COLORADO'S AMENDMENT 2: A RESULT IN SEARCH OF A REASON

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"One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'"[1] With these words, Justice Anthony Kennedy opened the most result-oriented decision issued by the United States Supreme Court since *Roe v. Wade*.[2] The Court in *Romer v. Evans*[3] invoked the imagery of "separate but equal" and our nation's long struggle for racial equality to strike down an amendment to the Colorado Constitution that prohibited special legal protections for homosexuals. Justice Kennedy, however, would have been well served by reading the remainder of Justice Harlan's dissent in *Plessy v. Ferguson*:

> There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people .... Our institutions have the

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1. Romer v. Evans, 116 S. Ct. 1620, 1623 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).
2. 410 U.S. 113 (1973).
3. 116 S. Ct. 1620 (1996).

> distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must keep within the limits defined by the Constitution.[4]

This article examines the life and death of Colorado's Amendment 2[5] from its origins as a citizen-initiated ballot measure through its demise at the hands of an activist Supreme Court. Each court that considered the issue found a different rationale for invalidating the Amendment. The movement of this issue through the courts is an important case study for those who are concerned with "a new constitutional law that is much more egalitarian and socially permissive than either the actual Constitution or the legislative opinion of the American public."[6]

The discussion comprises four major sections. First, the Article reviews the background of Amendment 2 through its adoption. Second, the Article chronicles the Amendment's tortured journey through the Colorado state courts—injunction, supreme court, trial, and return to the supreme court. Third, the Article discusses the arguments presented to the Supreme Court and the Court's decision. Finally, this Article examines the ramifications of the *Romer* decision for contemporary issues such as same-sex marriages, the armed forces, the regulation of sexual conduct, and the future of democratic self-government.

I. BACKGROUND

The battle over Amendment 2 had its genesis in ordinances and policies adopted by various Colorado governmental entities beginning in the late 1970s. These governmental bodies granted special rights or protections to homosexuals:[7] three home rule cities enacted ordinances prohibiting discrimination based on sexual orientation in jobs, housing, and public accommodations;[8] the Colorado Civil Rights Commission voted to

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4. *Plessy*, 163 U.S. at 558.

5. For the complete text of the Amendment, see *infra* text accompanying note 15. Amendment 2 is codified as COLO. CONST. art II, § 30(b) (1992), *held unconstitutional by Romer*, 116 S. Ct. at 1629.

6. ROBERT H. BORK, THE TEMPTING OF AMERICA 6 (1990).

7. In the interests of economy, homosexuals, lesbians, and bisexuals will be referred to by the term "homosexual" throughout this Article.

8. *See* DENVER, COLO., MUN. CODE art. IV, § 28-91(b) (enacted 1991); BOULDER, COLO., REV. CODE § 12-1-2(2)(1)(A) (enacted 1987); ASPEN, COLO., MUN. CODE § 13-98(a)(1) (enacted 1977).

recommend that the General Assembly extend the State's civil rights act to ban discrimination based upon sexual orientation; the Governor issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges adopted policies prohibiting discrimination based on sexual orientation; and the Colorado General Assembly enacted a statute prohibiting health insurance companies from determining insurability based on sexual orientation.[9]

The sponsors of Amendment 2, a Colorado Springs-based group known as Colorado for Family Values (CFV), believed that those local gains would be used by homosexual activists as "leverage to approach state legislators on larger scale measures."[10] The Governor's Executive Order and the Civil Rights Commission's recommendation of statewide legislation had already elevated the issue to a statewide level.[11] In light of the success homosexuals had enjoyed, particularly with respect to the insurance statute, CFV believed that it "was a real possibility to say that in Colorado a small elite number of the Colorado State legislature would impose a homosexuality law on

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9. *See* LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, AN ANALYSIS OF 1992 BALLOT PROPOSALS, S. 58-369, 58th Leg., 2d Sess. (Colo. 1992), Appendix F to the Petition for Certiorari (describing these three measures) [hereinafter 1992 BALLOT PROPOSALS ANALYSIS]. The portion of this analysis relating to Amendment 2 constitutes the Appendix to the Article, see *infra* pages 269-278.

The authors have sought to provide citations that will minimize inconvenience in locating referenced materials. All references to evidence, testimony, motions or briefs refer to those filed as part of the Amendment 2 litigation. Citations to evidence and testimony in the trial record will be indicated by volume and page. Citations to pleadings, motions, or briefs filed by the parties, or orders of the court, will be with reference to the following cases: district court, no. 92 CV 7223 (D. Colo. 1992); Colorado Supreme Court, [hereinafter *Evans I*], no. 93 SA 17; Colorado Supreme Court [hereinafter *Evans II*] nos. 94 SA 48 and 128 (consolidated); Supreme Court of the United States, no. 94-1039. In instances where an item may be located in more than one place, parallel citations may be given. Thus, the district court's order on the merits after trial, while not officially reported, will be cited both as "Findings of Fact, Conclusions of Law and Judgment (Dec. 14, 1993)" and as "Appendix C to the Petition for Certiorari." This document can also be found at 1993 WL 578586. Select materials presented at trial will be cited both to the record and to the Joint Appendix. Briefs filed in the U.S. Supreme Court may also be found at: 1995 WL 310026 (Brief for Petitioners); 1995 WL 370335 (Brief for All Respondents Except Aspen); 1995 WL 417786 (Brief for Aspen Respondents); 1995 WL 466395 (Petitioners' Reply Brief); 1995 WL 782809 (Amicus Curiae Brief for Human Rights Campaign Fund and others, in support of respondents); and 1995 WL 862021 (Amicus Curiae Brief for Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip P. Kurland, & Kathleen M. Sullivan, in support of respondents).

10. Testimony of Kevin Tebedo, Record vol. 16, at 1038.

11. *See* Testimony of Tony Marco, Record vol. 15, at 839, Joint Appendix at 177; Testimony of Will Perkins, Record vol. 15, at 728-29, Joint Appendix at 147.

the entire state."[12] This, in turn, would raise serious concerns about the prospect of substantial civil rights fraud, the future of educational policy, and, ultimately, the State's official approval of homosexuality as a legitimate, alternative lifestyle.[13] Believing the General Assembly was vulnerable to formidable homosexual lobbying power, CFV decided to take the issue of extending civil rights protections to homosexuals directly to the people.[14]

In March 1992, CFV submitted petitions to place before the electorate a proposed amendment to the Colorado Constitution. The Amendment provided:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[15]

A highly contentious campaign followed, characterized by competing claims of "equal rights" versus "special rights." CFV claimed that the extension of antidiscrimination laws to include sexual orientation would be tantamount to granting special rights not enjoyed by the public at large.[16] Thus, Amendment 2

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12. Testimony of Kevin Tebedo, Record vol. 16, at 1043.

13. *See* Testimony of Tony Marco, Record vol. 15, at 860-61, 865; Testimony of Will Perkins, Record vol. 15, at 751-52, Joint Appendix at 168-69; Testimony of Kevin Tebedo, Record vol. 16, at 1045.

14. *See* Testimony of Tony Marco, Record vol. 15, at 859, Joint Appendix at 177.

15. COLO. CONST. art II, § 30(b) (1992), *held unconstitutional by Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996).

16. As one civil rights expert observed:

> every civil rights provision ends up awarding special privileges. And, it does that because the property right is vested in the owner. The right to rent or dispose is one of the great and honored roots in out society. So if you redefine a class that has a right to limit your discretion in disposal and use, you have transferred the property right from the prior title holder to this class. And, that constitutes a very large privilege.

Testimony of Joseph Broadus, Record vol. 17, at 1194, Joint Appendix at 209. *See also* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 400 (1994) ("[C]ivil rights laws codifying this principle are nothing more than exceptions to the general rule of free choice.").

was not intended to eliminate all legal rights for homosexuals, or to protect those who broke the law by harming or threatening homosexuals.[17] Rather, Amendment 2 would merely prevent homosexuals from receiving preferred legal status at the expense of the civil rights of other citizens.[18] In particular, Amendment 2 was intended to preserve privacy, associational, and religious rights.[19]

Amendment 2's legislative history, including the Colorado Legislative Council analysis (204,000 copies of which were distributed statewide to the voters), confirms this view.[20] A wide range of motivations supported Amendment 2: (1) the accurate belief that extension of special protections on the basis of homosexuality is not required under the current U.S. Supreme Court and other federal authorities; (2) the ease by which special class status in this context could be exploited; (3) the dilution of both public respect and resources for current civil rights programs that could result from extending new protections to homosexuals; (4) the belief by voters that behavioral inclinations, perceived by many to be immoral, ought not to serve as the basis for special protections; and (5) the desire to further associational and religious rights.[21]

Even so, Amendment 2 faced significant opposition. Many prominent political figures and organizations such as Governor Roy Romer, then-U.S. Representative Ben Nighthorse Campbell, U.S. Representative Patricia Schroeder, the Colorado Civil Rights Commission, the American Civil Liberties Union, the League of Women Voters, over 300 Denver area religious leaders, and most of the newspapers in the State opposed the Amendment.[22] The Denver media refused to run some of CFV's

17. *See* Testimony of Tony Marco, Record vol. 15, at 853-54, Joint Appendix 182-83; Testimony of Will Perkins, Record vol. 15, at 722, 744, Joint Appendix at 141, 162.

18. *See* Testimony of Tony Marco, Record vol. 15, at 846, 868.

19. *See* Testimony of Joseph Broadus, Record vol. 17, at 1189-90, Joint Appendix at 205-06; Testimony of Tony Marco, Record vol. 15, at 865.

20. *See* Testimony of Stanley D. Elofson, Record vol. 6, at 65-66.

21. *See* 1992 BALLOT PROPOSALS ANALYSIS, *supra* note 9, at 7; *see also* Defendant's Exhibit C (Letter from John N. Franklin, former Chairman, Colorado Civil Rights Commission, to the Colorado Legislative Council (Mar. 4, 1992); Statement by Tony Marco, Co-Chairman, Colorado Family Values, submitted to the Colorado Legislative Council (1991) at 21, 24-30; Letter from Kevin Tebedo, Director, Colorado for Family Values, to Stanley D. Elofson, Assistant Director, Colorado Legislative Council (July 23, 1992)).

22. *See* Testimony of Will Perkins, Record vol. 15, at 740-41, 787, Joint Appendix at 158-61, 173; Testimony of Kevin Tebedo, Record vol. 16, at 1044, 1050.

advertisements,[23] and Amendment 2's opponents outspent its supporters by nearly a two-to-one margin.[24]

Nonetheless, on November 3, 1992, the proposal passed by a margin of 813,996 to 710,151 (53.4% to 46.6%).[25]

II. THE STATE COURTS

On November 12, 1992, a group of individual plaintiffs, joined by Denver, Boulder, and Aspen (the cities whose anti-discrimination ordinances had been overturned)[26] instituted an action to enjoin enforcement of Amendment 2, claiming it facially violated several provisions of the federal[27] and state[28] constitutions. As defendants, they named Colorado Governor Roy Romer[29] and Attorney General Gale A. Norton.[30]

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23. *See* Testimony of Will Perkins, Record vol. 15, at 739-40, Joint Appendix at 157-58.

24. *See* Testimony of Will Perkins, Record vol. 15, at 747-48, Joint Appendix at 165; Testimony of Kevin Tebedo, Record vol. 16, at 1046; Defendant's Exhibit S.

25. *See Evans I*, 854 P.2d 1270, 1272 (Colo. 1993).

26. The Aspen plaintiffs insisted upon filing separately throughout the litigation, although they never diverged from the positions taken by the main plaintiffs. Unless noted otherwise, all references to Plaintiffs will refer to those arguments advanced by the main plaintiffs. The Plaintiffs below were the Respondents in the Supreme Court; however, for ease of reference they will be referred to throughout as the Plaintiffs.

27. Specifically, the Plaintiffs claimed that the Amendment violated the following protections of the U.S. Constitution: (1) the right to equal protection (namely, rights to vote and "political participation"); (2) the right to freedom of speech and association; (3) the prohibition against establishment of religion; (4) the right to petition; (5) the prohibition against vagueness; (6) the guarantee of a republican form of government; (7) the Supremacy Clause; (8) the Due Process Clause; and (9) the right of access to courts.

28. In addition to those state constitutional provisions mirroring the federal Bill of Rights, Plaintiffs claimed that Amendment 2 violated the following: (1) limits on the initiative power, *see* COLO. CONST. art. V, § 1; (2) city powers of home rule, *see* COLO. CONST. art. XX; (3) powers of local school districts, *see* COLO. CONST. art. IX, § 15; and (4) limitations on amendments, *see* COLO. CONST. art. II, § 2. The plaintiffs did not clearly explain how an amendment to a state constitution could violate that constitution, although the "limitations on amendments" argument appears to have had its origins in a series of California cases distinguishing constitutional "amendments" from broader "revisions." *See, e.g.*, Legislature v. Eu, 816 P.2d 1309 (Cal. 1991); Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (Cal. 1978). The California Constitution specifically provides that although "[t]he electors may amend the Constitution by initiative," a "revision" may be accomplished only by convening a constitutional convention and obtaining popular ratification, or by legislative submission to the voters. CAL. CONST. art. XVIII. The Colorado Constitution makes no such distinction between "amendments" and "revisions," and even the California courts are reluctant to set aside a popular vote. *Accord Eu*, 816 P.2d at 1320 ("If, as petitioners predict, Proposition 140 ultimately produces grave, undesirable consequences to our governmental plan, the Legislature or the people are empowered to propose a new constitutional amendment to correct the situation.") (citations omitted). Not surprisingly, this distinction has never been recognized outside of California.

29. That the Governor was an outspoken opponent of Amendment 2 presented an

A. The Preliminary Injunction Hearing

On December 23 and 28, 1992, the Plaintiffs filed motions for a preliminary injunction, alleging that Amendment 2 infringed upon homosexuals' right to equal protection of the laws and their First Amendment right to "expressive conduct."[31]

From the very inception of the case, the parties differed widely on the meaning and reach of Amendment 2. The Plaintiffs, focusing solely on its "any claim of discrimination" language, claimed that the Amendment authorized, and indeed encouraged, all types of discrimination against homosexuals, and deprived homosexuals of legal redress for any possible wrong done to them by government or private citizens.[32] Such a broad-based right of discrimination, the Plaintiffs claimed, could only be founded upon notions of impermissible hostility or antipathy towards an unpopular political group.[33]

Characterizing Amendment 2's sponsors as the "religious right,"[34] the Plaintiffs vilified them by stating that

> to cast the purpose of the measures as a "defense of family values"—is akin to Hitler's appeals to traditional German

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additional challenge to the defense.

30. It was never clear why the Attorney General was named, as she had no enforcement responsibilities relating to this self-executing constitutional amendment. Over a year later, after trial on the merits had been completed, the Plaintiffs sought to remove her, arguing she was initially sued only to "perfect jurisdiction," or "to ensure proper service on the state." Motion for Voluntary Dismissal of All Claims Against Defendant Attorney General at 1, 3. Such reasoning remains baffling. The Plaintiffs named the State of Colorado as a party when they filed their Amended Complaint on December 23, 1992. Hereinafter, the defendants will be jointly referred to as the State.

31. *See* Brief in Support of Preliminary Injunction, at 28-33, 42-45.

32. *See* Brief in Support of Preliminary Injunction at 10, 18-19, 24; Reply Brief in Support of Preliminary Injunction at 6-8. The Plaintiffs claimed that Amendment 2 immunized individuals from liability for acts against homosexuals that would otherwise constitute crimes, stripped homosexuals of the right to police protective services, and even deprived them of the right, if employed by government, to have colleagues provide basic life and safety support assistance. *See id.*; U.S. Supreme Court Brief for Respondents at 34-37. Indeed, one amicus brief before the Supreme Court compared Amendment 2 to the decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), stating "Amendment 2 may create a situation where homosexual citizens of Colorado have no rights, in public or private interactions, which heterosexuals are bound to respect." Brief of Amicus Curiae for National Bar Association at 3.

33. *See* Brief in Support of Preliminary Injunction at 39-42.

34. The Plaintiffs defined the beliefs of the "religious right" to "include a belief that the Bible should be interpreted literally, opposition to a set of values labeled 'secular humanism,' and an evangelical commitment to convert and to limit the influence of Satan, liberalism, socialism, and communism." Brief in Support of Preliminary Injunction at 7-8 n.13. In addition to embracing most people who even nominally identify themselves as Christians, this definition raises intriguing inferences regarding those who would characterize themselves as belonging to the "religious left."

