

Cutting the Gordian Knot of Affirmative Action: *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998)

While some opponents of affirmative action programs viewed *Adarand Constructors, Inc. v. Peña*¹ as the end for affirmative action programs, supporters have clung to Justice O'Connor's admonition that strict scrutiny is not "fatal in fact"² and have chosen to see it as merely a step toward narrowing these unwieldy, yet perhaps necessary, programs.³ *Lutheran Church-Missouri Synod v. FCC*⁴ demonstrates the federal judiciary's continued whittling away of excess affirmative action programs and how constricting the reach of such programs does not equate to making them per se invalid.⁵ Rather than shirking the court's responsibility to apply strict scrutiny to this volatile area, D.C. Circuit Judge Silberman ruled in accordance with the existing law. Moreover, by refusing to accept the FCC's superficial justifications, he exposed these machinations for what they were—unconstitutional racial preferences rather than provisions ensuring an even playing field.⁶

1. 515 U.S. 200 (1995).

2. *Adarand*, 515 U.S. at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)). "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* See generally Karen M. Berberich, *Strict in Theory, Not Fatal in Fact: An Analysis of Federal Affirmative Action Programs in the Wake of Adarand v. Peña*, 11 ST. JOHN'S J. LEGAL COMMENT. 101 (Fall 1995) (finding it possible to tailor affirmative action programs so that they withstand strict scrutiny).

3. See Jennifer R. Byrne, *Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action*, 42 ST. LOUIS U. L.J. 619 (1998).

4. 141 F.3d 344 (D.C. Cir. 1998).

5. See David Zimmerman, *Five Supreme Court Constitutions: Race-Based Scrutiny Past, Present, and Future*, 10 BYU J. PUB. L. 161, 176-78 (1996) (describing the concurring opinions in *Adarand* as advocating "a per se rule against race-based classifications"); Berberich, *supra* note 2, at 118 (characterizing the concurring opinions of Justice Scalia and Justice Thomas as "explicit efforts . . . to eliminate all race-based remedies for discrimination.").

6. On November 19, 1998, the Federal Communications Commission issued a notice of proposed rule-making, voting 5-0 for the proposed rule, which imposes outreach requirements on broadcast stations. See *Broadcasting: Proposed EEO Rules for Broadcasters Respond to Lutheran Church Decision*, Empl. Pol'y & L. Daily News, (BNA), at D-9 (Nov. 23, 1998). Although this rule requires that minority and female applicants be informed of job vacancies, the rule does not include a requirement that the broadcast

The Lutheran Church-Missouri Synod ("the Church") is licensed by the Federal Communications Commission ("the Commission") to operate two radio stations in Clayton, Missouri.⁷ Although the format of one station is religiously inspired and the format of the other is "classical music with a religious orientation,"⁸ the Church deemed knowledge of Lutheran doctrine to be a "requirement" for those employed by the stations.⁹ The Commission's adoption of equal employment opportunity ("EEO") regulations established a framework for radio stations' employment practices.¹⁰ This framework both prohibited employment discrimination¹¹ and required that the radio stations "adopt an affirmative action 'EEO program' targeted to minorities and women."¹²

When the Church applied for its 1989 licensing renewal, the Commission found its affirmative action program to be questionable.¹³ The Commission determined that the Church had not complied with the EEO requirements in two ways: the Church's religious hiring preference was over-inclusive¹⁴ and it failed to "utilize a formal EEO process" in its recruitment practices.¹⁵ As a result, the Commission imposed formal

stations "assess the composition of their workforces in comparison to the local labor market." *Id.* Thus, this rule lacks the minority hiring preferences that plagued the former rule.

7. See *Lutheran Church-Missouri Synod*, 141 F.3d at 346.

8. *Id.*

9. See *id.* The Church describes the religious mission of the stations by stating they "have been dedicated to the task of carrying out in their way the Great Commission which Christ gave to His Church, to preach the Gospel to every creature and to nurture and serve the people in a variety of ways." *Id.*

10. See *id.*

11. See *id.* "Stations are forbidden to discriminate against any person 'because of race, color, religion, national origin, or sex.'" *Id.* (quoting 47 C.F.R. § 73.2080(a) (1997)).

