n.9) (citations omitted) (emphasis added by Justice Scalia).

292. *Id.* (Scalia, J., dissenting). The dissent claimed that the Colorado court's decision noted that the current anti-discriminatory laws would still serve to protect homosexuals. *Id.* (Scalia, J., dissenting). Thus, in Justice Scalia's opinion, Amendment 2 merely prohibited special treatment of homosexuals. *Id.* (Scalia, J., dissenting).

293. *Id.* (Scalia, J., dissenting). For example, according to the dissent, a business must pay homosexuals their pensions, just like every other employee; however, Amendment 2 would prevent the state or any municipality from making death-benefit payments to a "life-partner" of a homosexual since it does not make such payments to the long-time roommate of non-homosexuals. *Id.* (Scalia, J., dissenting). The dissent also stated that homosexuals can purchase the same auto insurance as everyone else, but

Further, the dissent asserted that the majority erred by misconstruing the denial of equal treatment.[294] The dissent claimed that the majority insisted that Amendment 2 denied homosexuals equal treatment because they cannot receive "*preferential* treatment without amending the state constitution."[295] In other words, the dissent alleged that the majority based its opinion on the notion that any law denies a person equal protection if he cannot obtain "*preferential* treatment under the laws" [296] as easily as others even if that person received otherwise equal treatment under the law. [297] Consequently, the dissent asserted that Amendment 2 did not deny equal protection to homosexuals.[298]

Next, the dissent alleged that the majority ignored the fact that a legitimate, rational basis existed for the prohibition of these special protections for homosexuals.[299] In support of its position, the dissent emphasized that the Supreme Court's own decision in *Bowers v. Hardwick*[300] held that the Constitution does not prohibit a state from making homosexual conduct a crime.[301] Hence, the dissent surmised

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neither the state nor any municipality could require an insurance company to ignore the distinctive health risks associated with homosexuality. *Id.* (Scalia, J., dissenting). Moreover, the dissent argued that the majority failed to dispute the dissent's allegation that Amendment 2 will most likely not adversely affect most protections. *Id.* (Scalia, J., dissenting).

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

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

296. *Id.* (Scalia, J., dissenting). Justice Scalia argued that the majority rationale implied that whenever an Act imposed a disadvantage or failed to confer a benefit on a particular group, the Act denied equal protection to that group. *Id.* at 1630-31 (Scalia, J., dissenting). For example, the dissent compared this situation to one where the state passed a law prohibiting nepotism. *Id.* at 1631 (Scalia, J., dissenting). According to the majority's logic, the electorate's vote would deny equal protections to a civil servant's family members since the family members must now persuade the electorate to repeal the law if the family members wish to receive the benefit of city contracts. *Id.* (Scalia, J., dissenting). The dissent rejected this notion as a denial of Equal Protection and referred to the Court's theory as "unheard-of." *Id.* (Scalia, J., dissenting).

297. *Id.* at 1630 (Scalia, J., dissenting). Justice Scalia contended:

> The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation.

Id. (Scalia, J., dissenting).

298. *Id.* at 1631 (Scalia, J., dissenting).

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

300. 478 U.S. 186 (1986). See *supra* text accompanying notes 57-64 for a discussion of *Bowers*.

301. *Romer III*, 116 S. Ct. at 1631 (Scalia, J., dissenting).

that a state, which may criminalize homosexual conduct, can indeed enact laws which merely disfavor it.[302]

The dissent then rejected the argument that *Bowers* did not apply because "a greater-includes-the-lesser" rationale failed to justify Amendment 2's application to people who do not "engage in homosexual acts," but who merely espouse a homosexual "orientation."[303] Relying on *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*,[304] the dissent noted that some courts have held that it is "virtually impossible" to distinguish between people with a particular orientation toward homosexuality from people who engage in homosexual activity.[305] However, even assuming that Amendment 2's reference to a person of homosexual "orientation" means a person who possesses a tendency to, but does not actually engage in, homosexual conduct, the dissent maintained that *Bowers* still established a rational basis for Amendment 2.[306]

After applying *Bowers*, the dissent added that legislation which failed to perfectly define a particular class does not necessarily violate

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302. *Id.* (Scalia, J., dissenting). Scalia stated, "[a]fter all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.* (Scalia, J., dissenting) (quoting Padula v. Webster, 822 F.2d 97, 103 (1987)). See *supra* text accompanying notes 126-33 for a summary of *Padula*. Thus, according to Justice Scalia, it is constitutionally permissible for a state to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct. *Romer III*, 116 S. Ct. at 1631-32 (Scalia, J., dissenting).

303. *Id.* at 1632 (Scalia, J., dissenting).

304. 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2519 (1996). See *supra* text accompanying notes 134-44 for the facts of Equality Found. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995).

305. *Romer III*, 116 S. Ct. at 1632 (Scalia, J., dissenting) (quoting *Equality Found.*, 54 F.3d at 267). Moreover, the dissent commented that the Colorado Supreme Court also noted the difficulty in separating these groups. *Id.* (Scalia, J., dissenting). The dissent quoted the Colorado court as saying that:

> Amendment 2 target[ed] this class of persons based on four characteristics: sexual orientation; conduct; practices; and relationships. Each characteristic provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying *the same class of persons.*

Id. (Scalia, J., dissenting) (quoting *Evans II(b)*, 882 P.2d at 1349-50) (emphasis added by Justice Scalia).

306. *Id.* (Scalia, J., dissenting). Justice Scalia argued that "[i]f it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct." *Id.* (Scalia, J., dissenting).

the Equal Protection Clause.[307] Thus, the dissent contended that the Court incorrectly nullified Amendment 2 merely because the Colorado legislature could have drawn it more precisely to include only those persons with a homosexual "orientation" who actually engaged in homosexual activities.[308]

Even assuming, *arguendo*, that the majority correctly determined that the provision regarding homosexual "orientation" was invalid, the dissent agreed that the respondent's facial challenge nonetheless failed.[309] The dissent emphasized that a facial challenge to a law requires a challenger to demonstrate that the law is not valid under *any* circumstances.[310] Because, in its opinion, *Bowers* established the validity of Amendment 2, the dissent argued that the respondents failed to meet their burden of proof.[311]

c. Amendment 2 as a Valid Exercise of Democratic Principles

The *Romer III* dissent additionally objected to the majority's characterization of the Colorado electorate's "animus"-filled[312]

307. *Id.* (Scalia, J., dissenting). For example, the dissent cited *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (policy barring hiring of methadone users even though some methadone users may not pose a threat to passenger safety), and *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (mandatory police retirement age of 50 does not violate equal protection even though the Act may prematurely end the careers of some competent officers), to demonstrate imperfect classifications that did not violate the Equal Protection Clause. *Romer III*, 116 S. Ct. at 1632 (Scalia, J., dissenting).

308. *Romer III*, 116 S. Ct. at 1632 (Scalia, J., dissenting). The dissent referred to a previous court of appeals opinion in which Justice Kennedy wrote:

> Nearly any statute which classifies people may be irrational as applied in particular cases. Discharge of the particular plaintiffs before us would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals [from the Navy] is rational.

Id. at 1632 (Scalia, J., dissenting) (quoting Beller v. Mittendorf, 632 F.2d 788, 808-09 (9th Cir. 1980)). See *supra* text accompanying notes 118-25 for a discussion of *Beller*.

309. *Romer III*, 116 S. Ct. at 1632 (Scalia, J., dissenting).

310. *Id.* (Scalia, J., dissenting) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

311. *Id.* at 1632-33 (Scalia, J., dissenting). However, the dissent admitted that people who possess a homosexual "orientation," but refuse to engage in homosexual conduct, may present an applied challenge and most likely win. *Id.* at 1633 (Scalia, J., dissenting). In *Romer III*, however, none of the respondents claimed such status. *Id.* (Scalia, J., dissenting).

312. *Id.* (Scalia, J., dissenting). In his dissenting opinion, Justice Scalia referred to the majority's use of the word "animus" as suggesting that the Colorado voters, because they voted in favor of Amendment 2, hated and maintained ill-will towards homosexuals. *Id.* (Scalia, J., dissenting).

rationale in creating Amendment 2.[313] While the dissent acknowledged that, although one person should never hate another, a person may find another's conduct reprehensible.[314] In the present case, the dissent stated that the only "animus" dealt with the "moral disapproval of homosexual conduct."[315]

Further, the dissent suggested that even though Coloradans are entitled to be hostile towards homosexual conduct, Amendment 2 does not actually reflect intense hostility.[316] While Amendment 2 prohibited giving homosexuals favored treatment because of their homosexuality, they could still receive favored treatment for other reasons (i.e., as senior citizens).[317] Additionally, the dissent found it comical that the majority portrayed Coloradans as "hate-filled 'gay-bash[ers],'"[318] considering that Colorado repealed anti-sodomy laws in 1971.[319]

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

314. *Id.* (Scalia, J., dissenting). For example, Justice Scalia observed that most people find murder, polygamy and cruelty to animals as reprehensible conduct that they profess animosity towards. *Id.* (Scalia, J., dissenting).