> family values: Kinder, Kirche, Kuche (children, church, kitchen). The Nazis' adoption of laws that permitted discrimination against homosexuals led to their exclusion from all phases of economic, social and cultural life, subjected them to indiscriminate violence and confiscation of their property, and allowed their arbitrary arrest, confinement in concentration camps, and death.[35]

The Plaintiffs then argued that a state constitution cannot be amended to "make it more difficult for an unpopular minority to enact legislation or policy that would protect it from discrimination."[36] The Plaintiffs urged that, as with the amendment at issue in *Reitman v. Mulkey*, the adoption of Amendment 2 meant that "the right to discriminate . . . was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government."[37] Then the Plaintiffs urged the recognition of a

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35. Brief in Support of Preliminary Injunction at 7-8 n.13. Homosexual activists frequently resort to "demonizing those who believe homosexual behavior is sinful or immoral by comparing them to Klansmen, Nazis, and similar racists 'whose associated traits and attitudes appall and anger Middle America.'" Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 126 n.151 (1995) (quoting MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL 189 (1989)). *See also* RICHARD A. POSNER, SEX AND REASON 292 (1992).

> [C]riticism of homosexuality or homosexuals is almost as taboo as criticism of blacks, women, or Jews. The term *homophobe*, properly reserved for persons with a pathological fear or hatred of homosexuals, is now, like *racist*, an epithet apt to be bestowed on anyone who so much as questions the most extreme claims made on behalf of homosexuals.

Id. Cf. Brief in Support of Preliminary Injunction at 15 ("There is a significant correlation between anti-gay attitudes and racism, anti-Semitism, anti-feminism, and authoritarianism.") (without citation to authority); Frances A. Koncilja, *Colorado Bar Ass'n President's Message to Members: Amendment 2 Goes to the U.S. Supreme Court*, 24 COLO. LAW. 751, 752 (1995).

> With all due respect, I do not think the lawyers representing Colorado understand . . . that majorities cannot do certain things to minorities . . . . Under Colorado's approach, a lynching would be legal—after all, only one person disagrees with the outcome (terribly democratic, you know; an almost unanimous expression of the will of the people) . . . .

Id.

36. Brief in Support of Preliminary Injunction at 22 (citing Reitman v. Mulkey, 387 U.S. 369 (1967)).

37. Brief in Support of Preliminary Injunction at 24 (quoting *Reitman*, 387 U.S. at 377). In *Reitman*, the Court found unconstitutional an amendment to the California Constitution that provided:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Reitman, 387 U.S. at 371 (quoting CAL. CONST. art. I, § 26). However, the U.S. Supreme

heretofore unknown group-based constitutional right to "participate equally in the political process."[38] Finally, the Plaintiffs argued that Amendment 2 violated their right to expressive conduct because it "substantially increases the risk that an individual will experience private retaliation for protected expression."[39]

The Defendants responded by urging a much narrower interpretation of Amendment 2, focusing on the Amendment's underlying legislative history, the legal and textual context in which its terms were used, and the axiom that States cannot circumvent the supremacy of federal laws.[40] In this light, Amendment 2 neither affirmatively authorized, encouraged, or established discrimination based on sexual orientation, nor barred homosexuals from having federally-based suits adjudicated in state court. The Amendment did not leave homosexuals unprotected from all governmental[41] or private

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Court did not strike down the amendment at issue in *Reitman* because it permitted "discrimination" in general; rather, it upheld a California Supreme Court ruling invalidating the provision on the theory that it was intended to, and would, promote racial discrimination in housing matters. *See id.* at 377.

38. Brief in Support of Preliminary Injunction at 29 (citing Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating city charter amendment effectively repealing a prior racial antidiscrimination ordinance and requiring voter approval before such ordinance could be put into effect)).

39. *Id.* at 42-45 (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-64 (1958)).

40. *See* Brief in Opposition to Preliminary Injunction at 2-3. *See also* Brief in Support of Defendant's Motion to Dismiss at 4-9.

The title of Amendment 2 was "No Protected Class Status," and the "claim of discrimination" language followed phrases like "protected class," "minority status," and "quota preferences." The special policies, provisions, and recommendations relating to sexual orientation that had been adopted or enacted by various Colorado entities (including Petitioner Romer, the Governor of Colorado) prior to the passage of Amendment 2 had themselves been phrased in terms of prohibitions on "discrimination." *See* DENVER, COLO., MUN. CODE art. IV, § 28-91(b) (enacted 1991); BOULDER, COLO., REV. CODE § 12-1-2(2)(1)(A) (enacted 1987); ASPEN, COLO., MUN. CODE § 13-98(a)(1) (enacted 1977); Joint Appendix at 22, 32, 62, 90. It is therefore unsurprising that in seeking to undo these measures, the proponents of Amendment 2 used the same terminology.

On the proposition that States cannot circumvent the supremacy of federal laws, see, for example, Howlett v. Rose, 496 U.S. 356, 369-71 (1990) (holding that state courts cannot refuse to entertain a federally mandated cause of action).

41. The government must always have a rational basis to discriminate against homosexuals, and that rational basis must be applied to the specific context under consideration. No government can, for instance, make employment decisions about homosexuals and bisexuals for reasons that are irrelevant to the performance of the particular job. *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. & Tel., 595 P.2d 592, 597 (Cal. 1979) (holding that the "state may not exclude homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him unfit for the job from which he's been excluded"); *see also, e.g.*, Padula v.

discrimination.[42] Amendment 2 merely realigned the rights of the citizenry of the State with those provided by federal law and generally recognized throughout the rest of the country.[43]

The State then distinguished the Plaintiffs' political participation cases as concerning either *racial* discrimination[44] or the right to vote,[45] neither of which were relevant to an analysis of Amendment 2.[46] And, the State argued, unlike *Patterson*, in

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Webster, 822 F.2d 97, 104 (D.C. Cir. 1987) (same, in the FBI employment context). Similarly, the government cannot deny to homosexuals basic protections provided by law enforcement authorities.

42. Amendment 2 did not immunize private citizens from criminal (or civil) responsibility for harassment or assaults; it conferred no right upon private citizens to avoid contract obligations entered into with homosexuals. *Cf.* 1992 BALLOT PROPOSALS ANALYSIS, *supra* note 9, at 6 ("The amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers."); Appendix F to Petition for Certiorari at 7 (arguing that homosexuals would remain "entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories."); *id.* at 2 (defining the term "discrimination" not in an open-ended manner, but rather in relation to employment, housing, and public accommodations). All Amendment 2 did for private citizens was ensure that the government would not interfere with their choices about associating with homosexuals.

43. Nationwide, at the time Amendment 2 was proposed, only six States, eight other governors, 110 cities and counties in 25 States, and 65 universities had adopted anti-discrimination laws or policies with respect to sexual orientation. *See* Appendix F to Petition for Certiorari at 3-4.

44. In particular, *Reitman* and *Hunter v. Erickson* had been limited to this specific factual context. For discussions of *Reitman*, see Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring) ("[R]acial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts...."). *See also* Fletcher v. Rhode Island Hospital Trust Nat'l Bank, 496 F.2d 927, 931 (1st Cir. 1974), *cert. denied*, 419 U.S. 1001 (1974); Benschoter v. First Nat'l Bank of Lawrence, 542 P.2d 1042, 1047 (Kan. 1975), *appeal dismissed for want of substantial federal question*, 425 U.S. 928 (1976) (both citing Judge Friendly's concurrence with approval); *cf.* Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150, 155 (7th Cir. 1975) (distinguishing Reitman v. Mulkey, 387 U.S. 369 (1967)), *cert. denied*, 424 U.S. 928 (1976); Howe v. United Parcel Service, Inc., 379 F. Supp. 667, 674-5 (S.D. Iowa 1974) (holding that a "double standard" exists for determining "state action" in race and other suspect class cases). For discussion of *Hunter v. Erickson*, see *infra* text accompanying notes 92-101.

45. *See, e.g.*, Gordon v. Lance, 403 U.S. 1 (1971); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

46. The Plaintiffs also cited *The Federalist No. 51* (James Madison) as supporting the notion that "measures that restrict any identifiable group's ability to bring about change through the ordinary political processes are highly suspect under the Equal Protection Clause." Brief in Support of Preliminary Injunction at 28. The State responded not only that *The Federalist No. 51* does not say this, but also that in Madison's day women, non-property holders, and felons—to say nothing of black slaves—were all identifiable groups explicitly prohibited from participating in ordinary political processes. In addition, the *Federalist Papers* were authored some eight decades *before* the framing of the Fourteenth Amendment, making them of limited utility in construing the Equal Protection Clause.

which Alabama wished to compel a form of expression that would inevitably lead to private retaliation against specific individuals, Amendment 2 involved neither a compulsion of nor a prohibition on expression.[47]

The district court held an evidentiary hearing and, after receiving evidence for four days, ruled that the Plaintiffs were entitled to a preliminary injunction because they had demonstrated a reasonable probability that Amendment 2 violated the Equal Protection Clause of the federal Constitution.[48]

The district court did not then, nor did it ever, determine the precise meaning of Amendment 2. But in granting the preliminary injunction, the court did find that Amendment 2 infringed upon a fundamental right—though this right had not been identified by the Plaintiffs, nor, for that matter, by anyone else in the history of American jurisprudence. According to the district court, Amendment 2 infringed upon "the fundamental right not to have the State endorse and give effect to private biases" with respect to "an identifiable class."[49]

Grounding its analysis in Eighth Amendment ideas of "evolving standards of decency,"[50] the district court sought to demonstrate that equal protection standards have evolved as well. The court appeared to base its analysis on a vote tally of two Supreme Court cases related only in that both concerned

47. The Plaintiffs had, in effect, argued that the First Amendment protects viewpoints from both governmental and private censorship and from both public and private consequences. But the First Amendment merely guarantees the right to express viewpoints free from *governmental* interference; it does not guarantee that there will be no consequences from private parties for the expression of viewpoints. *See* Student Gov't Ass'n v. Board of Trustees of the Univ. of Mass., 868 F.2d 473, 479 (1st Cir. 1989) (holding that government is under no obligation to remove barriers to expression that are not created by the government); *see also* Bohen v. City of E. Chicago, Ind., 622 F. Supp. 1234, 1247, 1248 (N.D. Ind. 1985), *aff'd in part, rev'd in part*, 799 F.2d 1180 (7th Cir. 1986) (holding that the Constitution does not protect individuals from the obnoxious behavior and harassment of other private individuals).

48. The district court's decision presumed, without ruling, that the governmental Plaintiffs had standing to bring the action. *But see* Board of County Comm'rs of Jefferson County v. City and County of Denver, 372 P.2d 152, 156 (1962) ("[T]he equal protection clause of the Fourteenth Amendment was not designed to protect state instrumentalities against state action, much less against the constitutional right of the people 'to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness . . . .'") (quoting COLO. CONST. art. II, § 2), *appeal dismissed for want of substantial federal question*, 372 U.S. 226 (1963).

49. Reporter's Transcript at 28-29, Appendix E to Petition for Certiorari at 17.

50. Trop v. Dulles, 356 U.S. 86, 101 (1958). *Cf.* Weems v. United States, 217 U.S. 349, 378 (1910) (stating that the Eighth Amendment may be progressive).

racial discrimination. The district court characterized the first case, *Reitman*, as "involv[ing] a fundamental right because what it did was it took this private discrimination and it gave state support to it."[51] Although the vote in *Reitman* was five to four, the district court seemed to believe that *Reitman* was reaffirmed by the Supreme Court's unanimous decision seventeen years later, in *Palmore v. Sidoti*,[52] to invalidate a child custody order based solely on a judicial determination that it would be harmful to a child to remain in a racially mixed household. The district court seized upon an isolated passage from *Palmore*, writing that

> [i]n so ruling, the Court said the Constitution cannot control such prejudices but neither can it tolerate them. "Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect."[53]

To establish that this evolution of equal protection rights had extended beyond racial discrimination, the district court then cited *City of Cleburne v. Cleburne Living Center*.[54] There, the U.S. Supreme Court cited *Palmore* in invalidating a city ordinance requiring a special use permit for the operation of a group home for the mentally retarded, because the Court could not identify *any* justification for the ordinance apart from "an irrational prejudice against the mentally retarded."[55]

Finally, the district court distinguished *Bowers v. Hardwick*[56] by invoking *Robinson v. California*,[57] yet another Eighth Amendment case in which the U.S. Supreme Court ruled that it was unconstitutional to criminalize the *status* of being addicted to

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51. Reporter's Transcript at 25, Appendix E to Petition for Certiorari at 15.

52. 466 U.S. 429 (1984).

53. Reporter's Transcript at 27-28, Appendix E to Petition for Certiorari at 17 (quoting *Palmore*, 466 U.S. at 433).

54. 473 U.S. 432, 439 (1985).

55. *Id.* at 450. The district court limited its discussion of *Cleburne* to a single sentence, stating only that "the Court said it is plain that the electorate as a whole, either by referendum or otherwise, could not order city action violative of the Equal Protection Clause." Reporter's Transcript at 28, Appendix E to Petition for Certiorari at 17. The court also cited *Lucas v. Forty-Fourth Colorado General Assembly*, 377 U.S. 713 (1964), for the proposition that a "city may not avoid the strictures of [the Equal Protection] clause by deferring to the wishes or objections of some fraction of the bodied [sic] politic . . . ." *Id.* Although true, these references beg the ultimate question of whether Amendment 2 violated the Equal Protection Clause, irrespective of how it was adopted.

56. 478 U.S. 186 (1986) (upholding a Georgia law criminalizing consensual homosexual sodomy).

57. 370 U.S. 660 (1962).

drugs. Even though Amendment 2's language referred to "homosexual, lesbian or bisexual orientation, conduct, practices or relationships," the district court found that Amendment 2 classified on the basis of status alone and therefore that it infringed upon a fundamental right of the Plaintiffs not to have the State support private prejudices.[58]

The district court's discovery of a fundamental right imposed upon Colorado the burden to satisfy strict scrutiny review by demonstrating at trial that Amendment 2 had been narrowly tailored to achieve one or more compelling government interests. Although the lengths to which the district court had to go to reach its conclusion should be apparent from the foregoing description, a few brief comments are warranted. Most obviously, both the status-conduct distinction and the "evolving standards of decency" concept are rooted in jurisprudence related to the Eighth Amendment's ban on cruel and unusual punishment. The U.S. Supreme Court has found that the status-conduct distinction is a substantive limitation "on what can be made criminal," which has "to be applied sparingly."[59] *Robinson*, the only previous case recognizing the status-conduct distinction, has been limited to its facts.[60] Moreover, the Court has expressly acknowledged that *civil* disabilities can be imposed on the basis of status without running afoul of the Constitution.[61]

Furthermore, criminal law has traditionally found an act indispensable to a finding of criminal liability, while equal protection law is full of classifications that impact status alone. Apart from those affecting protected classes (gender and race), status-based classifications are routinely upheld through use of

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58. Reporter's Transcript at 29. As with *Weems v. United States*, 217 U.S. 349 (1910), and *Trop v. Dulles*, 356 U.S. 86 (1958), the Plaintiffs had not cited *Robinson* in their briefs.

59. Ingraham v. Wright, 430 U.S. 651, 667 (1977).

60. *See* Powell v. Texas, 392 U.S. 514, 531-37 (1968).

> [U]nless *Robinson* is so viewed, it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter on the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.

Id. at 533.

61. Drug addicts could, for example, be civilly committed to involuntary confinement for treatment purposes. *See Robinson*, 370 U.S. at 664-67. The Court noted that "the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide." *Id.* at 665.

the rational basis test.[62] Homosexuals have never been found to be a suspect class for purposes of the Equal Protection Clause; hence, courts uniformly utilize the rational basis (rather than the strict scrutiny) standard of review in deciding cases involving homosexuals.[63]

Similarly, the Supreme Court has gone to great lengths to resist extending the use of the "evolving standards of decency" concept beyond the narrow confines of the Eighth Amendment.[64] Significantly, the Court has refused to endorse use of a similar "evolving standards of equality" test in assessing when a measure should be subjected to heightened judicial review.[65]

The twisting of *Palmore* and *Cleburne* is the most significant element of the district court's decision, particularly in light of the ultimate disposition of the case. As the Supreme Court and

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62. *See* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (upholding, under rational basis review, the validity of a state constitutional provision mandating that judges retire at age 70). Here the Court noted that

> [t]he Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all. But a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'

Id. See also United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980) (holding that the State may pursue legitimate objectives through means that are imperfect, even "illogical . . . and unscientific").

63. Many cases have analyzed discrimination against homosexuals using rational basis standards. *See, e.g.*, Thomasson v. Perry, 80 F.3d 915 (4th Cir.) (upholding former military policy excluding homosexuals from armed service), *cert. denied*, 506 U.S. 1020 (1996); Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995) (upholding amendment to city charter requiring voter approval of homosexual antidiscrimination protections), *vacated and remanded for reconsideration in light of Romer*, 116 S. Ct. 1620 (1996); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991) (remanding former military policy for further review), *cert. denied*, 113 S. Ct. 655 (1992); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (upholding the former military policy), *cert. denied sub nom.* Ben-Shalom v. Stone, 494 U.S. 1004 (1990); Holmes v. California Army Nat'l Guard, 920 F. Supp. 1510 (N.D. Cal. 1996) (invalidating "don't ask, don't tell" policy); Richenberg v. Perry, 909 F. Supp. 1303 (D. Neb. 1995) (upholding same policy); Selland v. Perry, 905 F. Supp. 260 (D. Md. 1995) (upholding same policy); Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994) (invalidating same policy).

64. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 668 & n.36 (1977) (refusing to extend "evolving standards of decency" to protect school children from corporal punishment and citing Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding Eighth Amendment inapplicable to deportation of aliens on the ground that "deportation is not a punishment for a crime")).

65. This test was suggested in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 466-67, 470, 472 (1985) (Marshall, J., concurring and dissenting). But, as the *Romer* decision itself reveals, the Court continues to use the traditional fundamental right-suspect class inquiry for determining when strict scrutiny review is required.

lower federal courts recognize, outside the context of suspect class considerations, *Palmore* and *Cleburne* establish *only* a rational basis principle in that they hold only that a measure cannot be supported solely by *irrational* prejudice or bias.[66]

Obviously, not every potential "prejudice" or "bias" is disqualified from consideration. All laws can be said to embody some sort of "private bias," inasmuch as all legislators or citizens have their own individual reasons for supporting or rejecting any proposed public policy. Indeed, any attempted distinction between so-called generic "private biases," which are impermissible, and "public biases," which are not, is illusory. Because one man's principle may be another man's prejudice, notions of "private bias" exist largely in the eye of the (adversely affected) beholder. Under any label, however, "private biases" are simply the process of making choices. Indeed, biases are the bases upon which we govern ourselves.[67]

Consequently, it is only certain types of "prejudices" or "biases" that are disregarded in the search for legitimate government interests. One type, of course, is "racial prejudice" (the concern of both *Reitman* and *Palmore*) which, after the Civil War and subsequent adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, could never again be recognized as having *any* legitimate basis.[68] Others include a "*bare* desire to

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66. *See, e.g., Cleburne*, 473 U.S. at 450 ("*irrational* prejudice") (emphasis added); *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) ("The effects of racial prejudice cannot justify a racial classification...."); Steffan v. Perry, 41 F.3d 677, 708, 719 (D.C. Cir. 1994) (Wald, J., dissenting from upholding exclusion of homosexuals from military) (arguing exclusion was inappropriate when done "for reasons founded *solely upon irrational and invidious prejudices*," when based upon "*invidious* prejudice or *unreasoned* antipathy", or when based upon "*irrational* biases") (emphases added); Holmes v. California Army Nat'l Guard, 920 F. Supp. at 1532 ("[T]he policy fails because it impermissibly relies on *irrational* prejudices against homosexuals as a group.") (emphasis added).

67. For example, bigamy laws give effect to private biases regarding plural marriages. Prohibitions on incest give effect to private biases against persons who wish to have sex with members of their own families. And prohibitions on Sunday liquor sales give effect to private biases to the detriment of those who attach no particular significance to the seventh day of the week. Nonetheless, all of these are patently constitutional. *See, e.g.*, Braunfield v. Brown, 366 U.S. 599 (1961) (holding prohibition on Sunday liquor sales not unconstitutional even though prohibition placed Orthodox Jews at substantial economic disadvantage); Reynolds v. United States, 98 U.S. 145 (1878) (holding anti-bigamy law constitutional).

68. The Court in *Reitman* and *Palmore* explicitly stressed the importance of the racial classification context to its holdings. In *Reitman* the Court noted that the challenged provision (a) was intended to authorize private racial discrimination; (b) in fact did authorize such discrimination; and (c) immunized that private discrimination from any governmental interference. Reitman v. Mulkey, 387 U.S. 369, 377, 381 (1967). In *Palmore*, the Court noted that (a) the Fourteenth Amendment's "core purpose" is to do

harm a politically unpopular group,"[69] and, closely related thereto, "*unreasoned* antipathy,"[70] "*mere* negative attitudes," and unsubstantiated "fear" toward a class of people.[71]

As noted above, in *Bowers v. Hardwick* the Supreme Court upheld the validity of a statute that penalized homosexual sodomy as criminal conduct. Significantly, in that case the Court rejected the claim that the "presumed belief of a majority of the electorate . . . that homosexual sodomy was immoral and unacceptable" was, in effect, nothing other than the private bias or negative attitudes which the Court had previously condemned.[72] The Court clearly found that not all objections to homosexual orientation are grounded in irrational prejudice.[73] The "bigoted comments" or actions "of a few citizens, even those with power, should not invalidate action which in fact has

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away with all governmental discrimination based on race; (b) because racial classifications are more likely to reflect racial prejudice than legitimate public concerns, they are subject to the most exacting scrutiny; and (c) public officials may not bow to the hypothetical effects of even widely and deeply held private racial prejudice. *See Palmore*, 466 U.S. at 432-33; *cf.* Jarret v. Jarret, 400 N.E.2d 421 (Ill. 1979) (refusing to review state supreme court decision taking away custody of children from divorced mother for living with unmarried man), *cert. denied*, 449 U.S. 927 (1980).

Reitman has never been cited as controlling authority by the U.S. Supreme Court, and all courts (other than Colorado's district court) cite *Palmore* in support of some form of rational basis review (either traditional, or "active"). *See, e.g., Pruitt*, 963 F.2d at 1166 (subjecting military regulation banning homosexuals to review under an "active" rational basis standard).

69. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1973) (holding that a purpose to discriminate against hippies could not, in and of itself, justify limiting food stamp program to related groups of people who are living together).

70. *See Steffan*, 41 F.3d at 708 (Wald, J., dissenting) (arguing that majority was wrong to uphold exclusion of homosexuals from navy).

71. *Cleburne*, 473 U.S. at 448 (emphasis added).

72. Bowers v. Hardwick, 478 U.S. 186, 196 (1986). Indeed, as the *Bowers* majority noted, "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id. See also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring) (arguing that all human societies have prohibited certain activities not because they harm others but because they are considered immoral: "[w]hile there may be great diversity of view on whether various of these prohibitions should exist . . . there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate 'morality'"); Paris Adult Theatre v. Staton, 413 U.S. 49, 59-60 (1973) (quoting with approval Chief Justice Warren's dissent in *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964), which argued for the "right of the Nation and of the States to maintain a decent society"); Dronenburg v. Zech, 741 F.2d 1388, 1397 (1984) (upholding Navy's mandatory discharge policy for homosexual conduct and stating that any "theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government").

73. *See* Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989) ("We do not believe that the concerns . . . can be so easily dismissed as mere prejudice, though individual prejudice no doubt exists in the military and elsewhere.").

a legitimate basis."[74] The district court's "fundamental right" was, then, supported by neither precedent nor logic.

B. State Supreme Court (Round 1)

On appeal to the Colorado Supreme Court, the State attacked the district court's reasoning. Far from defending that reasoning, the Plaintiffs ran away from it; their only reference to the ruling below was a footnote somewhat tepidly claiming that "[r]ead in light of the arguments actually presented to the district court, this holding is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation by its endorsement of private bias."[75] Plaintiffs went on to argue that "even if the district court did not rule on the [*Hunter v. Erickson*] political participation argument presented to it, this court may affirm on grounds different than those upon which the district court relied, so long as appellee's [sic] rights under the judgment are not increased."[76]

The Colorado Supreme Court affirmed the issuance of the preliminary injunction on July 19, 1993.[77] Like the district court, the Colorado Supreme Court did not determine "the precise scope of Amendment 2," for the court decided that even the limited meaning given it by the State[78] presumptively violated "an independently identifiable group's" "right to participate equally in the political process."[79] The essence of this "fundamental right" was that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest."[80] That "fundamental right" was infringed here, the

74. Arthur v. City of Toledo, 782 F.2d 565, 573-74 (6th Cir. 1986) (quoting Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1292 (7th Cir. 1977). *See also* Mobile v. Bolden, 446 U.S. 55, 92 (1980) (Stevens, J., concurring) ("[A] political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decision making process were motivated by a purpose to disadvantage a minority group."); Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.").

75. Plaintiffs-Appellees' Answer Brief at 19 n.19.

76. *Id.* (citing Farmer's Group, Inc. v. Williams, 805 P.2d 419, 428 (Colo. 1991)).

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

78. *Id.* at 1284 n.25.

79. *Id.* at 1276.

80. *Id.* at 1279.

court concluded, because homosexuals were no longer "free to appeal to state and local government for protection against discrimination based on their sexual orientation."[81]

In dissent, Justice William H. Erickson reasoned that the majority had blurred "fundamental rights" cases with "suspect class" cases to create a heretofore unknown federally-mandated group-based fundamental right.[82] Justice Erickson found that both prior U.S. Supreme Court decisions and the analysis of constitutional scholars refuted the existence of a fundamental right of any independently identifiable group to participate equally in the political process.[83] Indeed, he concluded that the U.S. Supreme Court's cases support strict scrutiny review only where a suspect class is adversely affected by a restructuring of the political process.[84] As Justice Erickson subsequently pointed out, the majority's "new fundamental right," which until *Evans I* "had never been recognized by . . . any court," "[i]ronically . . . accomplished exactly what the voters who passed Amendment 2 sought to prevent— . . . heightened protection for homosexuals, lesbians, and bisexuals."[85]

Justice Erickson was correct. The supposed right of every independently identifiable group to participate fully at each and every level and in each and every phase of state and local government has no basis in the text of the Constitution and, as the Colorado Supreme Court admitted, is not directly attributable to any case or set of cases decided by the U.S. Supreme Court. The Colorado court based the group right on a principle[86] intuited from four distinct lines of authority, a principle which found its most "explicit, and nuanced, articulation" in a line of cases beginning with *Hunter v. Erickson.* Specifically, the court seized upon an isolated comment in *Hunter*: the "State may [not] disadvantage any particular group

81. *Id.* at 1286. Amendment 2 "bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *Id.* at 1285.

82. *Evans I*, 854 P.2d at 1294.

83. *See id.* at 1292-1301.

84. *See id.* at 1300.

85. *Evans II*, 882 P.2d 1335, 1356 (Colo. 1994) (en banc), *aff'd*, 116 S. Ct. 1620 (1996).

86. The Colorado Supreme Court phrased the principle in the following way: "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." *Evans I*, 854 P.2d at 1279.

by making it more difficult to enact legislation on its behalf."[87] This new group right is, according to the Colorado Supreme Court, the "common thread which unites"[88] cases on preconditions on the right to vote,[89] reapportionment,[90] and restrictions on candidate eligibility.[91]

But *Hunter v. Erickson* cannot support such a broad conclusion. In that case, the U.S. Supreme Court reviewed an amendment to a city charter that repealed a racial anti-discrimination ordinance, and required voter approval before such ordinance could be put into effect. Characterizing the amendment as placing "special burdens on racial minorities within the governmental process," the Court observed that

> [b]ecause the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect" and subject to the "most rigid scrutiny." They "bear a far heavier burden of justification" than any other classifications.[92]

Any doubt about *Hunter's* reach was eliminated two years later when in *James v. Valtierra*[93] the U.S. Supreme Court refused to extend *Hunter* beyond the context of race, concluding:

> [I]t cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . The present case could be

87. *Id.* at 1279 (quoting Hunter v. Erickson, 393 U.S. 385, 393 (1969)).

88. *Id.*

89. *See, e.g.*, Gordon v. Lance, 403 U.S. 1 (1971) (upholding provisions requiring consensus of three-fifths before bond-indebtedness is authorized); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (invalidating statute limiting franchise in certain school districts to owners, lessees of taxable realty (or their spouses) and parents or guardians or children in public schools).

90. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires seats in both houses of a bicameral state legislature to be apportioned on a population basis).

91. *See, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (invalidating scheme that placed higher burdens on new or third party candidates for local offices than for statewide offices); Williams v. Rhodes, 393 U.S. 23 (1968) (invalidating state election laws that made it very difficult for new parties to qualify for ballot position in presidential elections).

92. *Hunter*, 393 U.S. at 391-92 (citations omitted).

93. 402 U.S. 137 (1971). *James* concerned the validity of a California constitutional provision prohibiting state public entities from developing, constructing, or acquiring low-income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of *Hunter v. Erickson*, that the California measure unconstitutionally discriminated against poor people in the exercise of their right to seek redress from governmental authorities. *See also id.* at 144-45 (Marshall, J., dissenting) ("It is rather an explicit classification on the basis of poverty . . . .").

affirmed only by extending *Hunter*, and this we decline to do.

> .... [Appellees] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a law-making procedure that "disadvantages" a particular group does not always deny equal protection.[94]

The Court reaffirmed race as the core rationale for the *Hunter* doctrine in *Washington v. Seattle School District No. 1.*[95] There, the Court invalidated a voter-initiated statute that removed the power of school boards to order busing to desegregate schools. The Court confirmed that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action."[96] It is only "when the State allocates governmental power non-neutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process," that a different analysis is required.[97] Indeed, as the majority noted, the core rationale of this line of cases is that

> when the State's allocation of power places unusual burdens on the ability of *racial* groups to enact legislation specially designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[98]

Thus, *Hunter* and its progeny call for strict scrutiny *only* where the political process has been restructured to place unusual

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94. *James*, 402 U.S. at 141-42. The Colorado Supreme Court reinterpreted the U.S. Supreme Court's clear statement that Hunter was not to be extended, writing that "we are of the opinion that *James* is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*." *Evans I*, 854 P.2d 1270, 1282 n.21 (Colo. 1993).

95. 458 U.S. 457 (1982).

96. *Id.* at 470.

97. *Id.*

98. *Id.* at 486 (emphasis added) (citations omitted). The Court's repeated emphasis on the racial nature of the classification at issue underscores the fact that race was the controlling factor in this 5-4 decision. *See id.* at 470-71, 474, 485-86.

burdens upon racial minorities,[99] or at most, members of a suspect class.[100] *Hunter* simply does not support the Colorado Supreme Court's ruling.[101]

The voting, reapportionment, and candidate eligibility cases also provided no support for the Colorado court's ruling. In each of those decisions, the U.S. Supreme Court's exacting examination expressly rested on the challenged action's infringement of one or both of the established fundamental constitutional rights of voting and political association. Further, at root, these cases involved the process of selecting representatives; they did not concern the *range of issues* upon which all voters may or may not vote.[102]

Amendment 2 did not deny homosexuals the right to vote in upcoming elections,[103] dilute the value of their votes,[104] or place obstacles in the way of particular candidates or parties.[105] All it

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99. *See* Arthur v. City of Toledo, 782 F. 2d 565, 571-74 (1986) (observing that *Hunter, James,* and *Seattle Sch. Dist.* reflect prohibition on racial discrimination); Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975) (characterizing *Hunter* as striking "down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race"); Lee v. Nyquist, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."), *aff'd mem.*, 402 U.S. 935 (1971).

100. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (using "political powerlessness" phrase to describe suspect class); *see also* Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991) ("*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics.").

101. Nor, contrary to the Colorado court's belief, does *Gordon v. Lance*, 403 U.S. 1 (1971). There, in affirming a single issue super-majoritarian vote requirement, the Supreme Court necessarily rejected both of the approaches used by the Colorado court: extending *Hunter* beyond racial classifications, and expanding the ballot access cases to state action that merely made it more difficult for some kinds of governmental action to be taken.

102. *Cf.* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629 (1969) ("Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not.").

103. *See* Hill v. Stone, 421 U.S. 289 (1975) (invalidating provision limiting voters in city bond elections to persons who have listed property for taxation); *Kramer*, 395 U.S. at 621 (invalidating provision limiting voters in school district elections to persons owning or leasing taxable real property, and parents or custodians of children enrolled in schools).

104. *See* Reynolds v. Sims, 377 U.S. 533 (1964); *see also* Mrazek v. Suffolk Co. Bd. of Elections, 630 F.2d 890, 898 (2d Cir. 1980) ("The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond this warranty of mathematical equivalency of votes.").

105. *See* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (invalidating scheme that placed on new or third-party candidates for local offices

did was constrain the powers of government[106] by limiting the authority of elected representatives—an outcome quite consistent with the very nature of constitutions.[107] And, in a system founded on the notion that the people are the source of governmental authority,[108] it stands the system on its head to say that the Constitution requires that state or local representatives retain the right to override the limits placed upon their authority by the people.[109]

If any political participation rights have been infringed, they are those of the supporters of Amendment 2 who saw the victory they had won through the political process evaporate in the hands of the judiciary.[110] But the reasoning of the Colorado Supreme Court has a significance beyond simply the context of Amendment 2. Widespread adoption of this reasoning would call into question a wide range of state and federal legislation, for *Hunter* and its progeny made no distinction between popularly enacted constitutional provisions and ordinary statutes, ordinances, or other governmental actions depriving individuals of the ability to seek relief through other

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higher burdens than those placed on candidates for statewide offices); Williams v. Rhodes, 393 U.S. 23 (1968) (invalidating complex state statutory structure which had the effect of excluding from the ballot all but the candidates from the two major political parties).

106. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (stating that "the State . . . at its pleasure may modify or withdraw" all governmental powers entrusted to its political subdivisions).

107. *See* City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 672 (1976) ("In establishing legislative bodies, the people can reserve to themselves the power to deal directly with matters which might otherwise be assigned to the legislature."); *accord* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 84 (Thomas P. Peardon ed., 1952) ("[T]he legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them.").

108. *See, e.g., City of Eastlake*, 426 U.S. at 672-73 ("Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create."); Luther v. Borden, 48 U.S. (7 How.) 1, 7 (1849) ("The sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure.").

109. It is difficult to understand how individual political participation rights are denied when Amendment 2 promotes *everyone's* direct voice in the political issue rather than filtering that voice through representatives. *See* Town of Lockport v. Citizens for Community Action, 430 U.S. 259, 266 (1977).

110. *See generally* Vance v. Bradley, 440 U.S. 93, 97 (1979) (stating that our system of government presumes that "even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted"); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) ("It is not the province of [the courts] to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").

governmental officials.[111] Extending *Hunter* to permit challenges by any "independently identifiable" group effectively allows the exception to swallow the rule. Virtually every law makes a classification. Thus every law can be said to affect "independently identifiable" groups, if the person defining the group employs any imagination at all.

Indeed, "identifiable group" analysis quickly becomes a morass, as beliefs and conduct blur into immutable characteristics.[112] Although the court attempted to limit "independently identifiable" groups to those having traits unrelated to the issue addressed by the law,[113] the attempted limit failed. Virtually *every* group affected by legislative classification is defined by reference to characteristics distinct from how members of the group voted. Gun owners, civil servants, incumbent politicians, convicted felons, farmers, insurance companies, hot dog vendors, alcoholics, smokers, and members of every other conceivable interest group share common traits that make them "independently identifiable" quite apart from any legal measure adversely affecting them.[114]

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111. *See* Hunter v. Erickson, 393 U.S. 385 (1969) (voter-initiated municipal charter amendment); Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982) (voter-initiated statute); Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970) (statute passed by state legislature), *aff'd mem.*, 402 U.S. 935 (1971).

112. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) (An "identifiable group" is one "that possess distinctive interests and tends to vote on the basis of those interests," including "political, religious, ethnic, racial, occupational, and socioeconomic groups."); Karcher v. Daggett, 462 U.S. 725, 754 n.12 (1983) (Stevens, J., concurring) ("Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context.").

113. The Plaintiffs and their amici struggled mightily to articulate a cogent limiting principle for this new right. *See, e.g.*, Brief of Amicus Curiae for National Bar Association at 14 (The pertinent "traits" are to be discerned by reference to "metaphysical and cultural indicia of commonality independent of the political goal."). It is hard to imagine that the Framers of the Fourteenth Amendment, struggling to rebuild a nation devastated by a civil war, contemplated the federal courts resolving equal protection claims with reference to Kant and Hegel. *Cf.* Frazier v. Cupp, 394 U.S. 731, 740 (1969) (stating "[w]e will not, however, engage in such metaphysical subtleties in judging the efficacy" of a person's consent to a search).

114. The flaw in this definition was laid bare at the trial. Witnesses on both sides agreed that there is no consensus or accepted definition of what constitutes homosexuality. *See* Record vol. 13, at 273, 276; vol. 14, at 699-700; vol. 15, at 862, 869-70; vol. 17, at 1158, 1161-62. Plaintiff Evans testified he could identify a person's sexual orientation based upon "a lifetime experience that you know. It's not something that's quantifiable." Testimony of Richard G. Evans, Record vol. 8, at 12. But if the group definition is inherently a matter of *self*identification, then the Colorado Supreme Court's test collapses on itself, because it lacks both identifiability and independence. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 267 (1995).

Under the rationale of the Colorado Supreme Court's decision, any distinction made by government in the establishment of its political structure would be vulnerable to federal constitutional attack; any individual whose cause was unsuccessful in a referendum or a statute would be entitled to have courts overturn that result, simply because the majority imposed its will on a minority concern.[115] Governmental choices on substantive issues, however, must necessarily create winners and losers. This is no violation of the Constitution; rather, it has been a basic fact of political life in this nation since its inception. Indeed, if the people are to advance their society through government, substantive issues need to be settled authoritatively. To dispense with this axiom would be to invite interminable governmental paralysis: major public policy issues could never be decisively settled through the political process, because the courts would oblige the government continually to reconsider every policy choice.[116] This, of course, would be nothing more than a prescription for social and political chaos.

C. The Trial and State Supreme Court (Round 2)

The Colorado Supreme Court remanded the matter for a trial on whether Amendment 2 was narrowly tailored to achieve a compelling governmental interest.[117] At trial,[118] in addition to advancing their fundamental rights claim, the Plaintiffs also presented evidence supporting their alternative strict scrutiny theory that homosexuals were a suspect class and that this status required the State to prove a compelling state interest in order

115. *See* Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 VAND. L. REV. 397, 428 (1985) ("Taken to its logical extreme, then, the equal protection clause could establish a tyranny of the *minority*, or, worse, the *courts*, over the will of the people.").

116. *See* THE FEDERALIST NO. 65, at 444 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert."); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* SELECTIONS FROM THE LETTERS, SPEECHES, AND STATE PAPERS OF ABRAHAM LINCOLN 79 (Ida M. Tarbell ed., 1925) ("Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.").

117. Recognizing that "strict scrutiny is strict in theory, but usually fatal in fact," Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1984) (citation omitted), the State sought certiorari after the Colorado Supreme Court's initial decision, but that petition was denied. *See* Romer v. Evans, 510 U.S. 959 (1993).

118. The trial was held October 12-22, 1993.

to have the Amendment upheld.[119]

Defending the Amendment, the State argued that it fulfilled seven compelling state interests: (1) deterring factionalism[120] through preemption of local laws; (2) preserving the integrity of the State's political functions;[121] (3) preserving the State's ability to remedy discrimination against suspect classes;[122] (4) preventing government from subsidizing a special interest group's political objectives;[123] (5) preventing governmental interference with personal,[124] familial,[125] and religious[126] liberty; (6) promoting the well-being of children;[127] and (7) advancing public morality.[128]

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119. Upon the State's motion in advance of trial, the court dismissed two of the Plaintiffs' claims: those pertaining to asserted violations of the federal guarantee of a republican form of government and to the state limitation on the power of the initiative. *See* Order at 7 (July 16, 1993). Immediately before opening statements, the Plaintiffs dropped their Establishment Clause claim and all state constitutional law claims (except those pertaining to the powers of home rule cities and school districts). *See* Record vol. 5, at 1420; vol. 12, at 7-9.

120. *See generally* Anderson v. Celebreeze, 460 U.S. 780 (1983) (holding States may limit ballot access in the interests of political stability); Storer v. Brown, 415 U.S. 724, 736 (1974) (same).

121. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 463 (1990).

122. *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

123. *See* Lyng v. International Union, 485 U.S. 360, 369 (1988) (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977)): "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his own mind and his conscience rather than coerced by the State."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

124. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

125. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1200 (E.D. Va. 1973) ("[T]he Constitution condemns State legislation that trespasses... upon the sanctity of the home, or upon the nurture of family life.").

126. *See* U.S. CONST. amend. I; COLO. CONST. art. II, § 4; *cf.* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 398 (1994) ("Symbolically, gay rights legislation declares homosexual behavior good (i.e., protected) and religiously motivated discrimination evil (i.e., prohibited).").

127. *See e.g.*, New York v. Ferber, 458 U.S. 747, 758 (1982) (upholding statute prohibiting sale of child pornography in part because of the harm to the children depicted in such materials); Ginsberg v. New York, 390 U.S. 629, 636 (1968) (upholding statute restricting sale of sexually explicit materials to persons under 17 years of age).

128. *See* Record vol. 5, at 1220-41; *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991) (plurality opinion) (describing State's interest in "protecting order and morality" as "compelling; substantial; subordinating; paramount; cogent; strong") (citation omitted).

Both sides presented evidence from "doctors, psychiatrists, genetic explorers, historians, philosophers, and political scientists."[129] In the end, the trial court found that neither side had established what it set out to prove. The Plaintiffs could not qualify for suspect or quasi-suspect class status[130] because they were not politically powerless.[131] As for the State, although the court found that Amendment 2 promoted two compelling interests (religious freedom and familial privacy), the Amendment failed strict scrutiny because it was not narrowly drawn to achieve those purposes by the least restrictive manner possible.[132] Therefore, the trial court permanently enjoined the Amendment.[133]

On appeal,[134] the Colorado Supreme Court held that Amendment 2 would not impact legal protections afforded homosexuals under laws of general applicability.[135] Nonetheless,

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129. Findings of Fact, Conclusions of Law and Judgment at 12 (Dec. 14, 1993), Appendix C to the Petition for Certiorari at 15. For a mildly entertaining account of the trial, see Jeffrey Rosen, *Sodom and Demurrer: Should the Courts Deliver Gay Civil Rights?*, NEW REPUBLIC, Nov. 29, 1993, at 16.

130. Characteristics of a suspect class include political powerlessness, a history of discrimination, and obvious, immutable, or distinguishing characteristics. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

131. *See* Findings of Fact at 14-15, Appendix C to Petition for Certiorari at 18 (noting that because homosexuals comprise at most only 4% of the population, their ability to draw 46% of the electorate to their side of the Amendment 2 debate is a "demonstration of power, not powerlessness"). As to the other two criteria for suspect class status, the court summarily found that "there is a history of discrimination against homosexuals," without, however, discussing whether any of that discrimination could be justified. Findings of Fact at 14, Appendix C to Petition for Certiorari at 17-18. But the court made no determination about "obvious" and "immutable" characteristics, because, in its view, "[t]he ultimate decision on 'nature' vs. 'nurture' is a decision for another forum, not this court." Findings of Fact at 14, Appendix to Petition for Certiorari at 17.

132. *See* Findings of Fact at 11, Appendix C to Petition for Certiorari at 14. A religious exemption to homosexual rights laws would have adequately protected the religious liberty interest. *See* Findings of Fact at 9, Appendix C Petition for Certiorari at 11-12. Any tie-in between protecting family values and denying homosexuals their right to equal political participation was too tenuous to withstand strict scrutiny review. *See* Findings of Fact at 9-10, Appendix C to Petition for Certiorari at 12. The trial court never discussed the proffered interest in promoting public morality.

133. For an extensive discussion of the trial itself, see Timothy M. Tymkovich, John Daniel Dailey, & Paul Farley, *Reason and Prejudice in the Battle Over Amendment 2*, 68 U. COLO. L. REV. (forthcoming Feb. 1997).

134. The Plaintiffs did not appeal or cross-appeal the trial court's adverse determinations with respect to suspect or quasi-suspect class status. *See Evans II*, 882 P.2d 1335, 1341 n.3 (Colo. 1994).

135. In its opinion, the court listed several statutes that Amendment 2 would not impact, including one prohibiting discrimination "for any legal, off-duty conduct such as smoking tobacco .... 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.* at 1346 n.9.

it refused to reconsider its previous ruling[136] or to overturn the lower court's refusal to find that Amendment 2 was supported by one or more narrowly tailored compelling interests.[137] In addition, the court rejected arguments based upon severability[138] and Tenth Amendment grounds.[139] The court also concluded that *Bowers v. Hardwick* presented no obstacle to its conclusion.[140] Accordingly, the Colorado Supreme Court affirmed the lower court's final judgment permanently enjoining the enforcement of Amendment 2.[141]

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136. In a three-sentence paragraph, the court summarily "reaffirm[ed] [its] holding that the constitutionality of Amendment 2 must be determined with reference to the strict scrutiny standard of review." *Id.* at 1341. In a display of somewhat circular reasoning, the court in a footnote relied extensively on two federal district court decisions identifying the same fundamental right, which themselves relied on the Colorado Supreme Court's prior opinion. *See id.* at 1341 n.4; Equality Found. of Greater Cincinnati Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded for reconsideration in light of Romer*, 116 S. Ct. 1620 (1996); Equality Found. of Greater Cincinnati Inc. v. City of Cincinnati, 838 F. Supp. 1235 (S.D. Ohio 1993).

137. Further contradicting itself, the Colorado Supreme Court first recognized, then denied, that Amendment 2 advanced two compelling interests. *Compare Evans II*, 882 P.2d at 1342 ("There can be little doubt that ensuring religious freedom is a compelling governmental interest.)" and *id.* at 1344 ("[P]reserving associational privacy may rise to the level of a compelling state interest.") *with id.* at 1342 n.5 ("[N]one of the interests identified by defendants are [sic] compelling.").

138. *See Evans II*, 882 P.2d 1341, 1349-50 (Colo. 1994).

> Amendment 2 targets 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.

139. "States have no compelling interest in amending their constitution [sic] in ways that violate fundamental federal rights." *Id.* at 1350.

140.

> The fact that there is no constitutionally recognized right to engage in homosexual sodomy, *see* Bowers v. Hardwick, 478 U.S. 186... (1986), is irrelevant. Amendment 2 by no stretch of the imagination seeks to criminalize homosexual sodomy. While it is true that such a law could be passed and found constitutional under the United States Constitution, it does not follow from that fact that denying the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process is also constitutionally permissible.

Evans II, 882 P.2d 1341, 1350 (Colo. 1994).

141. Justice William H. Erickson, the lone dissenter in this as in the previous decision, reasoned not only that Amendment 2 should not be subject to strict scrutiny review, *id.* at 1357-60 (Erickson, J., dissenting), but also that "at least" three interests satisfied rational basis review: "protecting religious freedom," "encouraging statewide uniformity in the law," and "allocating resources," *id.* at 1362-66.

III. UNITED STATES SUPREME COURT

The State's petition for certiorari sought review of the question

> [w]hether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections.[142]

The possible existence of a fundamental right—along with a wide range of the issues—was extensively briefed both by the parties[143] and by the multitude of amici curiae appearing in the case.[144] At oral argument, however, the Court's very active questioning[145] was concerned not with the "fundamental right"[146]

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142. Petition for Certiorari at i. The petition was granted on February 21, 1995. *See* Romer v. Evans, 115 S. Ct. 1092 (1995).

143. The Plaintiffs argued that Amendment 2 produced a type of political gerrymander, which, while not wholly depriving homosexuals of the right to vote, "substantially and unequally diminishe[s]" "the value of their ballot" by barring them "alone . . . an opportunity to seek [from state or local officials] a type of protection available to all other people in Colorado—an opportunity to seek protection from discrimination." Brief for Aspen Respondents at 13. But homosexuals were not denied equal representation because state and local decisionmakers were powerless to give them everything they wanted unless the Amendment were first repealed. Certainly, nothing in Amendment 2 required decision makers to ignore homosexual issues—even those matters embraced by Amendment 2 itself, because "the power to influence the political process is not limited to winning elections." Davis v. Bandemer, 478 U.S. 109, 132 (1986). Indeed, if the Plaintiffs were correct, then certainly state legislators and members of Congress would ignore lobbying efforts by political action groups on issues such as abortion, school prayer, and flag-burning. Of course, these issues continue to be prominent in state and federal political debate.

144. Twenty-seven amicus curiae briefs were filed. The following are some of the notable entities who signed on to one of the briefs filed in support of the Plaintiffs' position: American Bar Association, Colorado Bar Association, National Bar Association, several States (Oregon, Iowa, Maryland, Massachusetts, Minnesota, Nevada, Washington, and the District of Columbia); several cities (Atlanta, Baltimore, Boston, Los Angeles, Madison, New York, Portland, San Francisco, and Seattle); National Institute of Municipal Law Officers; Anti-Defamation League; NAACP Legal and Educational Defense Funds; American Psychiatric and Psychological Association; several religious organizations; homosexual activist groups; and a constellation of noted legal scholars (namely, Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip P. Kurland, and Kathleen M. Sullivan).

Amici supporting Colorado included several States (Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and Virginia); Equal Rights, Not Special Rights, Inc.; Colorado for Family Rights; Oregon Citizens Alliance; Pacific Legal Foundation; American Center for Law & Justice Family Life Project; Concerned Women for America, Inc.; and several religious organizations.

145. As usual, each side was given thirty minutes to present its case. But the justices asked questions, made comments, or made other interjections more than 200 times during arguments. *See* Transcript of Oral Argument (Oct. 10, 1995), *available in* 1995 WL 605822.