12. *Lutheran Church-Missouri Synod*, 141 F.3d at 346 (citing 47 C.F.R. § 73.2080(b) & (c) (1997)).

13. See *id.* The Church explained that "its hiring criteria of 'knowledge of Lutheran doctrine' and 'classical music training' narrowed the local pool of available minorities" and that its historical practice of drawing "many of its employees from the Concordia Seminary" where the stations were located lessened its outside recruiting. *Id.* at 346-47.

14. See *id.* at 347. The Commission took the position that religious broadcasters are exempt "from the ban on religious discrimination, but only when hiring employees who are reasonably connected to the espousal of religious philosophy over the air." *Id.* According to the Commission, lower level employees did not have such a connection. See *id.* The Commission viewed "receptionists, secretaries, engineers, and business managers" as lacking such a reasonable connection. *Id.*

15. *Id.* at 348. Analyzing the Church's compliance with 47 C.F.R. § 73.2080(c), the Commission found that the Church "did not include an EEO notice on its employment application, regularly solicit applicants from minority specific sources, or instruct any management level employee to implement a structured EEO program." *Id.*

reporting requirements on the Church as a sanction.¹⁶ Because the Commission saw the Church's employment prerequisite of a "classical music training" as a misrepresentation, it also fined the Church \$25,000 for a "serious lack of candor."¹⁷

Two months after the court heard argument in the case,¹⁸ the Commission requested a partial remand, claiming that "a recently released 'policy statement' . . . [would] permit religious broadcasters to use a religious preference for all positions."¹⁹ After asserting that it would "vacate those portions of its Lutheran Church order 'related to the EEO issue,'" the Commission quickly took the stance that it was "inappropriate . . . to commit itself concerning the merits of the adjudication on remand."²⁰

Writing for the D.C. Circuit, Judge Silberman began his opinion by denying the Commission's motion to remand.²¹ The court argued that this post-argument policy statement neither ensured that the Commission would vacate the order regarding the Church²² nor did it address whether the Church violated the EEO regulations as they apply to recruiting minorities.²³ The court rejected the Commission's claim that the Church lacked standing to bring an equal protection challenge,²⁴

16. *See id.* The sanction "required the Church to submit four reports at six-month intervals with the following information: (1) a list of all job applicants and hires, indicating their referral or recruitment source, job title, part-time or full-time status, date of hire, sex, and race or national origin; (2) a list of all employees, ranked from highest paid to lowest paid, indicating job title, part-time or full-time status, date of hire, sex, and race or national origin; and (3) a narrative statement detailing the stations' efforts to recruit minorities." *Id.* (citation omitted).

17. *Id.* After testifying that knowledge concerning classical music was a "requirement," a former management level employee submitted an affidavit to clarify the "requirement" and to explain that "while [they] seek only salespeople with a classical music background, [they] are not always successful." *Id.*

18. The dispute between the Lutheran Church-Missouri Synod and the FCC had been heard by an Administrative Law Judge prior to the appeal to the D.C. Circuit. *See In re Lutheran Church-Missouri Synod*, 12 F.C.C.R. 2152 (1997).

19. *Id.* For this reason, the Commission wanted to revisit all of the case—except for the \$25,000 fine. *See id.*

20. *Id.* at 349 (internal quotation omitted).