315. *Id.* (Scalia, J., dissenting). Justice Scalia noted that this "moral disapproval" formed the basis of society's criminal law—the same criminal law that the Court held constitutional in *Bowers*. *Romer III*, 116 S. Ct. at 1633 (Scalia, J., dissenting).. The dissent further refuted the majority's argument by suggesting that certain laws will always disfavor some particular group. *See id.* at 1634 (Scalia, J., dissenting). In addition, certain laws will make special protections for certain types of people difficult to obtain. *See id.* (Scalia, J., dissenting). Justice Scalia listed drug addicts, smokers and gun owners as examples of other groups that face the same type of disfavorable legislation. *Id.* (Scalia, J., dissenting). The dissent mentioned the Eighteenth Amendment's creation of prohibition as an action which left alcohol drinkers with the daunting task of trying to amend the United States Constitution, not merely the Colorado Constitution, to get their privileges returned. *Id.* at 1634-35 (Scalia, J., dissenting).

316. *Id.* at 1633 (Scalia, J., dissenting).

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

318. After chiding the majority for "verbally disparaging as bigotry adherence to traditional attitudes," the dissent then suggested that the Court chose to make the issue a "culture war[ ]" and chose to side with the "knights rather than the villeins." *Id.* at 1637 (Scalia, J., dissenting). The dictionary defines "villein" as: "in essence plebeians, but free men at the time of feudalism—low class and free with respect to all others but feudal lords." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983) at 1315. Furthermore, in its conclusion, the dissent made veiled references to the majority as elitists. *See Romer III*, 116 S. Ct. at 1637 (Scalia, J., dissenting). Justice Scalia wrote that the Court's attitude reflected "the views and values of the lawyer class from which the Court's Members are drawn." *Id.* (Scalia, J., dissenting).

319. *Romer III*, 116 S. Ct. at 1633 (Scalia, J., dissenting) (citing 1971 Colo. Sess. Laws, ch. 121, § 1). This action, however, according to the dissent, does not necessarily stand for the proposition that the general society now approved of homosexuality nor abandoned the view that homosexuality is morally wrong. *Id.* (Scalia, J., dissenting). Rather, for the dissent, the repealing of anti-sodomy laws created many inconsistencies within society. *See id.* at 1633-34 (Scalia, J., dissenting). The dissent alleged that homosexuals reside in disproportionate numbers in certain communities, thus

However, the dissent also reiterated its position that the Supreme Court should allow those same Coloradans the opportunity to enact legislation[320] which espoused a view more in line with their own morality.[321]

To further support its argument, the dissent compared Amendment 2 with laws regulating another sexually and morally divisive issue: polygamy.[322] In particular, the dissent demonstrated the similarities between the socio-political status of homosexuals and polygamists[323]

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establishing a strong power base. *Id.* at 1634 (Scalia, J., dissenting) (citing to Record, Exh. MMM, affidavit of Prof. James Hunter, as proof of homosexual attempts to gain a political power base and pass favorable legislation). With this power, the dissent argued that homosexuals attempted to encourage legislatures to enact many more favorable pieces of legislation and to "move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation." *Id.* (Scalia, J., dissenting) (noting Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 NEB. L. REV. 723, 724 (1993)).

320. Justice Scalia pointed out to the Court that the Colorado electorate validly and democratically chose to support Amendment 2. *Id.* at 1634 (Scalia, J., dissenting). Justice Scalia also commented that he "think[s] it no business of the courts (as opposed to the political branches) to take sides in this culture war. But the Court today has done so." *Id.* at 1637 (Scalia, J., dissenting).

321. *Id.* at 1634 (Scalia, J., dissenting). Justice Scalia stated, "homosexuals are entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well." *Id.* (Scalia, J., dissenting). Though, according to the dissent, Amendment 2 also preserved reasonable, traditional moral American values. *Id.* (Scalia, J., dissenting). While discussing the Court's opinion regarding people who dislike and disapprove of homosexuality, the dissent noted that one might compare the Court's "stern disapproval of 'animosity' towards homosexuality" with an earlier Court decision, *Murphy v. Ramsey*, 114 U.S. 15 (1885), which rejected a constitutional challenge to a statute that disadvantaged polygamous cohabitation. *Romer III*, 116 S. Ct. at 1636 (Scalia, J., dissenting). In *Murphy*, the Court remarked:

> [C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy, 114 U.S. at 45.

322. *Romer III*, 116 S. Ct. at 1635 (Scalia, J., dissenting). Presently, the Constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah contain provisions stating that polygamy is "forever prohibited." *Id.* (Scalia, J., dissenting) (citing ARIZ. CONST. art. XX, par.2; IDAHO CONST. art. I, § 4; N.M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; UTAH CONST. art. III, § 1).

323. *Id.* (Scalia, J., dissenting). According to the dissent, legislatures have singled out polygamists and those who possess a polygamous orientation for much more severe treatment than a mere denial of favored status. *Id.* (Scalia, J., dissenting).

and then reminded the Court that polygamy laws, like Amendment 2, singled out a specific group.[324] The dissent observed that while the Court invalidated Amendment 2, anti-polygamy laws remain constitutional, [325] thus begging the question of whether polygamists possessed less rights than homosexuals.[326] Moreover, Amendment 2 created mild consequences when contrasted with anti-polygamy laws, some of which denied certain individuals fundamental rights.[327] Since *Davis* remains good law in part,[328] the dissent questioned whether the Court had concluded that the social harm of polygamy constituted a legitimate concern of the government, while the perceived social harm

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

325. *Id.* (Scalia, J., dissenting). In addition, the dissent noted that Congress conditioned the admission of Arizona, Utah, and other states into the Union on their inclusion of anti-polygamy provisions in their respective constitutions. *Id.* (Scalia, J., dissenting) (citing Arizona Enabling Act, 36 Stat. 569 (1922); New Mexico Enabling Act, 36 Stat. 558 (1954); Oklahoma Enabling Act, 34 Stat. 269 (1922); Utah Enabling Act, 28 Stat. 108 (1958)). Justice Scalia commented:

> For Arizona, New Mexico, and Utah, moreover, the Enabling Acts required that the antipolygamy provisions be 'irrevocable without the consent of the United States and the people of said State'—so that not only were 'each of [the] parts' of these States not 'open on impartial terms' to polygamists, but even the States as a whole were not; polygamists would have to persuade the whole country to their way of thinking.

Romer III, 116 S. Ct. at 1635 (Scalia, J., dissenting).

326. *Romer III*, 116 S. Ct. at 1635 (Scalia, J., dissenting). The dissent noted that the voters in these states chose to outlaw polygamy. *Id.* (Scalia, J., dissenting). The dissent compared these constitutionally valid, democratic Acts, which banned a particular behavior, to the democratic passage of Amendment 2, which merely eliminated special protections, and failed to understand why the Court in earlier decisions upheld the anti-polygamy laws and now rejected Amendment 2. *Id.* at 1635-36 (Scalia, J., dissenting).

327. *Id.* at 1635 (Scalia, J., dissenting) (citing Davis v. Beason, 133 U.S. 333, 336 (1890) (denying the right to vote), *overruled in part*, *Romer III*, 116 S. Ct. 1620 (1996). The cited excerpt from *Davis* reads as follows:

> In our judgment, § 501 of the Revised Statutes of Idaho Territory, which provides that 'no person . . . who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law . . . is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory,' is not open to any constitutional or legal objection.

Davis, 133 U.S. at 346-47.

328. *Romer III*, 116 S. Ct. at 1636 (Scalia, J., dissenting) (noting that the Court cited a part of the *Davis* holding with approval in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 535 (1993)).

of homosexuality did not.[329] Thus, according to the dissent, while Congress still refuses to grant homosexuals suspect class protection, the Court essentially did so by rejecting Amendment 2.[330]

IV. ANALYSIS

Romer v. Evans established landmark precedent.[331] Yet the Supreme Court wrote an ambiguous decision which lacked legal support and failed to explicitly settle the homosexual class status question.[332] Furthermore, the dissent, given the opportunity to highlight the weaknesses in the majority opinion, neglected to focus on the majority's improper rationale.[333] Instead, the dissent drafted its own version of the *Romer III* issue and based its argument on principles of Justice Scalia's social conscience mixed with a modicum of legal precedent.[334] Although the majority correctly held that Amendment 2 violated the Equal Protection Clause, it irresponsibly avoided deciding the issue according to traditional Constitutional analysis.[335] The Court should have decided *Romer III* under the Equal Protection Clause by either pronouncing homosexuals a suspect or quasi-suspect class, or by enunciating a fundamental right to participate equally in the political process. Either solution would have created a demonstrative opinion that established unequivocal precedent, rather than the weakly supported holding which merely recycled tired rhetoric.

A. The Fundamental Rights Approach

While the Court made interesting arguments in *Romer III*, its argument lacked the legal precedent to unequivocally establish its decision.[336] Even though *Romer III* is, for the most part, a case of

329. *Romer III*, 116 S. Ct. at 1636 (Scalia, J., dissenting).

330. *Id.* at 1637 (Scalia, J., dissenting) (citing Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994); Civil Rights Amendments of 1975, H.R. 5452, 94th Cong. (1975); Americans With Disabilities Act of 1990, 42 U.S.C. § 12211(a) (1988 Supp. V)).

331. See *infra* Part V for a discussion of the impact of the *Romer III* decision.

332. *See Romer III*, 116 S. Ct. at 1629 (Scalia, J. dissenting) (noting the majority's "heavy reliance upon principles of righteousness rather than judicial holdings").