146. At oral argument Plaintiffs all but conceded that such a fundamental right did

but with the novelty, scope, and impact of Amendment 2. Justice Kennedy asked the very first question: "I've never seen a case like this. Is there any precedent that you can cite to the Court where we've upheld a law such as this?"[147] A moment later, Justice Kennedy again observed, "Here, the classification is adopted to fence out, in the Colorado Supreme Court's words, the class for all purposes, and I've never seen a statute like that."[148] Other inquiries probed the application of Amendment 2 to, for example, public library and hospital services,[149] while Justice Scalia obtained from the Plaintiffs the concession that they were not asking the court to overturn *Bowers v. Hardwick*.[150]

Ultimately, the Court opted simply to avoid the question presented for review, choosing instead to "affirm the judgment, but on a rationale different from that adopted by the State Supreme Court."[151] Justice Kennedy, writing for six members of the Court, held that Amendment 2 violated equal protection principles because it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. . . . A State cannot so deem a class of persons a stranger to its laws."[152]

Justice Kennedy reached this conclusion through a rather contorted process. Fully two-thirds of his short opinion is devoted to the history behind, and the possible broad application of, Amendment 2. Rejecting as "implausible" Colorado's interpretation that Amendment 2 "does no more

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not exist. When asked whether the State could, without violating equal protection, "end a ping pong game" (in which a locality passes a law, the State repeals it, the locality passes it, the State repeals it again, and so on) by barring "all protection against private discrimination," Plaintiffs' counsel acknowledged it could. *Id.* at 56. "So," the Court inquired, "if I understand you, you just can't end the ping pong game for this particular group?" *Id.* Plaintiffs' counsel responded, "That's correct, or any particular group." *Id.* Again, the Court asked, "But you can end the game?" *Id.* Again, Plaintiffs' counsel stated, "That's correct, you can end the game. If the State wants to repeal and prohibit any civil rights protections for anybody at any level of the government in the future, and do it for everyone." *Id.* at 56-57.

147. *Id.* at 4.

148. *Id.* at 5. Similarly, Justice Ginsburg inquired "whether in all of U.S. history there has been any legislation like this that earmarks a group and says, you will not be able to appeal to your state legislature to improve your status" or "that thou shalt not have access to the ordinary legislative processes for anything that will improve the condition of this particular group." *Id.* at 8.

149. *See id.* at 6 (Justice O'Connor), 26 (Justice Ginsburg).

150. *See id.* at 53.

151. Romer v. Evans, 116 S. Ct. 1620, 1624 (1996).

152. *Id.* at 1629.

than deny homosexuals special rights," Kennedy read Amendment 2 as effecting a "far-reaching," "[s]weeping and comprehensive" change in their legal status.[153] Indeed, he said, "[i]t is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies."[154]

Justice Kennedy, however, maintained that the Court need not determine whether Amendment 2 had this broad an impact, for

> even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. . . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[155]

In Justice Kennedy's view, Amendment 2's prohibition on "safeguards that others enjoy or may seek without constraint" imposed "a special disability" on homosexuals "alone" that was not sustainable even under the "conventional" rational basis

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153. *Id.* at 1625.

154. *Id.* at 1626. Such a reading of the provision, the majority noted, "would compound the constitutional difficulties the law creates," *id.*, even though, at this point in the opinion, the majority had not identified any constitutional difficulties with Amendment 2. Significantly, nowhere in its discourse on the possible meaning of Amendment 2 did the majority refer to the standard maxims about: (1) construing provisions, where possible, to avoid constitutional infirmities, *see* United States v. Grace, 461 U.S. 171, 175-76 (1983); (2) giving deference to a state attorney general's construction of a state provision, *see* Phyle v. Duffy, 334 U.S. 431, 441 (1948); Union Ins. Co. v. Hoge, 62 U.S. (21 How.) 35, 66 (1858); (3) construing terms in context, *see* Deal v. United States, 113 S. Ct. 1993, 1996 (1993); or (4) construing terms in light of the legislative history, *see* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991).

The application of *any* of these statutory construction principles would have led the Court to a conclusion far different from the one it seemed more than willing to endorse. The title of the Amendment ("No Protected Class Status"), the text accompanying the word "discrimination" (e.g., "minority status," "quota preferences," and "protected class"), the fact that the ordinances and laws that Coloradans wished to undo explicitly referenced the words "orientation" and "discrimination," and the legislative history underlying the provision (evidenced both by the Colorado General Assembly's ballot analysis and by the testimony of the Amendment's sponsors), all point to the limited reach of Amendment 2—the repeal of, and prohibition on reenacting, certain specific legal protections which were (and are) nowhere mandated by the Constitution or other federal law.

155. Romer v. Evans, 116 S. Ct. 1620, 1626-27 (1996). *But see supra* note 135.

standard of review.[156] Amendment 2, he wrote, "is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."[157] He thus found that its "unprecedented" attempt to disqualify a group from seeking specific legal protection was

> not within our constitutional tradition to enact . . . . Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.[158]

Amendment 2's perceived contravention of the principle of open government, however, was not the sole basis upon which the Court invalidated Amendment 2. Justice Kennedy also wrote, "Amendment 2 . . ., in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[159] Indeed, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus towards the class that it affects."[160]

Justice Kennedy summarily disposed of the State's proffered justifications for Amendment 2. Indeed, after cursorily identifying the State's "primary" interests here as (1) furthering personal and religious liberty and (2) conserving resources for other antidiscrimination efforts, his entire analysis of these justifications was as follows:

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156. *Id.*

157. *Id.* at 1628.

158. *Id.*

159. *Id.* at 1628-29. This is an appropriate juncture at which to emphasize the importance of the judicial nominating process. Justice Kennedy concluded in his opinion that "Amendment 2 fails, indeed defies" conventional rational basis analysis. *Id.* at 1627. In contrast, former judge Robert H. Bork, the original nominee for the seat eventually filled by Justice Kennedy, and his co-counsel Michael A. Carvin wrote in their amicus brief:

> [s]ince it is abundantly clear that Amendment 2 has a rational basis, the Court should simply lift the injunction without a further remand to the Colorado Supreme Court. . . . By prohibiting government coercion, Amendment 2 thus preserves the citizenry's traditional freedom to associate and to act on sincerely-held religious or moral beliefs concerning the propriety of certain behavior. While enhancing freedom is always rational, it serves a particularly compelling interest in the context presented here.

Brief of Amicus Curiae for Equal Rights, Not Special Rights, Inc. at 29 n.12.

160. *Romer*, 116 S. Ct. at 1627.

> The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.[161]

Justice Scalia, dissenting on behalf of himself, Chief Justice Rehnquist, and Justice Thomas, attacked the majority not only for mistaking a "Kulturkampf for a fit of spite,"[162] but also for taking a side in this "culture war," not through the exercise of "judicial judgment," but, rather, through an act of "political will"[163] emanating from the elitist views of the "lawyer class from which the Court's Members are drawn."[164] To effectuate its will, Justice Scalia pointed out, the majority did a number of extraordinary things. For example, it attached unwarranted significance to Amendment 2's "status" component and engaged in extended, unnecessary discussion about Amendment 2's possible applications. The majority's approach ignored both the Colorado Supreme Court's holding[165] and the governing

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161. *Id.* at 1629.

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

163. *Id.* at 1637.

164. *Id.* Elaborating, Justice Scalia wrote:

> How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: 'assurance of the employers' willingness' to hire homosexuals.... This law-school view of what 'prejudices' must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of the civil rights laws, and which took the pains to exclude them specifically from the Americans With Disabilities Act of 1990.

Id. at 1637 (citations omitted).

165. The Colorado Supreme Court had determined that people with a homosexual "orientation" were not distinct from those who engaged in homosexual "conduct, practices, or relationships." *Evans II*, 882 P.2d 1335, 1349-50 (Colo. 1994) ("[E]ach" of those "four characteristics" "provides nothing more than a different way of identifying the same class of persons."). Similarly, the court had recognized that Amendment 2 did

principles for adjudicating facial challenges to the validity of legislative measures.[166] Properly analyzed, Justice Scalia wrote, "[t]he amendment prohibits *special treatment* of homosexuals, and nothing more."[167] Consequently:

> The only denial of equal treatment it contends 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 obtain *preferential* treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged 'equal protection' violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.
>
> 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. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (*i.e.*, by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. . . . It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard-of.[168]

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not affect laws of general applicability. *See id.* at 1346 n.9.

166. Even assuming classifications based on homosexual orientation, were, for some reason, too imprecise, Justice Scalia maintained that "Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct." *Romer*, 116 S. Ct. at 1632-33 (Scalia, J., dissenting). *Cf.* Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 514 (1990) ("The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur."); United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

167. *Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting).

> It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit.

Id.

168. *Id.* at 1630-31. Later, in the same vein, Justice Scalia noted, "this is proved false

With respect to the issue of "animus," Justice Scalia decried the majority's inability to find room in the political process for both sides to compete for their view of a moral society.[169] He further criticized the majority for "verbally disparaging as bigotry adherence to traditional attitudes."[170] It was, he said, "nothing short of insulting" to suggest that Amendment 2 sprang from nothing other than a "bare desire to harm a politically unpopular group."[171] The result, he said, was to place "the prestige of [the Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[172] In this regard, Justice Scalia noted that the majority overlooked not only the rationale for (and logical ramifications of) *Bowers v. Hardwick*,[173] but also prior approvals of similar provisions by both the Congress[174] and the courts.[175] All of

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every time a state law prohibiting or disfavoring certain conduct is passed, because such a law prevents the adversely affected group—whether drug addicts, or smokers, or gun owners, or motorcyclists—from changing the policy thus established in 'each of [the] parts' of the State." *Id.* at 1634.

169. *See id.* Justice Scalia noted that "homosexuals are as 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.*

170. *Id.* at 1637.

171. *Id.* (quoting majority opinion at 1628, which in turn quotes Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). Justice Scalia noted, among other things, that Colorado had been one of the first twenty-five States to repeal homosexual sodomy laws. *See id.* at 1633.

172. *Id.* at 1629.

173. Justice Scalia found disturbing the majority's use of "grim, disapproving hints that Coloradans have been guilty of 'animus' or 'animosity' toward homosexuality, as though that has been established as Unamerican," when the only "animus" at work here was "moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*." *Id.* at 1633. Further, if under *Bowers* 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.... And *a fortiorari* 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.

Id. at 1631-32 (citations omitted).

174. Congress required anti-polygamy provisions in the constitutions of four western States (Arizona, New Mexico, Oklahoma, and Utah) as a condition for their admission to statehood. *See id.* at 1635. "Thus," Justice Scalia wrote, "this 'singling out' of the sexual practices of a single group for statewide, democratic vote—so utterly alien to our constitutional system, the Court would have us believe—has not only happened, but has received the explicit approval of the United States Congress." *Id.*

175. Further, the Court had upheld a territorial provision "depriving polygamists of the ability to even achieve a constitutional amendment, by depriving them of the power to vote." *Id.* (citing Davis v. Beason, 133 U.S. 333 (1890)). *See also* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 535 (1993) (citing *Beason* in support of the

this supports Amendment 2 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."[176]

The majority opinion in *Romer* is squarely grounded in the Plaintiffs' (and their amici's) themes of the "unprecedented" "selectivity," "severity," and "antipathy" of Amendment 2.[177] Yet, to reach the result it did, the Court had to disregard entirely not only well-established precepts of equal protection jurisprudence but also the trial court record—all of which it was more than willing to do, in order to provide a special level of protection from what it perceived to be the evil of discrimination.

No inference of unconstitutionality ought to arise simply because a measure is novel or otherwise unprecedented,[178] or even because it classifies on the basis of only one trait or characteristic.[179] Nor is there anything particularly "severe" or otherwise remarkable about Amendment 2's supposedly opprobrious "disqualification" of homosexuals. Amendment 2

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following proposition: "[A]dverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination . . . .").

Justice Scalia rhetorically inquired, "Has the Court concluded that the perceived social harm of polygamy is a 'legitimate concern of government,' and the perceived social harm from homosexuality is not?" *Romer*, 116 S. Ct. at 1636 (Scalia, J., dissenting). *Cf.* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) (plurality opinion of O'Connor, Kennedy, & Souter, JJ.) (refusing to disturb Roe v. Wade, 410 U.S. 113 (1973)).

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

Id.

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

177. Brief of Respondents at 34-37.

178. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

179. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring).

> There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious.

Id.

did not work a "disqualification," even in the limited sense of the word.[180] Homosexuals were not disqualified from participating in the political process and seeking to repeal Amendment 2 (or even to place an affirmative statement of protection in the state constitution), any more than the supporters of Amendment 2 were in proposing it and getting it passed. Victory might be more difficult to achieve at a statewide level, but this difficulty is experienced whenever a State preempts any issue.

More remarkable are the guiding principles the Court uses to dispose of the case: to wit, "that government and each of its parts remain open on impartial terms to all who seek its assistance."[181] The majority fails to recognize that the executive and legislative branches of the federal government (as well as every state governmental official, agency, and institution) do not, and *should* not, remain impartial to competing claims for political power. Often, the very objective of political action is to frustrate the efforts of political opponents. That this occurred at the state constitutional level is neither surprising nor exceptional. Constitutions establish both procedural and substantive limitations upon governments. The obstacle that Amendment 2 placed in the way of a political objective is thus no different than the obstacles faced by flag protectionists or abortion opponents. The Court's conclusion denying this truth seems to give some (but apparently not all) citizens a vested right to local decisionmaking, in contravention of state sovereignty, principles of self-government, and over 200 years of political practice throughout this country.[182]

If the Court did not mean to grant such a far-reaching and troubling right to local decisionmaking, we are left with the conclusion that the Court's basis for striking down Amendment 2 was that the Amendment's very "breadth" led the Court to infer that it was supported by a "bare . . . desire to harm"[183] homosexuals, rather than by "any identifiable

180. It certainly did not work a disqualification from the political process in general. Homosexuals could still advocate and vote for any number of other issues in which they might have a particular interest (e.g., homosexual marriage and adoption, funding for AIDS research and treatment).

181. *Romer*, 116 S. Ct. at 1628.

182. *See, e.g.*, Washington v. Seattle Sch. Dist., 458 U.S. 457, 480 n.23 (1982); *id.* at 496 (Powell, J., dissenting).

183. *Romer*, 116 S. Ct. at 1628 (quoting Department of Agric. v. Moreno, 413 U.S. 528,

legitimate purpose or discrete objective."[184] Yet the very same "breadth" of effect on homosexuals is achieved quite constitutionally whenever the people repeal antidiscrimination protections and refuse to pass them in the future.[185] All Amendment 2 did was accomplish that goal in a single measure without requiring repetitive repeal efforts.

The problem with the Court's equal protection analysis is "compounded," then, by the breadth of the Court's departure from its well-settled mode of determining whether a measure has satisfied the normally highly deferential rational basis test. That mode requires a state law be accorded "a strong presumption of validity,"[186] and that those attacking it "have the burden to 'negative every conceivable basis which might support it.'"[187] Further, the rational basis test does not require a narrowly tailored fit between means and ends, but only a "rough accommodation" of the State's interests.[188] Finally, the rational basis test is satisfied if the measure is reasonably related "to the achievement of *any combination of legitimate purposes.*"[189]

The Court neither used any of these principles nor explained why they were inapplicable. Obviously, the mere fact that Amendment 2 disadvantaged homosexuals ought to have been insufficient to invalidate it. Similarly, neither the type of disadvantage (repeal and prohibition on reenactment of antidiscrimination protections)[190] nor the possibility that some with distasteful motives may have supported it[191] is enough to raise the type of "inference of antipathy" justifying deviation

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534 (1973)).

184. *Id.* at 1629.

185. *See* Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 535, 542 (1982) (upholding a state constitutional amendment prohibiting state courts from ordering forced busing for the purposes of desegregation except to remedy a violation of the U.S. Constitution).

186. Heller v. Doe, 509 U.S. 312, 319 (1993) (quoting Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 314 (1993)).

187. *Beach Communications*, 508 U.S. at 315 (quoting Lehnausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). *See also Heller*, 509 U.S. at 320.

188. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973). *See also* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 813 (1976) ("That Maryland might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional.").

189. Vance v. Bradley, 440 U.S. 93, 97 (1979) (emphasis added). *Accord* Gregory v. Ashcroft, 501 U.S. 452, 470-71 (1991) (applying rational basis test to voter-enacted state constitutional provision discriminating against elderly judges).

190. *See Crawford*, 458 U.S. at 543.

191. *See supra* note 74.

from the normally deferential standard of rational basis review. Such inferences arise only where a law utilizes a quasi-suspect or suspect classification, or where no legitimate purposes are conceivable.[192]

The Sixth Circuit Court of Appeals found in a remarkably similar case that laws such as Amendment 2 serve "a litany of valid community interests."[193] These interests include (but are not limited to): (1) promoting "enhanced associational liberty"; (2) "returning the municipal government to a position of neutrality"; (3) reducing "governmental regulation of "private social and economic conduct," thereby "augment[ing] the degree of personal autonomy and collective popular sovereignty legally permitted concerning deeply personal choices and beliefs"; and (4) producing "cost savings for . . . taxpayers."[194]

The *Romer* Court wholly ignored extensive evidence in the record that Amendment 2 was similarly directed rather than motivated simply by a "bare desire to harm" others.[195] The trial court itself described the passage of Amendment 2 as stemming from

> a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied for or were part of a lobbying effort for the passage of the Amendment, and that involved spending money and presenting their views.
>
> There is absolutely nothing wrong with that. As a matter of

192. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

193. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 270 (6th Cir. 1995).