21. *See id.*

22. *See id.* Judge Silberman pointed out that "as a matter of administrative law . . . [this] 'policy statement' . . . does not bind the Commission to a result in any particular case." *Id.*

23. *See id.* "Even under the suggested modification, the Church might well have violated the EEO requirements by not preferring minority Lutherans over non-minority Lutherans." *Id.*

24. *See id.* The court found it obvious that the Church had been harmed by the FCC's finding that it had violated the EEO regulations and the resulting order. *See id.* "The

focusing most of its discussion on whether the Commission's EEO regulations could withstand such a challenge.²⁵ The court agreed with the Church's arguments that strict scrutiny, rather than rational basis scrutiny, should apply to the Commission's EEO program.²⁶ The court found that the program did not survive such an analysis.²⁷ The court interpreted the EEO program guidelines as mandating, or at least encouraging, proportional representation in the radio stations' workforces.²⁸ Even considering the policy change purportedly placing less emphasis on statistics, the court recognized that statistics triggered further review by the Commission and hence, remained significant factors in its ultimate determination.²⁹ The court reasoned that pressure on employers to meet a numerical goal results in race-conscious preferences.³⁰ Judge Silberman emphasized that it did not matter "whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race."³¹

The court then held that the EEO regulations' goal of diversity was not a compelling government interest,³² and that the regulations were not narrowly tailored to meet that interest.³³ The court asserted that the Commission had failed to produce any evidence that low-level employees targeted by the EEO requirements affected the ostensible goal of diversity in programming content.³⁴ Furthermore, the court found that the Commission had proffered the very same argument regarding the impact of race on program diversity that the Commission itself had rejected when offered by the Church with regard to

order [was] a black mark on the Church's previously spotless licensing record . . ."; moreover, "the remedial reporting conditions . . . increas[ed] an already significant regulatory burden." *Id.*

25. *See id.*

26. *See id.* at 351.

27. *See id.*

28. *See id.* at 352.

29. *See id.* at 353.

30. *See id.* at 353-54.

31. *Id.* at 354.

32. *See id.* at 354.

33. *See id.* at 355. The Commission argued that employee diversity would translate into diversity of programming. *See id.* at 356.

34. *See id.*

the impact of Lutheran faith on programming.³⁵ Because the court held that the EEO regulations were unconstitutional, it did not "think it [prudent] to decide the Church's RFRA and free exercise challenges" ³⁶ For that reason, the court chose "to remand to the FCC so it [could] determine whether it [had] the authority to promulgate an employment non-discrimination rule."³⁷ Concerning the issue of the \$25,000 forfeiture, the court found the Church's use of the term "requirement" to be a mistake, rather than a misrepresentation.³⁸ Because the misstatement was promptly corrected, the court vacated both the forfeiture and the lack of candor determination.³⁹

In its second consideration of this case, the D.C. Circuit denied the Commission's petition for rehearing.⁴⁰ Unpersuaded by the Commission's assertions that the policy statement concerning exemptions for religious broadcasters was binding, the court denied its motion to remand.⁴¹ Nor did the court find any basis for the Commission's contention that the RFRA claim had been dealt with improperly.⁴² Focusing on the appropriate level of scrutiny for the EEO regulations, the court found financial incentives to grant racial preferences and outright

35. *See id.* "The FCC would thus have us believe that low-level employees manage to get their 'racial viewpoint' on the air but lack the influence to convey their religious views. That contradiction makes a mockery out of the Commission's contention that its EEO program requirements are designed for broadcast diversity purposes." *Id.* at 356.

36. *Id.* The court emphasized, "To be sure, we have held only that the Commission's EEO program requirements are unconstitutional; therefore, our decision does not reach the Commission's non-discrimination rule which *King's Garden* interprets." *Id.* In *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974) (citation omitted) the D.C. Circuit upheld the FCC's limited exception to its anti-bias regulations which allowed exemptions for religious broadcasters employing those whose jobs were "connected with the espousal of the licensee's religious views." *Id.* at 53.

37. *Id.*

38. *See id.*

39. *See id.* at 356-57.

40. *See Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998).

41. *See id.* at 489. This "policy statement" represented a policy reversal by the FCC, allowing religious broadcasters to utilize religiously-based hiring preferences with regard to all employees. *Id.* Moreover, assuming that the "order" would have bound the commission, remanding the case would not grant the Church complete relief because the remedy would only deal with the *King's Garden* policy, ignoring the EEO issue. *See id.* at 490.