333. See *supra* Part III.D for a discussion of the *Romer III* opinion.

334. See *supra* Part III.D for a discussion of the *Romer III* opinion.

335. See *supra* Part III.D for a discussion of the *Romer III* opinion.

336. See generally *Romer III*, 116 S. Ct. at 1620-29, for the majority opinion and an illustration of the lack of substantial discussion of legal precedent to support the opinion. Excluding the Colorado Supreme Court opinions (from which the majority noted that it proposed a different rationale), the majority never relied on one case for more than a parenthetical or short sentence. *See id.* Moreover, the most substantial

"first impression,"[337] the Court's opinion still lacked decisiveness and absolute clarity.[338] For example, the United States Supreme Court, without any explanation, rejected the Colorado Supreme Court's strict scrutiny standard[339] and instead chose the rational relations standard, which traditionally governs gay rights cases.[340] Moreover, the Court never fully articulated why it rejected the idea of treating homosexuals as a suspect or quasi-suspect class and why it refused to follow the Colorado court and decide the case in terms of a fundamental right to participate in the political process.[341]

The Supreme Court, perhaps, wished to avoid expressly confirming the fundamental right that the Colorado Supreme Court had

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case discussion occurred when the majority refuted *Davis*, a case upon which the dissent heavily relied. *Id.* at 1628.

337. *See* Batterman, *supra* note 188, at 978 (intimating that *Romer III* is a case of first impression before the Supreme Court in this area of gay rights). But see *Bowers v. Hardwick*, 478 U.S. 186 (1986), for a case that went before the Supreme Court on the legality of homosexual conduct. See *supra* text accompanying notes 55-64 for a discussion of *Bowers*.

338. David A. Kaplan & Daniel Klaidman, *A Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24. The authors characterized Justice Kennedy's majority opinion as "emotional and grand." *Id.* The opinion, according to Kaplan and Klaidman, read like "a political manifesto [rather] than a piece of judicial reasoning." *Id.*

339. *Romer III*, 116 S. Ct. at 1624. In *Evans I(b)*, the Colorado Supreme Court commented that the Equal Protection Clause applies to all citizens, not just those considered suspect classes like racial or ethnic minorities. *Evans I(b)*, 854 P.2d at 1275 (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)). Also, the court recognized the fundamental right to participate equally in the political process. *Id.* at 1276-77 (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972)). In short, the Colorado Supreme Court asserted that "Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause." *Id.* at 1286. See *supra* text accompanying notes 203-29 for a comprehensive analysis of *Evans I(b)*.

340. *Romer III*, 116 S. Ct. at 1627. *See supra* text accompanying notes 68-112. See also *supra* text accompanying notes 113-44 for an examination of gay rights cases and the courts' treatment of homosexuals; see *infra* note 435 for a discussion of the Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996).

341. *See generally Romer III*, 116 S. Ct. at 1624-29 (the Court noted that it affirmed the Colorado Supreme Court decision (that Amendment 2 violated the Equal Protection Clause) but on different grounds, and simply argued that the legislative classification bore no rational relation to an independent and legitimate legislative end). *See infra* notes 354 and 357.

recognized.[342] Yet, by all implication, it did just that.[343] The Court seemed to recognize that homosexuals lost voting power because Amendment 2 limited their ability to enact favorable legislation.[344] Amendment 2, according to the Supreme Court, prevented homosexuals from seeking the same protections others pursued without constraint.[345] Furthermore, the Court stated that Amendment 2 "identif[ied] persons by a single trait and den[ied] them protection across the board."[346] Therefore, the Court could have followed the Colorado Supreme Court[347] and applied its own decision in *Kramer v. Union Free School District No. 15*[348] to substantiate its opinion in

342. *Evans I(b)*, 854 P.2d at 1282. After a lengthy discussion of many cases, the Colorado Supreme Court expressly concluded that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Id.*

343. *See Romer III*, 116 S. Ct. at 1627-28; *see infra* note 357.

344. *Romer III*, 116 S. Ct. at 1627-28. In its decision, the Court specifically accepted the Colorado Court's interpretation of the Amendment: "We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court." *Id.* at 1624. As additional evidence of Amendment 2's negative impact on homosexual voting power, the Court noted that Amendment 2 prohibited homosexuals in Colorado from obtaining any special protections, whereas the law hindered no other group in this manner. *Id.* at 1627. Furthermore, the Court apparently adopted the Colorado Supreme Court's determination about Amendment 2's overall effect since it quoted directly from the Colorado court's conclusion. *Id.* at 1625. The Colorado Supreme Court held: "The 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Id.* (quoting *Evans I(b)*, 854 P.2d at 1285).

In addition, the Supreme Court should have applied a case like *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) (discussing and overruling legislation which limited candidates from getting on the ballot). See *supra* text accompanying notes 162-68 for an expanded summary of *Williams*. In the case of Amendment 2, for example, an opponent may run anti-gay ads which lack any relation to the campaign, but may serve to scare the public. A gay candidate lacks any recourse in that situation under Amendment 2 and such ads would effectively bar the candidate.

See *supra* text accompanying notes 169-75 for a discussion of *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (instructing that, in the context of political subdivisions and voting districts, "[t]he vote of any citizen is approximately equal in weight to that of any other citizen in the State"). Again, the *Reynolds* Court's holding appears to substantiate the Supreme Court's assertion that Amendment 2 failed the rational relations test since it limited homosexual voting power to enact favorable legislation.

345. *See Romer III*, 116 S. Ct. at 1626-27. See *supra* text accompanying notes 149-55 for a discussion of *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969) (holding that the strict scrutiny test should apply to legislation that effectively limits a group's ability to participate in governmental affairs).

346. *Romer III*, 116 S. Ct. at 1628.

347. *Evans I(b)*, 854 P.2d at 1285 (citing *Kramer*, 395 U.S. at 627).

348. 395 U.S. 621 (1969).

Romer III. In *Kramer*, the Court ruled that the strict scrutiny test applies to legislation which effectively limits a group's ability to participate in government.[349] In *Romer III*, the Court drew that same, specific conclusion, but chose not to support it with *Kramer*.[350]

Additionally, the Supreme Court should have followed another Colorado Supreme Court argument by applying *Hunter v. Erickson*[351] to emphasize that laws which disadvantage any group by limiting their power to enact legislation are unconstitutional under the Equal Protection Clause.[352] Although it did not specifically mention the *Hunter* case, the United States Supreme Court did cite most of the cases upon which the Colorado Supreme Court based its interpretation of Amendment 2.[353] Therefore, the United States Supreme Court essentially used *Hunter* and the other Colorado Supreme Court citations to help render its decision, but the Court stopped short of establishing the same fundamental right of homosexuals to participate equally in the political process.[354]

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349. *Id.* at 626.

350. *Romer III*, 116 S. Ct. at 1627-28.

351. 393 U.S. 385 (1969).

352. *See Evans I(b)*, 854 P.2d at 1279-82.

353. *Romer III*, 116 S. Ct. at 1624.

354. The Colorado court firmly established the right to participate equally in the political process. *Evans I(b)*, 854 P.2d at 1282. Moreover, the Supreme Court never rejected the Colorado Supreme Court's interpretation of the three main United States Supreme Court cases that the Colorado court used: *Hunter v. Erickson*, 393 U.S. 385 (1969), *Gordon v. Lance*, 403 U.S. 1 (1971), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). This implicitly suggests either that (1) the Supreme Court agreed with the interpretation generally, but did not agree with it for this particular case, or (2) the Supreme Court rejected the Colorado Supreme Court's interpretation and applied its own. In either case, the Court never clearly stated its rationale and left open the door for speculation and extrapolation. *But see Evans I(b)*, 854 P.2d at 1301 (Erickson, J., dissenting). Justice Erickson, the lone dissenter on the Colorado Supreme Court, disagreed with the Colorado Supreme Court by suggesting that the majority exercise caution in how it assessed "new fundamental rights" that, in his opinion, the United States Supreme Court had not yet recognized. *Id.* (Erickson, J., dissenting). Justice Erickson wrote:

> At some point in the future, the Supreme Court may agree with the majority's underlying legal premise and identify such an expansive fundamental right to participate equally in the political process. Such a substantive due process decision would most likely conduct an analysis similar to previous Supreme Court decisions and address the importance of the right, relevant Constitutional provisions, the history and traditions of our country, and whether the right is implicit in the concept of ordered liberty. The fact that such analysis is not present in the Supreme Court precedent cited by the majority cautions against the recognition of such a fundamental right.

Evans I(b), 854 P.2d at 1301 (Erickson, J., dissenting). By following this logic, the Court could have announced a strong decision, and done so while still avoiding expressly establishing homosexuals as a suspect class, something that the Court

B. The Suspect or Quasi-Suspect Class Analysis: A Definitive Conclusion, but Politically and Socially Distasteful

Just as the Court avoided explicitly establishing a fundamental right to participate in the political process, it likewise avoided defining homosexuals as a suspect class.[355] Moreover, the *Romer III* Court sent a mixed signal by applying the traditionally weak rational basis[356] test in such a stringent manner, yet, at the same time, refusing to expressly advance gay rights.[357] Perhaps the Court believed that Congress designed the Equal Protection Clause to eliminate racial discrimination[358] and "'only those classifications that are like race in some relevant sense can responsibly be accorded similar treatment.'"[359] The Petitioners also contended that the Court should

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apparently wants to do. *See* Kenton, *supra* note 114, at 888-89 (illustrating the Court's reluctance to examine the issue of homosexuals as a suspect class).