194. *Id.* With regard to the third interest listed, see also *Federal Communications Comm'n v. Beach Communications*, 508 U.S. 307, 320 (1993) (Stevens, J., concurring) ("Freedom is a blessing. Regulation is sometimes necessary, but it is always burdensome. A decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom."); *Eisendstadt v. Baird*, 405 U.S. 438, 453-54 n.10 (1972); and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Brandeis, J., dissenting) (quoting with approval the statement in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), that "[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."). As Thomas Jefferson put it, "That government is best which governs the least." Thomas Jefferson, *quoted in* LAURENCE J. PETER, PETER'S QUOTATIONS 231 (1977).

195. Romer v. Evans, 116 S. Ct. 1620, 1628 (1996).

> fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is to the voter, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.[196]

In addition, a poll conducted only a month after the vote by an independent survey firm, on behalf of the *Denver Post* and KCNC-TV, showed that only ten percent of those surveyed thought people voted for Amendment 2 because they hated homosexuals, and eighty-one percent "agreed" that "except for their choice of sexual partners, homosexuals are not really different from anyone else."[197] A follow-up survey conducted in September 1993 showed that while support for homosexuals in general increased, so did support for Amendment 2.[198] It is quite apparent that in the mind of the average voter, Amendment 2 and hatred of homosexuals had little, if anything, to do with one another. For good reason, then, no one on the Colorado Supreme Court thought to question the legitimacy of most of the interests asserted in support of Amendment 2.[199] Given the record in this case, the U.S. Supreme Court's finding of "animus" is not simply contrary to the evidence, it is indefensible.[200]

How, then, can the *Romer* decision be explained? The key lies with the Court's view of the importance of the legal protections Amendment 2 attempted to withhold. The Court appears to regard "antidiscrimination" laws as different in kind from all other type of social and economic legislation.[201] But there is

196. Reporter's Transcript at 16-17, Appendix E to Petition for Certiorari at 10.

197. Defendants' Exhibit B, Joint Appendix 120-25. Only 13% of poll respondents thought "homosexual behavior should be against the law, even if it occurs between consenting adults," and fully 73% believed that Amendment 2 was about special rights. *See id.*

198. *See* Joint Appendix 126-32.

199. Indeed, the Colorado court appeared to find, by a vote of six to one, that Amendment 2 was supported by *two* compelling—albeit not narrowly tailored—governmental interests. *See Evans II*, 882 P.2d at 1342-43, 1344 (Colo. 1994). The seventh justice did not conclude Amendment 2 was subject to strict scrutiny, and found it easily met the rational basis test. *See id.* at 1357, 1360 (Erickson, J., dissenting).

200. In light of the U.S. Supreme Court's ruling, the Colorado Supreme Court's lengthy analyses of the "political participation" theory and the State's proffered interests begin to take on a new luster.

201. It was on this point that the amici brief of the five legal scholars was pivotal. In

nothing qualitatively different about legislation described by the term discrimination; the term, "once divested of [its] emotional connotation, . . . simply means to distinguish or to draw a line."[202] Discrimination, then, is nothing more than the process of making choices. As a noted scholar has put it:

> Legislation characteristically classifies, distributing certain benefits to, or requiring certain behavior of, some but not others. . . . Thus unless all legislation that classified, which is to say virtually all legislation, is to fall, the baseline equal protection requirement must be close to that the Court in fact has developed, the so-called "'rational basis'" test.[203]

For the Court to assert that everyone either has, or more accurately, *ought* to have, the right to the special protections afforded by antidiscrimination laws, is truly astonishing. More fundamentally, to state that "[t]hese are protections taken for granted by most people either because they already have them or do not need them"[204] simply begs this larger question. Whether a non-suspect class *should* have[205] or *needs*[206] legal

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that brief, Professor Tribe and his colleagues argued that Amendment 2 was a per se violation of the Equal Protection Clause because it precluded, "for a selected set of persons, even the possibility of protection under any state or local law from a whole category of harmful conduct, including some that is undeniably wrongful." Brief of Amici Curiae for Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip P. Kurland, & Kathleen Sullivan at 2. The category of "harmful conduct" these amici identified was "the mistreatment of discrimination, however invidious and unwarranted." *Id.* at 1. "Outlawry," they wrote, "may be consistent with some regimes, but it is not consistent with the regime contemplated by the Fourteenth Amendment." *Id. See also* Brief for Respondents at 13 n.14 (referring to and endorsing the scholars' position that "Amendment 2 constitutes a per se deprivation of equal protection because it strips only one group of people of all eligibility for any protection from an entire category of wrongful mistreatment—the mistreatment of discrimination.").

202. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 109 (1976).

203. JOHN HART ELY, DEMOCRACY AND DISTRUST 30-31 (1980). Despite the view quoted, Ely joined Tribe's Amicus Brief on behalf of the Plaintiffs.

204. *Romer*, 116 S. Ct. 1627.

205. One commentator has noted:

> A consensus has developed in our society around the central insight of the civil rights movement, Dr. Martin Luther King's perception that racial discrimination is invidious because people should be judged by the content of their character, not by the color of their skin. Racial classifications are improper, therefore, not because race is immutable and inherent, but rather because race is a morally neutral characteristic. Race tells nothing about an individual's character or abilities. In contrast, legal distinctions drawn on the basis of socially undesirable conduct, such as disadvantaging burglars or drug users, are clearly legitimate. These classifications are not invidious, because they further legitimate societal goals by discouraging inappropriate or immoral behavior. Laws prohibiting homosexual sodomy seem to fall in this category, because they are the product of a sincere and reasonable societal objection to

protections beyond those afforded by laws of general application is a decidedly legislative, and not a judicial, question.[207] Homosexuals do not have these protections in most of the country,[208] and certainly not under federal law. In a larger context, many political battles have been waged, won, and lost over whether particular traits or classifications either deserved or needed laws interjecting government into areas previously left to the free choice of the parties involved.[209]

As the Court itself conceded, the "antidiscrimination" laws Amendment 2 sought to displace are themselves part of an

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conduct deemed immoral, unnatural, or unhealthy.

Richard Duncan & Gary Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 102-03 (1995) (citations omitted).

206. Civil rights expert Joseph Broadus testified at trial that

> there has been a growing sense . . . not of living in a society where we help the truly needy and we attempt to avoid doing injury, but the fact that we are evolving in [sic] a society of victimization where even those who are relatively well off seek to protect themselves as being needy and use the power of the State to gain what could be a special privilege.

Record vol. 17, at 1193-94, Joint Appendix at 209.

In this respect, the Plaintiffs' own witness, Jerome Culp, conceded that "with respect to the people who are so identified, it looks like gays, lesbians, and bisexuals continue to be more affluent than the average" and "[t]end to have higher levels of education." Testimony of Jerome Culp, Record vol. 19, at 1414-15. Indeed, as one pro-homosexual rights author put it, "gay men and lesbians suffer no discernible communal economic deprivation and already operate at the highest levels of society: in the boardroom, the media, the military, the law, and industry." Defendant's Affidavit 6 (Barry Gross) (Record vol. 18, at 1341); Record vol. 19, at 1349-51. This was in accord with the extensive evidence presented by the State. *See, e.g.*, Record vol. 16, at 920, 932; vol. 17, at 1155; Defendants' Affidavit 9 (James Hunter) (vol. 18, at 1341); vol. 19, at 1349-51; Defendants' Exhibits V (Simmons Market Survey) (vol. 16, at 908-09), EEE (*USA Today* Analysis of U.S. Census Bureau data) (vol. 16, at 924), and MMM (Overlooked Opinions, Inc. Survey) (vol. 16, at 924).

207. *Compare* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442-46 (1985) *with* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (1994).

208. *See* Testimony of Kenneth Sherrill, Record vol. 14, at 649, 652.

209. At least one erstwhile libertarian commentator hailed the *Romer* decision because "[s]uch class legislation was of paramount concern to the Constitution's framers, who worried about the power of factions to manipulate the coercive power of government for their own ends." Clint Bolick, *'Romer' Court Struck a Blow for Individuals Against Government*, LOS ANGELES DAILY J., June 4, 1996, at 6. However, this stands the issue on its head: a small but powerful faction—homosexual advocates—had succeeded in manipulating the coercive power of government. Amendment 2 was simply a majoritarian response that *withdrew* governmental power. The Framers understood that a State as an individual political community might well embark upon an "improper or wicked project," but they were confident that the structure of our federal system would ensure that such evils would "be less apt to pervade the whole body of the Union." THE FEDERALIST NO. 10, at 65 (James Madison) (Jacob E. Cooke ed., 1961). In any event, judicial intervention at the expense of popular choices was not seen as the solution to political divisiveness. Invoking the Framers in support of *Romer* is bad law and even worse history. *See supra* note 46.

"emerging" legal trend, which go "well beyond" the common law.[210] It is to be expected when laws which historically were focused upon the singular evil of racial discrimination are expanded into "an extensive catalogue of traits . . . including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation,"[211] that at some point the people may well decide that the pendulum has swung too far. The courts have not seen something like Amendment 2 before because only in recent years have new rights proliferated so uncontrollably. With the presence of movements throughout the country to curtail the expansion of special legal protections, it is difficult seriously to maintain that only "animus," and not a more potentially profound realignment of the social and political priorities of the nation, can explain measures such as Amendment 2.[212]

IV. THE FUTURE

The *Romer* decision raises a host of further questions, only a few of which are discussed below. With respect to political structure, the Supreme Court less than a month after *Romer* granted certiorari to, vacated the judgment of, and remanded for further consideration, a Sixth Circuit Court of Appeals decision upholding an Amendment 2-like provision adopted by Cincinnati voters at a municipal, rather than statewide, level.[213] Justice Scalia, joined again by Chief Justice Rehnquist and Justice Thomas, would have either denied certiorari (thus effectively sustaining the Sixth Circuit decision) or set the matter for full briefing and argument. In his view, it was of great moment that the measure was enacted at the municipal, as opposed to the state constitutional, level. "The consequence of [the *Romer*] holding," Justice Scalia wrote, "is that homosexuals in a city (or other electoral subunit) that *wishes* to accord them special protection cannot be compelled to achieve a state

210. *Romer*, 116 S. Ct. at 1625.

211. *Id.* at 1626.

212. For a concise, thoughtful layman's discussion of the issues before the U.S. Supreme Court, see Jeffrey Rosen, *Disoriented*, NEW REPUBLIC, Oct. 23, 1995, at 24.

213. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 116 S. Ct. 2519 (1996).

constitutional amendment in order to have the benefit of that democratic preference."[214] Extending *Romer* to invalidate Cincinnati's provision would mean that

> nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals. Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are [sic] concerned, be permitted to do what they please. This is such an absurd proposition that *Romer*, which did not involve the issue, cannot possibly be thought to have embraced it.[215]

However, *Romer* indeed could be read to embrace the proposition Justice Scalia rejects, if one considers the Court's sui generis view of the nature of antidiscrimination laws along with its apparent view that, no matter how articulated, any public interest proffered in support of such measures is nothing more than a cleverly-masked disguise for "irrational" prejudices and biases. Whether that view is held by some on the Court, it seems that the majority is unwilling to adopt it so publicly; after all, the majority easily could have reversed summarily the Sixth Circuit decision with a per curiam decision, citing *Romer*. The majority may have thought it possible that the Sixth Circuit case could be distinguishable because the Cincinnati ordinance was a local measure, and thus inherently could not have the "sweep" or "breadth" that was found so objectionable with respect to Amendment 2.[216]

The Sixth Circuit's decision on remand bears watching, and that court's treatment of the "political participation" theory will be particularly interesting. Because the U.S. Supreme Court affirmed the judgment in *Romer* "on a rationale different from that adopted by the State Supreme Court,"[217] the political participation theory was neither adopted nor rejected by the Court. The vitality—and constitutionality—of the theory is still

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214. *Id.* at 2519 (Scalia, J., dissenting).

215. *Id.*

216. Of course, it is also possible that the majority was unwilling itself to extend its new doctrine further in a summary fashion, but that some of those who voted for the remand hope that the lower court will do their work for them and strike down the measure in light of *Romer*.

217. *Romer*, 116 S. Ct. at 1624.

open to question.[218] The Cincinnati decision, and its possible treatment by the Supreme Court should the case return there, may help answer this question.[219]

Outside of Colorado and Cincinnati, the effect of *Romer* may be felt most immediately in the larger context of popular movements to limit affirmative action. The California Civil Rights Initiative (CCRI), also called Proposition 209, has received a great deal of attention lately. The Proposition was passed by the voters in November 1996, and recently enjoined by a federal district court.[220] However, CCRI neither focuses upon a single group or characteristic, nor refers to homosexual orientation.[221] To the extent that the decision in *Romer* hinges upon the perceived selectivity of Amendment 2 in "singling out a certain class of citizens,"[222] CCRI would not appear to suffer from this type of constitutional defect.[223]

A more intriguing question is whether California, or any State, can ban special protections across the board because doing so would not single out any group. At oral argument, counsel for the Plaintiffs specifically approved such an approach.[224] If this approach were held constitutional under *Romer*, that decision would well lead to an anomalous and counterintuitive constitutional doctrine: special protections for

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218. *See* Lorenz v. State, 928 P.2d 1274, 1280 (Colo. 1996) (reaffirming *Evans I* but refusing to extend the political policy theory to "occupation or business interest").

219. On balance, it appears more likely than not that the Sixth Circuit will reaffirm its holding that the charter amendment "furthered a litany of valid community interests," Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 270 (6th Cir. 1995), and will attempt to grapple with the profound tension between *Romer* and *Bowers* identified by Justice Scalia. *See id.* at 266-68.

220. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1508-09 (N.D. Cal. 1996).

221. Proposition 209 provides, in pertinent part:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

CAL. CONST. art. I, § 3(a).

222. *Romer*, 116 S. Ct. at 1628.

223. *See* Coalition for Econ. Equity, 946 F. Supp. at 1508 n.34 (relying upon *Hunter* doctrine but explicitly side-stepping its application in *Evans I*); *cf.* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2502 (1994) (Kennedy, J., concurring in the judgment) ("[B]y creating the district, New York did not impose or increase any burden on non-Satmars, compared to the burden it lifted from the Satmars, that might disqualify the District as a genuine accommodation.").

224. *See* Transcript of Oral Argument at 57 ("That's correct, you can end the game. If the State wants to repeal and prohibit any civil rights protections for anybody at any level of government in the future, and do it for everyone.").

non-suspect classes may not be prohibited unless such protections are prohibited for *everyone*, including the suspect classes who might actually need them.

In addition to the questions it raises about political structure, *Romer* also raises doubts about what treatments of homosexuals are constitutional. Most obviously, *Romer* calls into question the continuing viability of *Bowers v. Hardwick*. As noted earlier, after *Bowers* it could hardly be doubted that government action vis-a-vis homosexuality stood on a different plane than the impermissible "animus" condemned in *Palmore*, *Cleburne*, and *Moreno*.[225] But the *Romer* majority clearly indicated its distaste for *Bowers* by conspicuously failing to cite it, despite being challenged to do so by Justice Scalia's repeated references to that decision in his dissent. That *Bowers* was not overruled in *Romer* is most likely attributable to the well-known reluctance of the swing Justices (Justice Kennedy and Justice O'Connor) to depart from the rule of stare decisis in controversial cases.[226] Hence it is likely that the Court will avoid a reaffirmation of *Bowers* and will attempt over time to limit the decision to its facts.

Beyond the weakening of *Bowers* itself, the Court's implicit recognition of a distinction between conduct and status (orientation) threatens a long-standing, practical, and unintrusive way of identifying homosexuals for legal purposes.[227] Lower courts, which have traditionally employed status as a shorthand for conduct,[228] will now be discouraged from

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225. *See supra* notes 68-74 and accompanying text.

226. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion of O'Connor, Kennedy, & Souter, JJ.) (refusing to disturb Roe v. Wade, 410 U.S. 113 (1973)). "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.*

227. Indeed, it is not inconceivable that the Court might someday eviscerate *Bowers* by determining that any conduct-based prohibition is nothing but a straw man for "animus" directed at those who because of their status (orientation) are inclined to engage in such conduct.

228. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995) ("It is virtually impossible to distinguish or separate individuals of a particular *orientation* which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct."); Steffan v. Perry, 41 F.3d 677, 690, 690 n.11 (D.C. Cir. 1994) (asserting that the argument that there is almost no correlation between sexual orientation and conduct "is preposterous"; also noting the position of Lambda Legal Defense & Education Fund, as an amicus in *Bowers*, that homosexual orientation is inexorably intertwined with homosexual conduct); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (stating that government "need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the

following this useful technique.

Even more disturbing than its blurring of a formerly accepted legal distinction is the Court's blithe recasting of legitimate moral objections into impermissible hatred and prejudice. By implying that morally-based objections to homosexual conduct are somehow illegitimate, the Court may be sending a signal that will have repercussions far beyond *Romer.* And if the seeming illegitimacy of morally-based objections in *Romer* is extended further, to weaken all morally-based objections with which the majority of the Court disagrees, then our jurisprudence will be changed indeed.[229]

Lower courts in military cases have led the way both in developing the conduct-orientation distinction and in discounting the validity of morally-based objections.[230] Even those courts upholding the validity of homosexual exclusion from the armed services seldom, if ever, refer to any shared sense of morality as a basis for government action.[231] The current "don't ask, don't tell" policy authorizes exclusion of individuals who either engage in homosexual conduct or make

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sleuthing of... personal relationships for evidence of homosexual conduct"), *cert. denied,* 494 U.S. 1004 (1990).

229. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

230. *See* Thomasson v. Perry, 80 F.3d 915, 951 (4th Cir.) (Hall, J., dissenting) ("Private prejudice is a private matter; we are all free to hate. But the same concept of liberty for all that protects our prejudices precludes their embodiment in law."), *cert. denied,* 117 S. Ct. 358 (1996); Pruitt v. Cheney, 963 F.2d 1160, 1164-66 (9th Cir. 1991), *cert. denied,* 506 U.S. 1020 (1992); Cammermeyer v. Aspin, 850 F. Supp. 910, 923-24 (W.D. Wash. 1994) ("[T]o the extent public disapproval of homosexual service in the military is based on prejudice, such disapproval would not be a legitimate basis for the government's policy."); *see also* Holmes v. California Army Nat'l Guard, 920 F. Supp. 1510, 1534 n.26 (N.D. Cal. 1996) ("By promulgating and seeking to enforce the ban on gays from the military, the military is officially sanctioning and encouraging homophobia."). The court in *Holmes* asserted that

> the concern asserted by the military is simply another way of saying that the presence of homosexuals makes some service members uncomfortable. While it may be true that some intolerant heterosexual service members are uneasy in the presence of homosexuals, the Court rejects the notion that the bigotry of those service members provides a constitutionally sufficient basis to banish an entire class of persons from the military.

Id. at 1533.

231. *See Thomasson,* 80 F.3d 915; Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994); *Ben-Shalom,* 881 F.2d 454; Richenberg v. Perry, 909 F. Supp. 1303 (D. Neb. 1995); Selland v. Perry, 905 F. Supp. 260 (D. Md. 1995). For cases upholding the military's right to force individuals to leave the military if they engage in homosexual conduct, see, for example, Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied* 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

statements indicating that they are homosexuals.[232] These policies are usually attacked on equal protection, due process, and First Amendment freedom of speech grounds.

These three types of claims are interrelated. The due process and equal protection claims rise or fall together, because both require a rational relationship between the policy and a legitimate governmental interest.[233] Similarly, the validity of First Amendment claims typically depends on whether the particular statements reveal conduct or inclination that may be regulated consistent with due process and equal protection.[234]

Until recently, the issue was whether the government may exclude from military service those individuals for whom there is evidence only of homosexual orientation, as opposed to conduct. The Ninth Circuit Court of Appeals held under the old defense policy that something more was required: evidence of "a concrete, fixed, or expressed desire to commit homosexual

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232. Until 1993, homosexuals were excluded from military service pursuant to Department of Defense regulations. *See* 32 C.F.R. pt. 41, app. A, pt. 1 (1996). Since 1993, homosexuals have been subject to exclusion via statute. *See* 10 U.S.C. § 654a-f (1994), and revised regulations; Department of Defense Directives Nos. 1304.26, 1322.18, 1332.14, 1332.30; Department of Defense Instruction No. 5505.8.

The statute establishes that statements acknowledging homosexual orientation presumptively reflect a desire to engage in homosexual acts. The present Department of Defense policy differs from its predecessor in that it "sharply restricts the circumstances under which the military authorities may initiate an investigation of a service member." In addition, "[m]ilitary authorities are restricted as to what, if anything, they may ask applicants concerning their sexual orientation." Able v. United States, 88 F.3d 1280, 1286-87 (2nd Cir. 1996). Some jurists question the validity of these restrictions, arguing that they may be inconsistent with congressional intent. *See Thomasson*, 80 F.3d at 939-49 (Luttig, J., concurring).

233. *See* Watson v. Perry, 918 F. Supp. 1403, 1416-17 (W.D. Wash. 1996) (upholding policy against due process and equal protection attack); *see also Holmes*, 920 F. Supp. at 1536 (dismissing due process claim as being duplicative of more specific equal protection and First Amendment claims); Cammermeyer v. Aspin, 850 F. Supp. at 928 (finding due process violation because policy lacked rational basis).

234. These restrictions are usually upheld against First Amendment attacks on the theory that policies simply use speech as evidence of some object (homosexual conduct or orientation) the policies prohibit. *See Thomasson*, 80 F.3d at 931-34; *Pruitt*, 963 F.2d at 1163-64; Schoewnegerdt v. United States, 944 F.2d 483, 489 (9th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992); *Ben-Shalom*, 881 F.2d at 458-62; *Watson*, 918 F. Supp. at 1417-18; *Richenberg*, 909 F. Supp. at 1309-10; *Selland*, 905 F. Supp. at 263-65; Philips v. Perry, 883 F. Supp. 539, 547 (W.D. Wash. 1995).

In contrast, one court held that the current "don't ask, don't tell" policy violates the First Amendment by impermissibly imposing content-based restrictions on speech. *See Holmes*, 920 F. Supp. at 1534-36. A second court indicated that it would also find that the restrictions violated the First Amendment if it could be shown that the policy's rebuttable presumption of homosexuality was in fact irrebuttable. *See Thorne v. United States Dep't of Defense*, 916 F. Supp. 1358, 1366 (D. Va. 1996). *But see Richenberg*, 909 F. Supp. at 1313 (nothing that seven service members had rebutted the presumption).

acts."[235] This additional requirement was necessary, the court reasoned, because "a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not."[236]

The D.C., Fourth, and Seventh Circuit Courts of Appeals disagree with the Ninth Circuit, however, and instead find that homosexual orientation or propensity *can* serve as a basis for separation from service.[237] Assuming the military can proscribe homosexual conduct, the courts reason that it can also rationally attempt to prevent such conduct by using sexual orientation as a pragmatic guide for determining who is likely to engage in such conduct.[238] Moreover, the D.C. Circuit Court of Appeals in short order disposed of the "serious question" identified by the Ninth Circuit.

> Homosexuals and heterosexuals are . . . differently situated in that heterosexuals have a permissible outlet for their particular sexual desires whereas homosexuals in the military do not. The temptations facing heterosexuals, moreover, are less compelling than those that homosexuals would encounter, because men and women are quartered separately. They are separated because the military rationally assumes that heterosexuals, like homosexuals, are likely to act in accordance with their sexual drives whether or not such actions would be misconduct.[239]

A different and even more elementary battleground has developed in the wake of the *Romer* opinion. Until very recently, nearly everyone assumed that the military could proscribe homosexual acts. Yet the Second Circuit Court of Appeals recently remanded for reconsideration the question whether individuals could constitutionally be forced to leave the service

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235. *Meinhold*, 34 F.3d at 1479.

236. *Id.* at 1476. For this reason, the court would probably interpret the present policy in similar fashion. *See Holmes*, 920 F. Supp 1510 (holding that a new congressional statute and current defense policy impermissibly discriminate on basis of status alone); *Cammermeyer*, 850 F. Supp. 910 (holding that officer's discharge based solely on admission she was a lesbian violated equal protection and due process guarantees).

237. *See Thomasson*, 80 F.3d 915; Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); *Ben-Shalom*, 881 F.2d 454.

238. *See supra* cases cited in note 234. *But see* Able v. United States, 88 F.3d 1280 (2d Cir. 1996) (indicating that the military might not be able to proscribe homosexual acts).

239. *Steffan*, 41 F.3d at 692.

purely on the basis of homosexual conduct.[240] The court based its remand on the possible impact of *Romer* on "important constitutional questions as to the appropriate level of scrutiny to be applied to equal protection claims made by homosexuals and how any such test should be applied in the military context."[241]

Whether the issue be conduct or orientation, the new congressional statute and defense directives are likely to be upheld by the Supreme Court, if only because the Court accords exceptional deference to Congress and military authorities in matters of maintaining morale and unit cohesion.[242] Some of the most prominent military authorities in the country, including Colin Powell and Norman Schwartzkopf, have testified to the disruptive effects open homosexuality has had, and would have, on unit cohesion and morale.[243] Given the importance of this nation's ability to defend itself, concerns for privacy and sexual tension amongst members of the armed services will likely be adequate to uphold the present policy, regardless of how opponents characterize the policy's underlying dynamics.

Similarly, traditional heterosexual marriage laws may not necessarily be jeopardized by the *Romer* ruling.[244] Numerous courts have upheld statutes excluding same-sex marriages under a rational basis test because "marriage exists as a protected legal

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240. *See Able*, 88 F.3d at 1292.

241. *Id.* (citation omitted).

242. *See* Goldman v. Weinberger, 475 U.S. 503 (1986); Rostker v. Goldberg, 453 U.S. 57 (1981). *See also Thomasson*, 80 F.3d 915; *Ben-Shalom*, 881 F.2d 454; Richenberg v. Perry, 909 F. Supp. 1303 (D. Neb. 1995).

243. *See* S. REP. NO. 103-112, at 515 (1993). General Powell testified: "[T]he presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." General Schwartzkopf testified:

> [I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war.... Whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered.

Id. at 517.

244. Over a century ago, the Supreme Court observed:

> 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....

Romer, 116 S. Ct. at 1636-37 (Scalia, J., dissenting) (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)).

institution primarily because of societal values associated with the propagation of the human race."[245] It is true that due to scientific advances and liberalization of state adoption laws homosexuals may play a limited role in propagation. However, the distinguishing feature of marriage statutes is that they legally and socially legitimize sexual unions—something clearly falling on the *Bowers* "conduct," rather than the *Romer* "status," side of the jurisprudential ledger.[246] It should be noted, though, that to the extent that *Romer* weakens the conduct-status distinction, these rulings may be on less-than-solid judicial ground.

It is likely that most state courts will continue to uphold the validity of individual state marriage laws. However, if even one State chose to legitimize such marriages, it is an open question whether the Full Faith and Credit Clause[247] might require all other States to recognize homosexual marriages performed in that State.[248] The Hawaii Supreme Court's decision in *Baehr v. Lewin*[249] has focused sudden attention on this question. The court held that a state law limiting marriage to persons of the opposite sex[250] presumptively violated the Hawaii Constitution's prohibition against sex discrimination.[251] The court remanded

245. Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974). *Accord* Adams v. Howerton, 486 F. Supp. 1119, 1122-23 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); Anonymous v. Anonymous, 325 N.Y.S. 2d 499, 500 (N.Y. Sup. Ct. 1971); *In re* Estate of Cooper, 564 N.Y.S.2d 684, 687 (N.Y. Surrogate Ct. 1990) *aff'd*, 592 N.Y.S. 2d 797 (N.Y. App. Div. 1993); DeSanto v. Barnsley, 476 A.2d 952, 954 (Pa. Super. Ct. 1984).

246. *See In re* Adoption of T.K.J. & K.A.K. v. State of Colorado, Nos. 95CA0531, 95CA0532, 1996 WL 316800, at *6 (Colo. Ct. App. June 13, 1996) (acknowledging *Romer*, but nonetheless concluding that denial of petitions filed by unmarried homosexuals desiring to adopt each other's biological children meets rational basis review), *cert. denied*, 96 S. Ct. 588 (1997).

247. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

248. An excellent overall discussion of this question is found in Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994).

249. 852 P.2d 44 (Haw. 1993).

250. HAW. REV. STAT. § 572-1 (1985).

251. *See Baehr*, 852 P.2d at 67. HAW. CONST. art. I, § 5 (1978), provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

the case for trial to determine whether the same-sex marriage prohibition was narrowly tailored to achieve a compelling governmental interest.[252] If same-sex marriages were legitimized by this court, the other forty-nine States, which do not legally recognize such marriages, would have to decide how to react.

The general rule has been that out-of-state marriages must be recognized, unless doing so would violate the public policy of the domestic State.[253] Although there is a range of judicial decisions on this question, courts commonly require an explicit legislative declaration before they will invalidate a foreign marriage.[254] In some States this sentiment is so strong that courts validate out-of-state marriages even in the face of contrary domestic *criminal* statutes.[255] The *Romer* decision does not appear to disturb any of this precedent.

However, *Romer* may well affect the interpretation of the recent congressional action exempting States from the requirements of the Full Faith and Credit Clause in the area of marriage. Responding to the possible implications of the Hawaii situation, in September 1996 Congress passed and President Clinton signed the Defense of Marriage Act (DOMA). This Act provides, in pertinent part, that

> [n]o 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,

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252. *See Baehr*, 852 P.2d at 68. That trial was held in September 1996. On December 3, 1996, Judge Kevin S.C. Chang issued his findings of fact and conclusions of law, finding the sex-based classification in HAW. REV. STAT. § 572-1 unconstitutional and in violation of the equal protection clause of HAW. CONST. art I, § 5. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Hawaii Cir. Ct. 1996). Judge Chang has since issued a stay pending the State's plan to appeal the ruling before the Hawaii Supreme Court in 1997. *See* Manuel P. Mejorada, *Two Filipino American Gays at Starting Line for Same-Sex Weddings in US*, BUSINESSWORLD (MANILA), Dec. 13, 1996, *available in* 1996 WL 14370513.

253. *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 422 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

254. *See, e.g.*, Leszinske v. Poole, 798 P.2d 1049, 1053 (N.M. Ct. App. 1990) (recognizing a foreign marriage between an uncle and niece despite statute declaring such marriages "incestuous and absolutely void"). Most litigation regarding recognition of prohibited foreign marriages has arisen in the context of laws prohibiting polygamous marriages, marriages between persons of different races, and marriages between persons having a particularly close familial relationship.

255. *See, e.g.*, *In re* Estate of Loughmiller, 629 P.2d 156, 161 (Kan. 1981) (validating an out-of-state marriage between first cousins despite statute imposing criminal penalties for entering into such marriages within the State).

> 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.[256]

The obvious parallels between this language and that of Amendment 2 raise the inevitable question whether the Supreme Court would impute the same "animus" to members of Congress that it did to the people of Colorado.[257] Although it would appear that DOMA "identifies persons by a single trait," it cannot be said that it "denies them protection across the board."[258] Rather, its effect is limited to permitting individual States to refuse to recognize same-sex marriages. Thus, even if the Court were inclined to view this issue in terms of pure status, rather than conduct, the very narrow disability imposed distinguishes DOMA from Amendment 2.

More importantly, Congress has specific power under the Constitution to "prescribe . . . the Effect" of foreign marriages.[259] In enacting DOMA, Congress is exercising this power and is acting in accordance with well-established choice of law principles.[260] Thus, DOMA would likely withstand a *Romer* challenge.[261]

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256. Pub. L. No. 104-99, 110 Stat. 2419 (1996) (to be codified at 28 U.S.C. § 1738c).

257. *See Romer*, 116 S. Ct. at 1635 (Scalia, J., dissenting) ("[T]hus 'singling out' of the sexual practices of a single group . . . has received the explicit approval of the United States Congress."); *accord* H.R. REP. NO. 104-664, at 32 (1996) ("It would be incomprehensible for any court to conclude that traditional marriage laws are (as the Supreme Court concluded regarding Amendment 2) motivated by animus toward homosexuals.").

258. *Romer*, 116 S. Ct. at 1628.

259. U.S. CONST. art. IV, § 1.

260. In contrast, if Congress sought to *prohibit* state recognition of same-sex marriages, rather than simply ensure state discretion, it would likely be overstepping its constitutional authority.

> The Defense of Marriage Act does not affect the Hawaii situation. It does not tell Hawaii what it must do, and it does not tell the other 49 States what they must do. If Hawaii or another State decides to sanction same-sex 'marriage,' DOMA will not stand in the way.