42. *See id.* at 490-91. The Commission argued that the RFRA challenge should have been addressed prior to the court dealing with constitutional issues; in the alternative, the Commission argued that if the RFRA issue was constitutional, it was tied to First Amendment free exercise concerns and still should have been decided prior to the Fifth Amendment issue. *See id.*

compulsion to grant such preferences to be equally suspect.⁴³

In its final disposition of the case, the D.C. Circuit denied the Commission's suggestions of rehearing en banc in a truncated per curiam decision⁴⁴ with Chief Judge Edwards and Circuit Judges Tatel and Wald⁴⁵ dissenting. Chief Judge Edwards asserted the case presented no constitutional issue.⁴⁶ He viewed the EEO regulations merely as preventive measures targeting employment discrimination as opposed to racial classifications.⁴⁷ This lack of racial classifications therefore abrogated the need for strict scrutiny analysis.⁴⁸ Judge Tatel's dissent recognized the gradual narrowing of affirmative action programs, but nonetheless found the EEO program to withstand this limiting trend because it "require[d] nothing more than recruitment, outreach, self-evaluation, and data collection."⁴⁹ Absent evidence of "unequal treatment based on race," he would not require strict scrutiny analysis.⁵⁰

Strict scrutiny is not only the requisite standard of review for affirmative action programs, it is also the key to re-mooring this runaway policy to its origins. Historically, the use of racial preferences via affirmative action has been an effort to remedy past discrimination. Translating the use of racial preferences in an attempt to prevent future instances of discrimination

43. See *id.* at 491. The Commission's program "effectively oblige[d] the Church to implement racial preferences in its hiring decisions." *Id.* (citing *Lutheran Church-Missouri Synod*, 141 F.3d at 351-52). The court elaborated, "[T]he degree to which the regulations require, oblige, pressure, induce, or even encourage the hiring of particular races is not the logical determinant of whether the regulation calls for a racial classification. In *Adarand*, the challenged regulations did not require or obligate would-be contractors to grant a preference to minority subcontractors." *Id.* (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)) (emphasis added). Nevertheless, the pressure to do so could not be ignored.

44. See *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d at 494. Circuit Judge Rodgers did not file a statement of dissent, but believed the rehearing en banc should have been granted; Circuit Judge Garland did not participate. See *id.*

45. Circuit Judge Wald concurred with both dissents from the denial of the suggestions of rehearing en banc. See *id.* (Edwards, C.J., dissenting) (Tatel, J., dissenting).

46. See *id.*

47. See *id.* at 496-97.

48. See *id.* at 497. Chief Judge Edwards' understanding of *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), was that it clearly "dealt only with policies that actually classified on the basis of race." *Id.*

49. *Id.* at 500 (Tatel, J., dissenting).

50. *Id.* at 501-03. "Nothing in the regulations' outreach provisions . . . either directs stations to hire anyone on the basis of race or requires stations to maintain any specific racial balance. Nor do the regulations confer or withhold benefits upon anyone on racial grounds." *Id.* at 502.

subverts the goal of abolishing racial classifications.⁵¹ Over time, the concept of affirmative action has expanded to encompass more than just prohibiting and remedying race-based discrimination. It has become synonymous with taking action "on account of race" and in doing so, lost sight of its original purpose.⁵² In response, the federal judiciary has emphasized the narrow tailoring requirement of strict scrutiny⁵³ and has cautioned against supposed remedies for discrimination "that are ageless in their reach into the past, and timeless in their ability to affect the future."⁵⁴

"Outright racial balancing" cannot achieve the ends government purports to accomplish with affirmative action.⁵⁵ The Commission, for example, maintained that diversity of programming was a compelling interest. Even in the now defunct *Metro Broadcasting*, the U.S. Supreme Court "held only that the diversity interest was 'important'" and did not stretch the interest into the range of "compelling."⁵⁶ To argue that "programming diversity" can be achieved by hiring more minorities as low-level employees suggests that there is a "white" way of thinking, a "black" way of thinking, etc., that affects station programming. The government should be discouraging, not condoning, this sort of stereotypical categorization.⁵⁷ Even Justice Stevens, a proponent of