355. *See Romer III*, 116 S. Ct. at 1626-29.

356. See *supra* text accompanying notes 76-85 for an explanation of the rational basis standard. *See generally* Marcia Coyle, *Court: 'Animus' in Colo. Gay Law*, NAT'L L.J., June 3, 1996, at A11 (noting that *Romer* may reinvigorate the rational basis standard for scrutiny).

357. The Court applied a rational relations test to Amendment 2. *Romer III*, 116 S. Ct. at 1627. By applying the traditional test, the Court did not alter homosexuals' standing in regard to suspect class analysis. See *supra* text accompanying notes 113-76 for an examination of the legal system's traditional treatment of gay rights cases. However, with this decision, the Court unequivocally established that Amendment 2 violated the Constitution. *Id.* at 1629. Thus, the Court seemingly upheld the constitutionality of gay-rights legislation (unless a state can demonstrate that an Act similar to Amendment 2 possesses a rational relation to a legitimate state interest), but apparently chose not to make any other explicit decisions regarding gay rights. *Id.* at 1627.

358. *See* Duncan & Young, *supra* note 69, at 101 (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873)).

359. *Id.* (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 149 (1980) to demonstrate that the Supreme Court viewed race as the main requirement for suspect class treatment). In addition, many anti-gay advocates harbor the notion that the Equal Protection Clause should only act against race-related classifications. See, for example, Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33, 47-48 (1994), containing a discussion of a video entitled *The Gay Agenda*. In the video, David Llewellyn, president of the Western Center for Law and Religious Freedom, sets forth the proposition that gays fail to constitute a legitimate minority deserving of protection. *Id.* at 48. Instead, according to Llewellyn, homosexuals consist of privileged and powerful people with far more money and opportunities than either racial minorities or poor whites. *Id.*

Some chilling examples of behavior since Amendment 2's passage have arisen and include the following: A women's book store in Denver received a number of anonymous phone threats, including, "you queer dyke bitches!" Ned Zeman & Michael Meyer, *No 'Special Rights' for Gays*, NEWSWEEK, Nov. 23, 1992, at 32. A person called into the Denver Gay and Lesbian Community Center with a bomb threat, "We're going to blow up your f____ building." *Id.* Someone vandalized a classroom in the Denver

have ignored any argument in favor of homosexuals as a suspect class since they failed to meet the traditional suspect class requirements.[360] However, even though the Court refuted the Petitioner's argument,[361] it did not suggest that homosexuals should receive suspect status, but rather, merely noted that Amendment 2 did not rationally relate to a valid state interest.[362] Essentially, the majority tip-toed around the suspect class issue by constantly suggesting that Amendment 2 withholds special protections from a particular, named group.[363] Further, the Court neglected to discuss its refusal to explore the suspect class analysis,[364] even though it applied the rational relations test in an almost strict scrutiny fashion.[365] As a result, the lower

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Center for Performing Arts and scrawled on the blackboard, "FAGGOTS GET OUT OF THE ARTS." *Id.* Moreover, vandals knocked a Colorado Springs psychotherapist unconscious after she placed a bumper sticker on her car that read "Celebrate Diversity," and they then spray painted her office with the words "Stop Evil" and "Seek God." Paul McEnroe, *Violence is Apparent Fallout of Colorado Law on Gays*, STAR TRIB., Jan. 25, 1993, at 1A.

360. Petitioner's Brief, Romer v. Evans, No. 94-1039, 1995 WL 310026, at *16. *But see* Russell, *supra* note 359, at 49. Russell chastised the State's argument characterizing gay, lesbian and bisexual rights as non-comparable to traditional minority and women right's issues and therefore inferior. *Id.* In this vein, Russell, commenting on the trial court in *Evans I(b)*, suggested that "the trial court might have rejected the "factionalism" argument . . . by stating unequivocally that the eradication of sexual-orientation discrimination—like the elimination of racial bias—is an equality principle so important that it cannot be bargained away in the legislative/initiative process, because a majority of voters happen to consider it too 'divisive' and 'political.'" *Id.* at 64.

361. *Romer III*, 116 S. Ct. at 1629.

362. *Id.*

363. See *id.* at 1624-28 for an example of how the majority consistently refers to homosexuals.

364. The Court's reason to ignore this analysis is unclear, but politics possibly played a large role. Generally, it is true that a Justice who does not feel strongly about the matter before the Court will acquiesce to the other Justices to later accomplish his or her own specific goals. *See* PHILIP J. COOPER, BATTLES ON THE BENCH 153-56 (1995). According to Cooper, "[e]ven the most petulant person who comes to the Court must understand certain realities that govern his or her professional and, to some extent, personal life. First, for most of the things a justice wishes to accomplish, four additional votes are needed." *Id.* at 153. In *Romer III*, therefore, to garner the votes to strike down Amendment 2, the Court members who felt strongly about the decision possibly watered down the opinion to appease the various majority Justices and get their approval, as the Court has done in the past. *Id.* Thus, the majority opinion may not have addressed the suspect class issue directly because of this political gamesmanship. However, since no one save the Court can substantiate such speculation, this is pure conjecture.

365. *See generally* Thomas L. Jipping, *The Politically, not Judicially, Correct Court*, WASH. TIMES, May 23, 1996, at A17 (suggesting that Justice Kennedy employed a much higher standard to review Amendment 2 than mere rational relations).

courts may ultimately alter the homosexual status question through their own interpretation of *Romer III*.[366]

C. *The Dissenting Opinion*

1. Quick to Condemn, Yet Guilty of the Same

The majority won a battle for gay rights by rejecting an Amendment that voided gay-rights protections,[367] but chose not to identify any fundamental rights and failed to substantially support its opinion.[368] In contrast, the dissent's argument,[369] on its face, resounded powerfully against the sometimes ambiguous majority decision. [370] Justice Scalia wrote the dissent, joined by Chief Justice Rehnquist and Justice Thomas.[371] This vigorous and clearly focused opinion overshadowed

366. Joan Biskupic, *Court Declares Gays Not Legally Different*, WASH. POST, May 22, 1996, at A1 (noting that later courts will eventually decide *Romer's* actual effect on other homosexual issues).

367. Jill Lawrence, *Gay Issue Sizzles in the Senate: Kennedy Leads the Charge After House Ok's Defense of Marriage Act*, USA TODAY, July 15, 1996, at A4.

368. See *supra* text accompanying notes 331-66 for a critique of the majority opinion.

369. Scholars have always recognized the significance of dissenting opinions. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954). Justice Harlan's dissent stated that the "Constitution . . . neither knows nor tolerates classes among citizens." *Id.* at 559. This dissent became the springboard for many of the Civil Rights actions. DONALD E. LIVELY, FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT, at xxi (1992). Specifically, Lively noted that "[b]y the middle of the twentieth century, as the Court eliminated segregation of public schools and other contexts, Harlan's originally repudiated notions prevailed." *Id.*

370. In cases of great proportion, the dissent often serves as a harbinger of the future. *See* ALAN BARTH, PROPHETS WITH HONOR 7 (1974). Barth noted that many dissents merely convey the dissenter's oftentimes "aberrant view arising out of an individual justice's prejudices—or out of what [Justice] Hughes called 'cantankerousness.'" *Id.* Specifically, Barth cited Justice McReynolds' comment about a New York milk control board setting milk prices. *Id.* McReynolds disagreed with the majority by asserting that "'to adopt such a view, of course, would put an end to liberty under the Constitution.'" *Id.* Though acknowledging the "folly" in dissents, Barth also claimed that at times the dissenters illuminated the future "by their discernment and understanding." *Id.* at 8. According to Barth, the "[d]issent has played a seminal role in the functioning of the Supreme Court." *Id. See* Griswold v. Connecticut., 381 U.S. 479 (1965) (Black, J., dissenting) (stating that the Constitution never specifically guaranteed a right to privacy).

371. This fact indicates that Justice Scalia most likely felt strongly about the issue and probably put forth a great effort to capture the opportunity to write the opinion since Justices often battle with one another for this honor. *See, e.g.*, Beverly Blair Cook, *Justice Brennan and the Institutionalization of the Dissent Assignment*, 79 JUDICATURE 17 (1995). Cook underscored the importance of a dissenting opinion. *Id.* at 23. A well-written dissent may serve to change the majority opinion and force them to rethink or defend their current position. *Id.* Also, politicians involved in the judicial

the majority in several ways.[372] The majority did not apply much substantial precedent,[373] nor did it clearly announce a definitive holding,[374] though the dissent bolstered its cutting argument[375] with a few Supreme Court decisions.[376] However, the dissent never truly focused on the main issue either.[377] For example, while the majority tip-toed around the suspect-class analysis,[378] the dissent ignored the equal protection and fundamental rights issues altogether.[379]

Instead of focusing on traditional equal protection/fundamental rights analyses, the dissent saw fit to argue its own issues. These arguments ranged from a religious battle,[380] to criminalizing homosexuality,[381] to comparing Amendment 2's discriminatory effect

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appointment process will look upon the dissents to help alter the Court's doctrine by substituting a new justice who may share the minority's view to reshape the majority. *Id.* Generally, the ranking dissenter (the most senior Justice) will assign the writing and most often, the assignee will cordially accept. *Id.* at 22. In many instances, however, the senior will himself take the most interesting topics. *Id.* at 21.