142 CONG. REC. S4851-62 (daily ed. May 8, 1996) (statement of Sen. Nickles). In any event, a congressional statute that dictates the content of state marriage laws may violate the Tenth Amendment. *Cf.* New York v. United States, 505 U.S. 144, 161 (1992) (holding Congress may not "commandeer" state governments by forcing them to adopt a federal regulatory program); Koog v. United States, 79 F.3d 452, 458 (5th Cir. 1996) (concluding that the Brady Handgun Violence Protection Act, 18 U.S.C. § 922s (1994), "cross[es] the line from permissible encouragement of a state regulatory response into that constitutionally forbidden territory of coercion of the sovereign States"), *petition for cert. filed*, 65 U.S.L.W. 3001 (U.S. June 19, 1996) (No. 95-2052).

261. The U.S. Department of Justice concurs in this view. "[T]he Supreme Court's ruling in *Romer v. Evans* does not affect the Department's analysis (that H.R. 3396 is

V. CONCLUSION

At the end of the day, Amendment 2 was invalidated by three different courts on three vastly different rationales. The only apparent common thread was that Amendment 2 offended the individual jurists' sense of sound public policy. But, as Justice Harlan said, "I do not understand that the courts have anything to do with the policy or expediency of legislation."[262] Indeed, the Constitution "is made for people of fundamentally differing views, and the accident of [judges] finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with it."[263] Although one may speculate as to the potential effect of the *Romer* decision on constitutional jurisprudence, the most significant effect may be the long-term impact upon the body politic. It may be true that the average person appears unconcerned, trusting in the infallibility of Supreme Court pronouncements.[264] Increasingly, however, individuals who feel marginalized by unresponsive governments are seeking to make themselves heard through both violent[265]

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constitutionally sustainable) . . . ." H.R. REP. No. 104-664, at 33 (1996) (Letter from Ann M. Harkins for Assistant Attorney General Andrew Fois, Office of Legislative Affairs, to Rep. Charles T. Canady, Chairman, Subcommittee on the Constitution, Committee on the Judiciary (May 29, 1996)).

262. Plessy v. Ferguson, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting).

263. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). *See also* Stanford v. Kentucky, 492 U.S. 361, 379 (1989) ("[To reach] a decision supported neither by constitutional text nor by the demonstrable current standards of our citizens . . . . is to replace judges of the law with a committee of philosopher-kings."); *accord* LEARNED HAND, THE BILL OF RIGHTS 73 (Atheneum 1977).

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

Id.

264. *But see* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

265. *See generally* SOUTHERN POVERTY LAW CENTER, FALSE PATRIOTS 6-7 (1996) (describing appeal of "patriot" movement to "ordinary citizens disillusioned with big government"). *See also* Howard Pankratz, *Culture War To Get Ugly If Debate Stifled, Prof. Says*, DENVER POST, Oct. 21, 1993, at B1.

> "At the foundation of any democratic society is the principle that the laws that order our lives are legitimate only so long as they enjoy popular consent," . . . .
>
> "Without such consent, nearly anything can happen. This is why cultural disputes are potentially the most volatile. Sociologically speaking, cultural disputes provide the foundation and legitimation [sic] for violent confrontation."

Id. (quoting University of Virginia Professor James Davidson Hunter).

and non-violent[266] means. It is for this reason, and perhaps more so than at any time in recent memory, that

> [t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[267]

Romer v. Evans is more than simply an erroneous decision interpreting the Equal Protection Clause. From "private bias" to group-based "political participation" to "disadvantage born of animus," at every level the treatment of the case reveals a judiciary willing to reach beyond existing precedent in order to achieve a certain end. In the words of one of the authors' colleagues, *Romer* was truly a result in search of a reason, an unhappy example of the judiciary's willingness, under the guise of constitutional interpretation, to substitute its own voice for that of the American people.

266. *See, e.g.*, Thomas Fleming, *From Bryan to Buchanan*, CHRONICLES, Mar. 1996, at 8.

267. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865-66 (1992) (plurality opinion of O'Connor, Kennedy, & Souter, JJ.). *Cf.* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 136 (1921) ("Benevolent judges empowered to adjudicate according to their individual sense of justice might produce a benevolent despotism, but such a regime would put an end to the reign of law.").

APPENDIX

AMENDMENT 2—CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

NO PROTECTED STATUS

Ballot Title: *An amendment to Article II of the Colorado Constitution to prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination.*[*]

PROVISIONS OF THE PROPOSED CONSTITUTIONAL AMENDMENT

The proposed amendment to the Colorado Constitution would:

—prohibit the state, its branches or departments, or any of its agencies, political subdivisions, municipalities, and school districts from adopting or enforcing any law or policy that entitles any person to claim discrimination, protected status, minority status, or quota preferences based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships; and

—make all existing anti-discrimination ordinances, laws, regulations, and policies prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.

DEFINITIONS

For the purposes of this analysis, the following terms have the given meanings:

—"*Civil Rights Laws*" refers to local, state, and federal laws

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* This is the text of Amendment 2, along with the 1992 Ballot Proposals Analysis, as prepared and distributed by the Legislative Council of the Colorado General Assembly, published as RESEARCH PUBLICATION NO. 369 (1992). Signatures for this measure were gathered by volunteers.

designed to protect classes of persons from discrimination in areas such as employment, housing, and public accommodations.

—"*Constitutional Rights*" refers to the guarantees contained in the federal Bill of Rights (first ten amendments to the United States Constitution) and made applicable to the states through the Fourteenth Amendment.

—"*Discrimination*" as commonly used in civil rights law, means any act which denies, prevents, or limits any person from obtaining or maintaining employment, housing, or public accommodations based on race, age, gender, disability, nationality, or religion. Some states and localities have extended similar protections against discrimination based on factors such as marital or familial status, military status, sexual orientation, or political affiliation.

—"*Equal Protection*" refers to the clause in the Fourteenth Amendment to the United States Constitution which prohibits any state from adopting any law which denies the equal protection of the laws guaranteed to the citizens of the United States.

—"*Political Subdivision*" generally refers to a county, municipality, school district, local junior college district, special district, water conservation district, cooperative agency, regional commission, or an Indian tribe organized pursuant to the federal "Indian Reorganization Act of 1934," as amended.

—"*Protected Status*" means that a group has been identified for protection from actions which affect a protected or suspect class and which are limited or scrutinized as required by anti-discrimination statutes, ordinances, or common law.

—"*Quota*" refers to a remedy which imposes numerical goals to correct past discriminatory employment practices.

—"*Sexual Orientation*" means the status of an individual as to his or her sexuality, for example, heterosexuality, homosexuality, lesbianism, or bisexuality.

BACKGROUND

The proposed amendment arises in the context of three decades of increased governmental activity in the areas of civil rights. The concepts of the federal Civil Rights Act of 1964 have been extended by Congress, the states, and local governments

which have enacted new laws and strengthened existing laws to prohibit discrimination in employment, housing, access to public accommodations, and other areas involving civil rights. Courts at all levels are involved in interpreting and applying these laws, and administrative agencies have been created to enforce some of them. The proposed amendment identifies one area—discrimination based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships—in which civil rights laws and policies could *not* be enacted or enforced by the state government or by local governments in Colorado.

Evidence of discrimination. There is disagreement concerning the extent of discrimination against homosexuals, lesbians, and bisexual persons. Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation.

CURRENT LAWS AND POLICIES

Presently, a patchwork of federal, state, and local laws, regulations, and policies are in effect which monitor, offer limited protection against, or prohibit discrimination based on sexual orientation.

Local ordinances. Three home rule cities—Aspen, Boulder, and Denver—have ordinances protecting individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation. None of the ordinances requires quotas, affirmative action, minority status

or requires that employers or landlords seek out homosexual, lesbian, or bisexual employees or tenants. These cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations.

Aspen's ordinance prohibits discrimination in the areas of employment, housing, and public accommodations because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation. The Aspen ordinance does not exempt religious institutions. In Boulder, religious institutions cannot refuse to hire an individual or restrict access to public accommodations or housing because of that person's race, creed, color, gender, sexual orientation, marital or familial status, pregnancy, national origin, ancestry, age, or mental or physical disability. The Denver ordinance entirely exempts religious institutions, thus allowing them to refuse to hire persons or restrict access to public accommodations or housing based on a person's sexual orientation.

In Boulder, the owner of an owner-occupied, one-family dwelling or duplex is not permitted to deny housing to an individual based on his or her sexual orientation. However, the ordinance does allow owners to limit renters or lessees to persons of the same sex. In Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinance.

The anti-discrimination laws in these three cities do not classify homosexual, lesbian, or bisexual persons as ethnic minorities, but instead outlaw discrimination based on sexual orientation. These laws banning discrimination based on sexual orientation also prohibit discrimination against heterosexual individuals as well as against homosexual, lesbian, and bisexual persons. Attempts to pass similar anti-discrimination ordinances based on sexual orientation were defeated in Colorado Springs and Fort Collins. In addition, Denver Public Schools has adopted a nondiscrimination policy prohibiting discrimination based on sexual orientation.

State laws and policies. In 1990, the Governor issued an executive order prohibiting discrimination based on sexual orientation in the hiring, promotion, and firing of classified and

exempt state employees. The order applies to executive departments and to state institutions of higher education. Metropolitan State College of Denver has a policy prohibiting college sponsored social clubs from discriminating in membership on the basis of sexual orientation. Colorado State University has a general nondiscrimination policy prohibiting discrimination based on sexual orientation. Conversely, the University of Colorado Board of Regents defeated a resolution prohibiting discriminatory practices based upon sexual orientation. The only Colorado statute offering protection based on sexual orientation prohibits health insurance companies from determining insurability based on an individual's sexual orientation. Legislation was defeated in 1991 which would have expanded Colorado's ethnic intimidation law to include the right of every person, regardless of age, handicapping condition or disability, or sexual orientation, to be protected from harassment. Recently, the Colorado Civil Rights Commission voted to recommend that the state's civil rights law be amended to prohibit discrimination based on sexual orientation.

Federal laws. There are no federal civil rights laws that protect persons from discrimination based on sexual orientation in the areas of housing, employment, or public accommodations. However, the federal Hate Crime Statistics Act of 1990 requires the United States Attorney General to monitor, in addition to other crimes, those crimes that manifest evidence of prejudice based on sexual orientation.

Laws and policies in other states, municipalities, and higher education institutions. Anti-discrimination laws and policies based on sexual orientation are not unique to Colorado. Six states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Wisconsin) and the District of Columbia, and approximately 110 cities and counties in 25 states have passed legislation protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation in employment, housing, and public accommodations. In contrast, the voters in Oregon will be considering an initiated measure, which among other provisions, would outlaw legislation aimed at protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation. In 1988, the voters in Oregon overturned an executive order that would have protected

homosexual individuals from discrimination in state government.

Governors of eight states besides Colorado (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington) have issued executive orders prohibiting discrimination in state employment based on sexual orientation. Nationally, around 65 college and university systems have issued non-discrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

IMPACT OF THE PROPOSAL

Passage of the amendment would make unenforceable and unconstitutional those ordinances which prohibit discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons. Therefore, the portion of those ordinances prohibiting discrimination based on sexual orientation adopted by the city council or approved by the voters in the cities of Aspen, Boulder, and Denver would be rendered invalid. In addition, the amendment would nullify existing anti-discrimination policies based on sexual orientation which have been adopted by any state branch of government, department, agency, or school district in Colorado and would prevent adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation. The amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers. However, the amendment does not address the rights of heterosexual individuals to bring claims of discrimination under existing or future ordinances, therefore the impact of the amendment on the rights of heterosexuals is not known.

ARGUMENTS FOR

1) There is no evidence that homosexual, lesbian, and bisexual individuals are sufficiently disadvantaged to warrant designation as a protected class. Protected class status is not a basic right guaranteed to all citizens by the United States Constitution. In general, protected class status has been afforded to groups which have historically been subjected to purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection

from the majoritarian political process, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Some groups which have been given protection are those identified because of national origin, culture, age, disability, gender, religion, and marital or familial status. Similarly, there are no organized, state-sanctioned legal barriers which deny their ability to participate in the political process as has been the situation faced by racial minorities, in particular. For these reasons, it appears that this amendment may pass constitutional muster.

2) Homosexual, lesbian, and bisexual persons do not require protected status because they are entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories. Since homosexual, lesbian, and bisexual persons cross all cultural lines they may already receive protections with regard to race, gender, age, ethnicity, disability, religion, or marital or familial status. Insufficient evidence exists for creating a legal cause of action by homosexual, lesbian, and bisexual individuals in employment, housing, and public accommodations to warrant adding sexual orientation as a protected class.

3) Granting protected status to homosexual, lesbian, and bisexual persons may compel some individuals to violate their private consciences or to face legal sanctions for failure to comply. For some individuals, homosexuality, or bisexuality conflicts with their religious values and teachings or their private moral values. If a landlord is required to rent an apartment, for example, to homosexual, lesbian, or bisexual persons, he or she may be asked to either condone a lifestyle of which they do not approve or to be in violation of a local ordinance. People and institutions should have the right to express and act upon their moral convictions without being accused of discrimination.

4) The amendment does not have a negative impact on home rule autonomy of Colorado cities nor does it intrude into traditional powers of local government. The Colorado Constitution guarantees local municipalities the ability to function legislatively only in municipal affairs. Civil rights issues are not normally considered by local governments. Because of the importance of these issues, a wider spectrum of individuals than just municipalities should consider these matters.

Consideration of individual and group civil rights on the municipal level sets an improper precedent and only serves to dilute the original purpose of legislation enacting civil rights protections.

5) A proliferation of local ordinances or the possibility of a state statute that would provide protected status for homosexual, lesbian, and bisexual persons may divert resources for current enforcement activities. Additional discrimination cases may produce a demand for more staff and other state and local resources to investigate complaints, resolve disputes, or litigate cases.

ARGUMENTS AGAINST

1) All individuals should be accorded the same basic dignity, right to privacy, privileges, and protections guaranteed to every citizen. Discrimination against any class of individuals is wrong and, if tolerated, can easily spread to any and all groups in our society. In a pluralistic society, a threat to the rights of any one group should be viewed as a threat to the rights of all citizens. The amendment deprives homosexual, lesbian, and bisexual persons of legal protection against discrimination based on sexual orientation by isolating them as a class which could not be protected by such civil rights laws. Civil rights laws are constantly evolving to meet the demands of society, and no group of people should be precluded from seeking civil rights protection or protection from discrimination. Civil rights laws prohibiting discrimination against homosexual, lesbian, and bisexual persons do not condone or encourage homosexuality or bisexuality; rather, they only condemn discrimination of any nature and ensure equal opportunity for every citizen. By eliminating legal protections, the amendment sanctions prejudicial acts against homosexual, lesbian, and bisexual persons.

2) Because homosexual, lesbian, and bisexual persons face discrimination in employment, housing, and public accommodations and are victims of hate crimes, civil rights laws are needed that prohibit discrimination based on sexual orientation. Without the ordinances, existing laws inadequately protect these individuals and fail to address discrimination in employment, housing, and public accommodations. Homosexual, lesbian, and bisexual individuals belong to all economic

classes and are members of all racial, ethnic, disability, age, and religious communities. Because the kind of discrimination that these individuals experience is solely connected to a person's sexual orientation, the added protection in the ordinances gives homosexual, lesbian, and bisexual individuals legal recourse should they be discriminated against on the basis of their sexual orientation.

3) The amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions with respect to civil rights. Two-thirds of all Coloradans live in home rule cities. Under the Colorado Constitution home rule cities are empowered to address the needs of their residents as they see fit. This amendment also undermines county powers and the ability of the executive branch of government, school districts, and political subdivisions to enact their own anti-discrimination policies on this issue. The amendment implies that governmental entities, including the state, counties, cities, school districts, and other political subdivisions, should not be trusted to decide whether or not to protect persons from discrimination based on sexual orientation.

4) Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital or familial status, does no more than protect persons from discrimination and guarantee their basic human rights. The amendment is misleading and prejudicial by implying that homosexual, lesbian, and bisexual persons are seeking "minority status" or "quota preferences." Instead, the current local ordinances protect the right to get a job, buy a house, or have the same access to public accommodations as every other citizen. Each of these local ordinances also bans discrimination on the basis of age, gender, disability, religion, and marital or familial status, which are factors that are unrelated to whether a person is a member of a racial or ethnic group.

5) By singling out homosexual, lesbian, and bisexual persons in the state constitution and effectively denying them potential remedies for discrimination, the amendment denies them the same equal protections under the United States Constitution as other citizens. The proposed amendment may violate the equal protection clause of the United States Constitution, which prohibits any state from adopting a law which singles out a

group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears. For example, those city ordinances barring discrimination on the basis of sexual orientation could still be applicable to heterosexual individuals bringing claims of discrimination based on sexual orientation in housing, employment, and public accommodations, but not to homosexual, lesbian, and bisexual persons. Arbitrarily discriminating against any class of individuals in employment decisions based on sexual orientation is a violation of equal protection laws. Further, it is also a violation for a state to adopt a constitutional amendment which arbitrarily discriminates against homosexuals.