51. See Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721, 727 (1996). "Broad-based racial preferences were never meant as a way of preventing future discrimination; they were meant as a remedy for past discrimination, whose present day legacy cannot be addressed by prospective anti-discrimination statutes." *Id.*

52. See *Middleton v. City of Flint*, 92 F.3d 396, 404 n.6 (6th Cir. 1996) (discussing the "transformation of 'affirmative action'"). Some now argue that, "it may very well be time to 'get beyond racial preferences,' even though we cannot 'get beyond race entirely.'" See Kahlenberg, *supra* note 51, at 721.

53. See generally *Middleton*, 92 F.3d 396 (finding that the affirmative action promotional system used by police department was not narrowly tailored); *Alexander v. Estopp*, 95 F.3d 312 (4th Cir. 1996) (finding that the affirmative action hiring program used by fire department was not narrowly tailored); *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997) (finding that the race-based programs used to award county construction projects were not narrowly tailored).

54. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986) (plurality opinion).

55. See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989) (noting that the city's quota was not "narrowly tailored to any goal, except perhaps outright racial balancing.>").

56. *Lutheran Church-Missouri Synod* 141 F.3d at 354.

57. "When affirmative action is not used to remedy identifiable discrimination, it can become the very evil it seeks to eliminate-discrimination." See Lara Hudgins,

affirmative action, has stated that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."⁵⁸

As Justice Brennan articulated, concern about using racial classifications via affirmative action stems from the fear that "even in the pursuit of remedial objectives an explicit policy of assignment by race may serve to stimulate society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relation to an individual's worth or needs."⁵⁹ Seeking to remedy past discrimination in a way that exacerbates the core of such discrimination can only lengthen the process of achieving a nation where race is not a divisive factor.⁶⁰ "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race."⁶¹ Otherwise, remedial attempts merely prolong the problem. "As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged."⁶² Whether for noble or for contemptible purposes, racial classifications are unconstitutional.

In general, the federal judiciary has been rightfully suspicious of proportionality-forcing programs precisely because such programs require that decisions be made based upon race. Accordingly, the federal judiciary has taken special

Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease, 47 BAYLOR L. REV. 815, 839 (1995).

58. *Adarand* 515 U.S. at 236 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)). See generally *Estepp*, 95 F.3d at 315 (finding the affirmative action program at issue was not narrowly tailored, and thus violated equal protection); *Freeman v. City of Fayetteville*, 971 F. Supp. 971, 975 (E.D.N.C. 1997) ("A narrowly tailored remedy cannot be over-inclusive and must be confined to alleviate 'the effects of identified discrimination' within the institution subject to the remedy." (quoting *Croson*, 488 U.S. at 507)).

59. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part).

60. See *Croson*, 488 U.S. at 527-28 (Scalia, J., concurring). Justice Scalia noted, "[T]hose who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still." *Id.*

61. *Adarand*, 515 U.S. 200 at 239 (Scalia, J., concurring in part and concurring in judgment).

62. *Id.* at 240 (Thomas, J. concurring in part and concurring in judgment).

pains to distinguish "securing equal treatment of applicants"⁶³ from instances where special incentives or disincentives are utilized to encourage racial preferences.⁶⁴ Though the Commission argued that its affirmative action program was only an outreach program,⁶⁵ i.e., "confined merely to recruitment efforts, and that hiring, promotion and compensation were based on merit, not race,"⁶⁶ the *Lutheran Church-Missouri Synod* court scrutinized the structure of this program because it seemed to entail much more.⁶⁷ The purported outreach efforts metastasized into hiring preferences. Circuit Judge Silberman noted that if racial considerations affected employment decisions, a remedy was required.⁶⁸ The *Lutheran Church-Missouri Synod* court compared the Commission's EEO program to *Adarand*, where "the regulations provided a financial incentive to bidding contractors to grant such a preference—an incentive that contractors were free (at their economic peril) to disregard."⁶⁹ The D.C. Circuit Court of Appeals dealt with a situation where an employer was essentially *penalized* unless it undertook racial balancing. When the penalty for not meeting racial parity is intensive review by the Commission, a perverse incentive program is established which necessitates the attainment of numerical goals. The natural result of these goals is racial preferences and unequal treatment based on an individual's race.