Cook recognized Justice Brennan as the Justice who most influenced the institutionalization of the dissenting opinion. *Id.* at 17. She noted that Brennan would try to equitably assign the opinions, but as the ranking member, took many of the best for himself. *Id.* at 21. Thus, the fact that Justice Scalia wrote this opinion may suggest that Justice Scalia had some particular interest in the case.

372. *See generally* Mona Charen, *Gay Rights Ruling Shows Legislative Side of High Court's Majority*, FRESNO BEE, May 28, 1996, at B5. Charen staunchly supported the dissent and commented that "Justice Scalia . . . not only points out the *Bowers* problem but goes further to demolish every aspect of the majority opinion." *Id.*

373. David Wagner, *Supreme Court Again Blurs Distinction Between Politics, Law*, CINCINNATI POST, June 27, 1996, at 20A. Wagner claimed that the majority essentially ignored and failed to establish clear legal precedent decision. *Id.*

374. *See supra* Part IV.A; *see also supra* Part IV.B and *infra* Part V (discussing the somewhat ambiguous majority decision).

375. Justice Scalia asserted, "[t]oday's opinion has no foundation in American constitutional law, and barely pretends to." *Romer III*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

376. See *id.* at 1629-37 (Scalia, J., dissenting) for the cases the dissent employed.

377. *See infra* text accompanying notes 411-14.

378. See *supra* text accompanying notes 355-66 for a discussion regarding the majority's avoidance of the suspect-class issue.

379. *See Romer III*, 116 S. Ct. at 1629-37 (Scalia, J., dissenting) (ignoring the Equal Protection issue for the most part).

380. *Id.* at 1629 (Scalia, J., dissenting) (comparing *Romer III* to a "Kulturkampf"). For a comprehensive discussion of the term "Kulturkampf" in the context of today's political climate and the *Romer* decision, see Jeremy Rabkin, *A Supreme Court in the Culture Wars*, PUB. INT., Sept. 1, 1996, at 3.

381. *Romer III*, 116 S. Ct. at 1631-33 (Scalia, J., dissenting) (applying Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld a criminal statute, to the *Romer III* case, which examines a discriminatory Amendment).

with polygamy statutes.[382] Also, the dissent chided the majority for failing to support its decision with legal precedent[383] and for its "heavy reliance upon principles of righteousness rather than judicial holdings";[384] yet, the dissent only cited distinguishable cases[385] and

382. *Id.* at 1635-36 (Scalia, J., dissenting) (comparing Davis v. Beason, 133 U.S. 333 (1890), *rev'd in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969), in which the Court upheld the criminalization of polygamy, to Amendment 2)).

383. *See, e.g.*, *Romer III*, 116 S. Ct. at 1629-37 (Scalia, J., dissenting). Justice Scalia, at the beginning of section II of his argument commented, "I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals." *Id.* at 1631 (Scalia, J., dissenting). He then proceeded to consider the *Bowers* case in detail as well as to suggest that *Bowers* established a rational basis for Amendment 2. *Id.* at 1631-32 (Scalia, J., dissenting). Moreover, Justice Scalia offered string cites and brief holdings from a few other similar cases like *Beller v. Middendorf*, 632 F.2d 788 (1980), and *Ben-Shalom v. Marsh*, 881 F.2d 454 (1989), to support his point. *Id.* at 1632 (Scalia, J., dissenting).

However, Justice Scalia then began his next section by stating that, "[t]he foregoing suffices to establish what the Court's failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here." *Id.* at 1633 (Scalia, J., dissenting). This statement embraces the same error the dissent claimed the majority made—the statement lacked precedential support. The cases the Justice cited all related to *Bowers* and accurately showed that the Constitution may recognize laws that criminalize homosexuality. Thus, based on this premise, Colorado may have possessed a rational relation to pass such a law. However, the Court rejected Amendment 2 because it did not find that the State supported the Amendment with a rational state interest—*i.e.*, the Amendment failed the test. Clearly, in the last 200 years, some legislation has failed a rational relations test.

In addition, Justice Scalia ignored the fact that little precedent directly on point exists concerning legislation that discriminates against homosexuals. In other words, *Romer* constituted a case of precedent-setting, first-impression for the Supreme Court. *See* Batterman, *supra* note 188, at 979 (noting that *Romer III* constitutes a case of first impression for the United States Supreme Court). Therefore little direct precedent existed on the issue prior to this decision. The other cases Justice Scalia cited, such as *Beller* and *Ben-Shalom*, relate to military policies, not public legislation.

384. *Romer III*, 116 S. Ct. at 1629. (Scalia, J., dissenting). Justice Scalia, by beginning the argument comparing a legal battle to a religious conflict, appears to recognize much of the rhetoric-filled claims by the conservative Christian organization CFV. For example, CFV asserted in its campaign propaganda that homosexuals caused or committed the majority of child molestations. Grauerholz, *supra* note 1, at 848 n.53 (citing Dr. Paul Cameron, *Child Molestation and Homosexuality* para. 17 (monograph, Family Research Institute 1993)). *But see* Associated Press, *Study Disputes Claim on Homosexual Abuse*, N.Y. TIMES, July 12, 1994, at A14 (discussing a study that concluded "[o]penly gay adults are no more likely than heterosexual adults to molest children"); *see also* Charlene L. Smith, *Undo Two: An Essay Regarding Colorado's Anti-Lesbian and Gay Amendment 2*, 32 WASHBURN L.J. 367, 372-73 (1993) (discussing statistics that refute the belief that gay men molest children); *Baehr v. Miike*, No. 91-1294, 1996 WL 694235, at *17 (Haw. Cir. Ct. Dec. 3, 1996). The *Baehr* court discussed evidence presented by the parties that established that the "most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between the parent and the child." *Id.* Specifically, the quality of care-giving and the

meaningless historical references for support.[386] Thus, the dissent pinpointed the flaws in the majority's opinion, yet failed to recognize the shortcomings in its own opinion.[387]

Justice Scalia extensively relied on *Bowers v. Hardwick*[388] and *Davis v. Beason*,[389] even though the Court partially overruled *Davis* in a later decision.[390] Justice Scalia used *Bowers* to demonstrate that Amendment 2 possessed a legitimate rational relation to protecting a public interest.[391] But, Colorado does not criminalize sodomy[392] and as Respondent's brief stated:

> [E]ven if an interest in preserving traditional sexual morality can justify state laws that actually regulate sexual conduct, such an interest cannot justify [Amendment 2's] blanket authorization of all discrimination against a class of people, even discrimination in contexts that are unrelated to sexuality or sexual conduct.[393]

Moreover, a moral precept that serves to disguise antipathy toward one group cannot justify discrimination even if safeguarding "traditional

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sensitivity given to the child constitute the most significant factors in child development. *Id.* The parents' sexual orientation, in and of itself, does not indicate parental fitness. *Id.*

385. *Romer III*, 116 S. Ct. at 1629-37 (Scalia, J. dissenting). For the most part, Justice Scalia relied on *Evans I(b)* and *II(b)*, *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Davis v. Beason*, 133 U.S. 333 (1890), *rev'd in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

386. See *infra* text accompanying notes 388-410 for a discussion of the dissent's history-based argument.

387. Charles Levendosky, *Scorn in the Place of Law; Justice Scalia's Dissent Elevated Spleen Over Constitutional Principle; The Supreme Court and Gay Rights*, BALT. SUN, June 2, 1996, at 6F. Levendosky noted that Scalia's hatred for homosexuals blinded him to the constitutional principles at hand. *Id.* According to the author, "He [Scalia] may be a brilliant scholar, but when he loses and takes it personally, Scalia-the-justice reacts with a narrowing tunnel vision. No light breaks through at the end." *Id.*

388. 478 U.S. 186 (1986).

389. 133 U.S. 333 (1890), *rev'd in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

390. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969). See *supra* text accompanying notes 46-54 for a discussion of *Brandenburg*.

391. *Romer III*, 116 S. Ct. at 1631 (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.").

392. *Id.* at 1633 (Scalia, J., dissenting) ("Colorado not only is one of the 25 States that have repealed their anti-sodomy laws, but was among the first to do so." (citing 1971 Colo. Sess. Laws 121, § 1)).

393. Respondent's Brief, at *45 n.32, *Romer III*, No. 94-1039, 1995 WL 417786. *But see* Charen, *supra* note 372, at B5 (arguing that the majority improperly ignored *Bowers* since the standards of jurisprudence require the Court to distinguish similar cases with converse holdings).

morals" constitutes a legitimate purpose.[394] If bare antipathy towards a group justified legislation which discriminated against that group, then that legislation would virtually render the requirements of the Equal Protection Clause meaningless.[395] Justice Scalia seemingly ignored these notions and failed to cite precedent to dispute these ideas.

Instead, he consistently focused on the conduct of homosexuality as morally bereft.[396] The Court, however, did not examine a law qualifying homosexuality as scandalous or illicit behavior.[397] Rather, the Court rejected a law that discriminated against a recognized group of individuals that the legislation identified through conduct.[398]

Justice Scalia attempted to tie criminal activity to homosexuality by suggesting that, because the Constitution allows the state to criminalize such conduct,[399] the Court should substantiate legislation which negatively demarcates people who engage in it.[400] This logic

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394. Respondent's Brief, at *45 n.32, *Romer III*, No. 94-1039, 1995 WL 417786 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447 (1985); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). *See also* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 26-27, 66-67, 92, 160 (Rutgers Univ. Press 1988) (quoting some Americans who characterized Irish, Catholics and Jews as inherently morally deficient).

395. Respondent's Brief, at *37, *Romer III*, No. 94-1039, 1995 WL 417786 (arguing that "if the 'rational basis' test has any content whatsoever, it cannot permit discrimination solely for discrimination's sake"). But see Bettelheim & Booth, *infra* note 441, at A1 for University of Colorado law professor Robert Nagel's comment that the majority wrote a suprisingly blunt and political decision that too curtly dismissed the moral debate over homosexuality as a non-issue.

396. *Romer III*, 116 S. Ct. at 1629-37 (Scalia, J., dissenting). The dissent noted:

> But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced centuries-old criminal laws that we held constitutional in *Bowers*.

Id. at 1633 (Scalia, J., dissenting).

397. The Colorado Supreme Court recognized this and suggested that "[t]he fact that there is no constitutionally recognized right to engage in homosexual sodomy is irrelevant." *Evans II(b)*, 882 P.2d at 1350 (noting Bowers v. Hardwick, 478 U.S. 186 (1986)).

398. See *supra* note 11 for Colorado Constitutional Amendment 2. Clearly, the Amendment did not mean to criminalize conduct. As the majority noted:

> [W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.

Romer III, 116 S. Ct. at 1626-27.

399. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

400. *Romer III*, 116 S. Ct. at 1631 (Scalia, J., dissenting) ("If it is constitutionally

misidentified the issue.[401] Colorado chose not to criminalize such activity and thus Amendment 2 violated the very tenets of the Equal Protection Clause.[402] Justice Scalia suggested that one could consider certain conduct, criminal or otherwise, reprehensible and even exhibit animus toward it.[403] Yet, the only type of conduct the dissent compared to homosexuality, murder, carries a criminal penalty in all states.[404]

In addition, Justice Scalia's historical references to long-held traditions concerning homosexuality failed to necessarily impute validity and merit to those ideas.[405] Justice Scalia's allusions to well-chronicled bias and antagonism against homosexuals[406] did not justify a discriminatory legislative amendment. Merely noting that it has always been this way[407] does not make the belief correct.[408] Thus,

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permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.") (emphasis added)

401. See Levendosky, *supra* note 387, at 6F, for a characterization of Justice Scalia's dissent as blind to the constitutional issues due to his dislike for homosexuals.

402. See *supra* text accompanying note 68 for Amendment XIV of the United States Constitution. Thus, Amendment 2 violates the Equal Protection Clause since it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination and it forbids reinstatement of these laws and policies." *Romer III*, 116 S. Ct. at 1625. Colorado did not criminalize homosexual conduct although the Constitution allows criminalization of such conduct. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194 (1986). Consequently, even in the face of *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974) (upholding the proposition that a legislature may deny a convicted felon the right to vote), the legislature in Colorado may not deprive homosexuals of any rights guaranteed to non-felony citizens.

403. *Romer III*, 116 S. Ct. at 1633 (Scalia, J., dissenting).

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

405. *See* Loving v. Virginia, 388 U.S. 1 (1967) (holding that the historic miscegenation laws are unconstitutional); *see also* James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993) (comparing *Loving v. Virginia*, 388 U.S. 1 (1967), and miscegenation to same-sex marriages and noting how long-held traditions do not always indicate correctness); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (comparing prohibitions on same-sex marriage to anti-miscegenation laws); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term - Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 94-95 (1994) (comparing Bowers v. Hardwick, 478 U.S. 186 (1986) with Plessy v. Ferguson, 163 U.S. 537 (1896) and suggesting *Bowers* embodied "segregationist" caste distinctions similar to those applied in *Plessy*); Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996) (showing that gay marriages do not harm a child's development in contrast to the State's position and historical beliefs).

406. *Romer III*, 116 S. Ct. at 1633 (Scalia, J., dissenting).

407. *Id.* (Scalia, J., dissenting) ("Surely that is the only sort of 'animus' at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*."). But see Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing Roe v. Wade, 410 U.S. 113, 117 (1973)), for the proposition that traditional views do

Justice Scalia criticized the majority for rhetoric and a lack of precedent.[409] Yet, much of his argument employed similar tactics[410] and, additionally, failed to focus on the actual Equal Protection Clause issue.

2. Misplaced Fears Concerns Over Amendment 2's Results

Throughout the dissent, Justice Scalia suggested that Amendment 2 merely retracted "special rights" from homosexuals[411] and that homosexuals did not deserve the same protections as other minority groups.[412] In his argument, Justice Scalia failed to adequately address the fact that the majority did not claim that Amendment 2 took away "special rights," but instead took away rights that every citizen enjoyed.[413] In addition, the dissent's steadfast objection to any

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not necessarily mean accurate laws).

408. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 489-90 (1954) (noting that while education for blacks was "non-existent" at the time the Fourteenth Amendment was passed, this does not "resolve the problem" of whether forced segregation of public schools violates the amendment), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that a state may provide "separate but equal" accommodations for blacks and whites without violating the Fourteenth Amendment).

409. See *supra* note 383 for Justice Scalia's criticism of the majority's failure to cite precedent to support its argument. *See generally* Charen, *supra* note 372, at B5. Charen contends that the Court legislated the *Romer III* decision, rather than base its holding on solid legal principles. *Id.* Charen also chided the Court for basing its interpretation of the law on the changing "climate of opinion" instead of maintaining objectivity. *Id.*

410. See Levendosky, *supra* note 387, at 6F, for a discussion of Justice Scalia's failure to use constitutional principles to guide his opinion.

411. *Romer III*, 116 S. Ct. at 1630 (Scalia, J., dissenting). Justice Scalia argues that:

> The only denial of equal treatment [the plaintiffs] contend[ ] homosexuals have suffered is this: They may not obtain *preferential* treatment without amending the state constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws.

Id. (Scalia, J., dissenting).

412. *See id.* at 1634 (Scalia, J., dissenting). Justice Scalia discussed the legislative success homosexuals enjoyed by getting certain Colorado municipalities to enact protective measures. *Id.* (Scalia, J., dissenting). These measures, Justice Scalia noted, equated moral disapproval of homosexual conduct with racial and religious bigotry. *Id.* (Scalia, J., dissenting).

413. *See id.* at 1625-26 (Scalia, J., dissenting). *See also* Respondent's Brief, *Romer III*, No. 94-1039, 1995 WL 417786 at *14. The attorneys for the plaintiffs alleged:

> Amendment 2 is unique in having such a discriminatory purpose and effect. Indeed, the State cannot cite a single other constitutional provision which, like Amendment 2, targets one group of people and excludes this group alone from obtaining anti-discrimination protection from ordinary legislative, administrative and judicial forums to which everyone else may freely appeal. . . .
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> . . . .

favorable comparison between traditional minority rights and those rights that homosexuals attempted to secure detracted from its contentions.[414] This argument confused the issue by trying to compare homosexuals and traditional minorities. Thus, the dissent seemingly ignored much of the actual Amendment 2 issues and ended up drawing irrelevant conclusions.

D. Overall Analysis

Romer v. Evans will undoubtedly leave a lasting impression on homosexual rights jurisprudence in our country.[415] Advocates and critics alike will consistently use as well as misuse the decision to support their respective positions.[416] Yet, the Supreme Court's

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> . . . Amendment 2 is unprecedented in that it insulates against legal control or review all instances of governmental and private discrimination based on a particular characteristic, regardless of context or circumstances.

Id.

414. *Romer III*, 116 S. Ct. at 1634 (Scalia, J., dissenting). *But see* Russell, *supra* note 359, at 72-73. Russell identified the relation between struggles against sexism, racism, and homophobia and the strength that unity between the groups may bring. *Id.* Specifically, Russell wrote:

> Rather, I offer the example of Amendment Two and the *Evans I*-*Evans II* litigation to argue that African-Americans and other groups in the so-called 'traditional' civil rights agenda may need to reclaim the power of analogy even as we seek to critique and distance ourselves from its excesses. Even as we seek to prevent others from 'stealing the center', i.e. the anti-racist commitment, of the civil rights agenda, we would benefit greatly from sharing that center with others persistently relegated to the periphery - and those others include the victims not only of racism/white supremacy, but also of sexism, classism and homophobia. Such a multi-pronged approach to formulating a new "civil rights agenda" would involve the hard work of confronting racism in gay, lesbian and bisexual communities, as well as homophobia in racially diverse communities - in other words, a concerted commitment to speaking out about the perhaps ineliminable differences that may permanently relegate us to different and unique 'categories' in social relations, in politics, and in legal theory."

Id. at 72.

415. Jerry Zremski, *High Court Decision on Homosexuality Doesn't Provide Strict Civil Rights*, BUFFALO NEWS, May 21, 1996, at A3 (stating that gay-rights activists and conservative Christians agreed that the Court's decision would create profound implications).

416. *See* Coyle, *supra* note 356, at A11. Coyle predicted that:

> *Romer [III]* . . . has implications beyond gay people's lives . . . it will affect proposals to end education for children of illegal immigrants, as well as pending cases such as those seeking to prevent the construction of an Islamic temple in a certain neighborhood . . . .
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> . . . .
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> '*Romer [III]*'s applications are as limitless as the weaknesses of our legislative bodies.'

Id. (quoting Matthew Coles, Director of the American Civil Liberties Union's Lesbian

decision did little to establish clear principles regarding the status of homosexuals.[417] For the most part, the Court applied the same test that the lower courts applied, while invalidating a democratically elected Amendment as unconstitutional.[418] The problem does not lie with the decision per se; the problem stems from the majority's lack of solid or even partial support for its decision.[419] The majority correctly decided that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.[420] However, the majority failed to provide sufficient rationale to support its invalidation of the Amendment.[421] The majority should have chosen simply either to make homosexuals a suspect class[422] or to apply the Colorado Supreme Court's logic and establish a fundamental right for homosexuals to participate equally in the political process.[423] Either option would still create much

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and Gay Rights Projects).

417. J. Michael Parker, *Court Decision on Gay Rights Leaves Many Questions*, SAN ANTONIO EXPRESS-NEWS, June 1, 1996. Parker questions whether the decision established homosexuals as a protected minority and muses about *Romer*'s effect on gay-marriages. *Id.* But, Parker quotes Elizabeth Birch, Executive Director of the Washington, D.C. based Human Rights Campaign, a national gay rights lobby group, as claiming that "[t]his decision doesn't confer one new right. It creates a more hopeful climate in which gays and lesbians can advocate for themselves. It embellishes our claim to equal protection under the law, but it doesn't delineate what that means beyond Colorado." *Id.*

418. See Jipping, *supra* note 365, for a discussion of Justice Kennedy's choice to ignore the Court's previous rulings that homosexuals do not constitute a legally suspect class, while issuing a political ruling which treats homosexuals as if they deserve suspect class protection by redefining critics' opposition to their agenda as nothing but hatred, prejudice, and bias.

419. David Wagner, *Supreme Court Again Blurs Distinction Between Politics, Law*, CIN. POST., June 27, 1996, at 20A. Wagner debated *Romer III's* conclusion and noted that the holding does not illustrate any legal precedent for cases like *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 116 S. Ct. 2519 (1996), contrary to the Supreme Court's decision in *Equality Foundation*, since *Romer III* "doesn't contain any [legal guidance]—just liberal preening culminating in a judicial fiat." *Id.*

420. *Upholding Equality*, BOSTON GLOBE, May 24, 1996, § 1 at 22. The author of *Upholding Equality* believed that the Court did not invalidate Amendment 2 to promote homosexual lifestyles or qualify sexual orientation with race or religion. *Id.* Rather, the author claimed, "*Romer v. Evans* had everything to do with not allowing any state to single out any one group or class and denying them equal protection under the law." *Id.*

421. *See generally* Linda Bowles, *What Constitution?*, CHI. TRIB., Dec. 11, 1996, § 1, at 27 (commenting that the judiciary branch represents the greatest enemy to American democratic government since many of the judiciary's decisions seemingly lack any constitutional basis).

422. *See, e.g.*, Jipping, *supra* note 365, at A17 (suggesting that "Justice Kennedy should first have determined whether homosexuals are a legally special class").

423. *But see* Francis Mancini, *Dangerous Ruling on Gay Rights*, PROV. J. BULL., May 23, 1996, at B6. This article decried the Colorado court's logic as "remarkably silly." *Id.*

controversy and face tremendous scrutiny and protest, but at least the Court would have avoided the ambiguity this decision will cause.[424]

V. IMPACT

Romer v. Evans closely resembles another landmark case in many respects—*Roe v. Wade*.[425] In *Roe*, the Supreme Court held that a woman's constitutional right to privacy includes the decision to terminate her own pregnancy.[426] Many individuals vociferously disagree with the ruling in *Roe*,[427] as many undoubtedly will not support the decision in *Romer III*.[428] Further, a number of commentators have taken umbrage with *Roe*'s weakly supported,[429]

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424. See Parker, *supra* note 417 (page unavailable), for a comment by Caia Mockaitis, a spokeswoman for Dr. James Dobson's Colorado Springs-based "Focus on the Family," that the *Romer* decision may confer a special minority status upon homosexuals. In contrast, Parker also cited Elizabeth Birch, who characterized Mockaitis' statement as "silly" and unfounded since, in Birch's opinion, the decision did little to enhance homosexual rights beyond establishing a prohibition against legislative actions similar to Amendment 2. *Id.*

425. 410 U.S. 113 (1973). See, for example, Kaplan & Klaidman, *supra* note 338, for a direct comparison of *Roe* and *Romer III*. *Roe v. Wade* is not herein examined in great detail, since most of its subject matter exceeds the scope of this Note. For a more detailed analysis of *Roe v. Wade*, see Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433 (1995) (reviewing DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE (1994)); Margaret G. Farrell, *Revisiting* Roe v. Wade*: Substance and Process in the Abortion Debate*, 68 IND. L.J. 269 (1993); Harry F. Tepker, Jr., *Abortion, Privacy and State Constitutional Law: A Speculation if (or when) Roe v. Wade is Overturned*, 2 EMERGING ISSUES ST. CONST. L. 173 (1989); Arnold H. Loewy, *Why Roe v. Wade Should be Overruled*, 67 N.C. L. REV. 939 (1989); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

426. *Roe*, 410 U.S. at 153.

427. Loewy, *supra* note 425, at 939 (arguing that "*Roe v. Wade*, however, is not simply wrong; it is *Wrong* in a fundamental way that few, if any, recent decisions of the Supreme Court can match").

428. Kim A. Lawton, *Clinton Signs Law Backing Heterosexual Marriage*, CHRISTIANITY TODAY, Oct. 28, 1996, at 80 (quoting Family Research Council Director of Cultural Studies, Robert Knight as saying, "[i]f you are a devout Christian, Jew, or Muslim, or merely someone who believes homosexuality is immoral and harmful, and the law declares homosexuality a protected status, then your personal beliefs are now outside civil law"). *See also* Steve Rabey, *Court Strikes Down Homosexual Rights Ban*, CHRISTIANITY TODAY, June 17, 1996, at 68. Rabey quoted Will Perkins, CFV director, as stating that "'[t]his decision . . . represents a body blow against freedom of belief and freedom of association.'" *Id.* According to Rabey, Perkins feared the decision will have "far-reaching cultural consequences, hurting the nation's children, setting back the campaign to preserve traditional family values, and opening the door for a flood of pro-homosexual legal attacks which homosexual extremists will now initiate." *Id.*

429. See generally Kaplan & Klaidman, *supra* note 338, at 24, for a comparison accusing the Court's *Romer III* and *Roe* decisions of failing to offer clear and convincing constitutional support for their ultimate conclusions. *Id.* The authors noted that "*Roe*'s

yet far-reaching conclusion.[430] Ultimately, as happened with *Roe*, future litigation will define the boundaries of the *Romer III* decision and its effects on homosexual rights.[431]

Constitutional scholars have suggested that *Romer v. Evans* possesses great potential as a building-block case for future homosexual rights litigation[432] and may eventually be tantamount to *Brown v. Board of Education*[433] or *Roe v. Wade*.[434] Even though the recent congressional vote in favor of the Defense of Marriage Act[435] emphasized a negative attitude toward gay marriages,[436] homosexual rights advocates experienced somewhat of an affirmation with the recent findings of fact in *Baehr v. Miike*[437] and the close Senate vote

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flawed reasoning wounded the high court's prestige for a generation" and *Romer III* may do the same. *Id.* at 30.

430. Farrell, *supra* note 425, at 272-73 (commenting that "*Roe* . . . neither settled the national dispute about abortion nor provided instruction on the proper role of the courts . . . . Instead, the decision only seemed to fuel the acrimony between pro-life and pro-choice advocates . . . ."). *See also* Loewy, *supra* note 425, at 939 (arguing "[t]he unique *Wrongness* of *Roe* lies in its utter lack of support from any source that is legitimate for constitutional interpretation . . . .").

431. *See* Lawton, *supra* note 428, at 80. For example, legal scholar, Hadley Arkes, a Professor of Jurisprudence and American Institutions at Amherst College, believes the Supreme Court's decision will greatly affect the future of homosexual marriages: "With this move, the Court may have armed federal judges to tie up any legislation in a state that refused to honor homosexual marriages." *Id.* (quoting Arkes).

432. Loyola University Chicago School of Law professor and constitutional scholar Diane Geraghty suggested that *Romer III* represents a case that future gay-rights advocates will use to support pro-gay-rights arguments. (Interview on file with author).

433. 347 U.S. 483 (1954).

434. 410 U.S. 113 (1973).

435. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996). The text reads as follows:

> 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. See also Lawton, *supra* note 428, at 80 (noting that Congress created the Defense of Marriage Act as a defensive measure to slow what pro-family activists fear as the growing social and legal legitimacy of same-sex marriages).

436. The Defense of Marriage Act came on the heels of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In *Baehr*, the court held that sex constituted a suspect classification under the Hawaii Constitution. *Id.* at 67. Thus, the court held that the state statute prohibiting same sex marriages was presumed unconstitutional unless the state could show that the classification was justified by compelling state interests, and that the statute was narrowly tailored. *Id.* However, the Defense of Marriage Act recognized the states' rights to choose whether to recognize same sex marriages. Defense of Marriage Act § 2.

437. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). In *Baehr*, the defendants denied the plaintiffs' application for marriage licenses solely on the grounds

on the *Employment Non-Discrimination Act*.[438] In light of this good fortune,[439] the *Romer III* decision, despite exhibiting shortcomings that may tarnish its ultimate strength, will likely support other decisions that reflect positively for gay-rights on similar topics.[440] The

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that the couples were the same sex. *Id.* at *1. The plaintiffs sought a judicial declaration that § 572-1 of the Hawaii Revised Statutes unconstitutionally denied same-sex couples marriage licenses. *Id.* Under a directive from the Hawaii Supreme Court, the defendant bore the burden of proof. *Id.* at *3. Defense counsel acknowledged its burden of proof and stated that "[t]he State . . . has a compelling interest in promoting the optimal development of children . . . . It is the State['s] policy to pursue the optimal development of children, to unite children with their mothers and fathers, and to have mothers and fathers take responsibility for their children." *Id.*

The district court found that the defendants presented insufficient evidence and failed to establish the existence of any adverse consequences to the public resulting from same-sex marriages. *Id.* at *16. According to the court, the defendants also failed to "prove the legal significance of the institution of traditional marriage and the need to protect traditional marriage as a fundamental structure in society." *Id.* at *17. Moreover, the court found that a parent's sexual orientation does not necessarily, by itself, indicate parental fitness. *Id.* Specifically, the court held that the defendants "failed to establish a causal link between the allowance of same-sex marriages and adverse effects upon the optimal development of children." *Id.* at *18. The court thus found that the defendants failed to establish that same-sex marriages will adversely affect "public interest in the well-being of children and families, or the optimal development of children." *Id.* Finally, the District Court ruled, "as a matter of law, that [the] Defendant has failed to sustain his burden to overcome the presumption that [the Hawaii statute] is unconstitutional by demonstrating or proving that the statute furthers a compelling state interest." *Id.* at *21.

438. Lawton, *supra* note 428, at 80 (noting that the Employment Non-Discrimination Act, which would have banned workplace discrimination based on sexual orientation, lost in the Senate in a 50-49 vote).

439. There are indications that homosexuality has gained some recent measure of support. Former Senator Barry Goldwater called for society to end discrimination against homosexuals. Lloyd Grove, *Barry Goldwater's Left Turn*, WASH. POST, July 28, 1994, at C1. In the federal government, the FBI ended its ban on hiring homosexuals. Jim Doyle, *FBI Agrees to End Policy Against Gays*, S.F. CHRON., Dec. 11, 1993, at A1. Even the advertising community realizes the importance of homosexual markets. Steve Johnson, *Targeting the Gay Market Makes Good Business Sense, Advertisers Find*, DENV. POST, Sept. 19, 1993, at D13. Moreover, marketing studies indicate that homosexuals exceed the national income average. Joya L. Wesley, *With $394 Billion in Buying Power, Gays' Money Talks and Corporate America Increasingly is Listening*, ATL. J. & CONST., Dec. 1, 1991, at F5. Even more recently, people realize that same-sex marriage would not create harmful problems or confuse children. Katherine Lanpher, *Defense of Marriage Act Passage Comes Too Soon*, HOUST. CHRON., Sept. 16, 1996, at A3.

440. See Kaplan & Klaidman, *supra* note 338, at 25 for a discussion suggesting that the *Romer III* decision does not demonstrate new landmark gay rights, but does create an apparent sympathetic judicial climate with regard to constitutional claims filed by gays and lesbians.

Romer III decision sent a positive signal[441] and signified a victory for opponents of anti-homosexual legislation.[442]

Generally, the political arena offers limited potential for gay rights advancements.[443] But *Romer III* appears to indicate the Court's willingness to defeat legislation which truly discriminates against homosexuals,[444] even if it is unlikely that the Court will classify homosexuals as a suspect class in the near future.[445] Moreover, in

441. Adriel Bettelheim & Michael Booth, *Court Rejects Amend. 2—1992 Law "Born of Animosity" Toward Gays*, DENV. POST, May 21, 1996, at A1 (quoting Richard Evans as saying, "[i]t's a good day; it's a good feeling," while also citing Will Perkins, chairman of CFV, the original sponsor of the Amendment, as commenting that "[t]oday is a chilling day").

442. *Romer III*, 116 S. Ct. at 1629. Amendment 2, according to the Court, effectively and arbitrarily took away protections given to homosexuals through local ordinances. *Id.* at 1626. The majority commented that a government may not enact prejudicial legislation without a rational relation to a legitimate state interest and thus an animosity-driven law may not exist. *Id.* at 1628. *See* Rabey, *supra* note 428, at 70 (quoting Suzanne B. Goldberg, who referred to the decision as the "most important victory ever for lesbian and gay rights").

443. *See* Steven A. Holmes, *Gay Rights Advocates Brace for Ballot Fights*, N.Y. TIMES, Jan. 12, 1994, at A17 (noting that "[o]pponents of gay rights have been emboldened since voters in Colorado passed an anti-gay rights measure in 1992"); *see also* 142 CONG. REC. H7270-71 (daily ed. July 11, 1996) (statement of Rep. McInnis). Representative McInnis noted:

> H.R. 3396, the Defense of Marriage Act, consists of two provisions which will protect the rights of various States and the Federal Government to make their own policy determinations as to whether same-sex marriages should be recognized in their respective jurisdictions. Section 2 of the bill clarifies that no State need give effect to a marriage recognized by another State if the marriage involves two persons of the same sex. It does not prevent a State from giving effect to such a marriage, nor does it prevent a State from making its own determination for purposes of its State law.

Id. at H7271.

444. *Romer III*, 116 S. Ct. at 1629. As evidence of the Court's change in attitude, it commented:

> One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

Id. at 1623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). *But see* Maggie Gallagher, *The People Deprived*, ATL. J. & CONST., May 24, 1996, at A23 (stating that the Supreme Court's ruling in *Romer III* deprived citizens of Colorado equal access to the law when it nullified the democratically enacted Amendment 2).

445. Strasser, *supra* note 71, at 947 (suggesting that the Court seems unwilling to recognize any new suspect classes and may feel that it identified all the true suspect classes.) *See, e.g.*, *Rethinking Equality*, WALL ST. J., May 22, 1996, at A22 (commenting that even though Amendment 2 failed the rational basis test, this does not automatically imply that the Court may soon endorse gay marriages or overturn the

addition to *Romer III*, cases on the near horizon will likely offer favorable precedent for gay rights activists.[446] Thus, armed with the Supreme Court's positive decision in *Romer III*, gay-rights proponents will probably move more definitively into the judicial arena as the place to further their cause.[447] Consequently, advocates and lower courts will eventually decide *Romer III*s' true significance since the Court failed to unambiguously pronounce the law regarding homosexual rights.[448]

VI. CONCLUSION

The United States Supreme Court held in *Romer v. Evans* that Colorado's Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[449] The Court ruled that the Amendment unequally withdrew regular and ordinary protections that most citizens freely enjoy.[450] Furthermore, the Court found that the State failed to support Amendment 2 with a rational relation to a compelling state interest.[451]

Romer v. Evans represented a turning point in the use of the Equal Protection Clause to support gay-rights.[452] The United States Supreme Court rejected a state's democratically-approved legislation because it found that the legislation violated the Fourteenth Amendment of the United States Constitution.[453] The decision

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military's "don't ask, don't tell policy," but instead that the Supreme Court suggested that all Americans should receive equal treatment before the law).

446. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (holding that sex constitutes a suspect classification under the Hawaii Constitution and therefore a state statute prohibiting same-sex marriages is presumed to violate the State constitution).

447. Batterman, *supra* note 188, at 978-79. Batterman surmised:

> As the gay community faces the very real prospect of losing these battles in the legislative arena, the judicial system will likely decide the ultimate issue of whether gay men and lesbians will be given the opportunity to obtain access to the same protections that women, Christians, African-Americans, the handicapped and a host of other diverse groups currently have.

Id.

448. See Coyle, *supra* note 356, at A11, for the view that *Romer III* will disempower *Bowers*, 478 U.S. 186, 199 (1986), and that the decision reinvigorates the rational-basis standard.

449. *Romer III*, 116 S. Ct. at 1629.

450. *Id.* at 1628.

451. *Id.* at 1628-29.

452. *See* Joan Biskupic, *Gay Ruling Embraces Civil Rights Premise*, WASH. POST, May 22, 1996, at A4 (quoting Stanford University Law professor Kathleen Sullivan as forecasting that "[n]ow governments defending discrimination against gay people have a higher burden").

453. *Romer III*, 116 S. Ct. at 1629.

extended the Equal Protection Clause blanket and affirmed the notion of equal protection under the law. The Court, however, floundered in its ultimate attempt to fashion a definitive precedent that advocates and critics may apply to their individual situations.[454] Consequently, even though there remains little doubt that *Romer III* created significant judicial history,[455] the lower courts will bear the ultimate burden of fashioning the decision's identity. Courts should continue to recognize that any amendment which adversely affects an identifiable group, whether or not the group constitutes a suspect class, may unconstitutionally infringe upon the group's ability to influence the political process.

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454. *See supra* Parts IV.A-B.

455. *See* Zremski, *supra* note 415, at A3 (noting that "[t]he U.S. Supreme Court handed gays their greatest legal victory Monday, but the justices stopped short of granting homosexuals the strict civil-rights protections granted to other minorities").

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