Even if one concedes a need for affirmative action programs in "special" circumstances, *Lutheran Church-Missouri Synod* demonstrates the latent infirmity of using "race" as opposed to actual victimization as the key factor in such line-drawing. The Commission attempted to justify its EEO program requirements by pointing to the racial disparity present in the radio stations. The foundation of its argument, however, lay upon manipulable statistics and was rejected by the D.C. Circuit. As Chief Judge Posner has noted, "Raw statistical

63. *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998).

64. *See id.* at 16-17.

65. *See Lutheran Church-Missouri Synod*, 141 F.3d at 351 (D.C. Cir. 1998).

66. *Messer v. Meno*, 130 F.3d 130, 136 (5th Cir. 1997).

67. *See Lutheran Church-Missouri Synod*, 141 F.3d at 351.

68. *See id.*

69. *Lutheran Church-Missouri Synod*, 154 F.3d at 491 (citing *Adarand*, 515 U.S. 200 (1995)).

disparities prove little; they certainly do not prove intentional discrimination."⁷⁰ The Commission changed its policy from one that was "purely result-oriented" and "relied primarily on labor force statistics,"⁷¹ to one that "purport[ed] to de-emphasize statistics and look more at a station's overall EEO efforts."⁷² Even so, its analysis of the Church's practices proved the haziness of the practical distinction between these two policies. The Commission assumed that the existing disparity necessarily meant that the Church had engaged in discriminatory behavior or at least had neglected some equal opportunity duty. However, this assumption ignores a host of non-discriminatory reasons. To infer employer discrimination from limited minority participation in a particular industry is to fall victim to tunnel vision, reaching conclusions without discerning an adequate basis for the presumed discrimination.⁷³ "Remedial efforts such as affirmative action should be limited to attacking the actual barriers to equal opportunity employment."⁷⁴ By addressing extant obstacles to equal opportunity employment, any redress necessitates the existence of actual victims. Thus, the remedy becomes victim-specific. "If the problem is not employer discrimination, the

70. *McNamara v. City of Chicago*, 138 F.3d 1219, 1223 (7th Cir. 1998). Chief Judge Posner noted, "A glance at almost any occupation in the United States will reveal disparities, often stark, between the racial, ethnic, religious, and sexual composition of the occupation and that of the American population in general, and not all of these disparities are plausibly attributable to intentional, or for that matter unintentional, discrimination, let alone intentional discrimination by the particular employer that has been sued Some of the differences may of course be due to discrimination, but the only discrimination for which an employer is liable is the discrimination that he engages in." *Id.*

71. *Lutheran Church-Missouri Synod*, 141 F.3d at 347. Under this standard, the FCC "automatically reviewed a station's compliance if its minority and female representation was less than 50% of their 'overall availability' in the area labor force. A workforce with minority representation matching 100% of overall availability is referred to . . . as 'parity,' a term which reflects the FCC's perception that proportional representation is the norm." *Id.*

72. *Id.*

73. See Lara Hudgins, *supra* note 57, at 817. "[A] disparity between the percentage of a protected class employed in a particular workforce or occupation and the raw percentage of class members in a regional labor pool, standing alone, cannot be a 'strong basis in evidence' sufficient to justify hiring or promotion quotas." *Middleton*, 92 F.3d at 406 (holding that "the district court erred by adopting without deeper analysis . . . raw statistics concerning the city's general labor pool as the relevant population against which to gauge the City of Flint's police promotion policies and practices"). See also *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d 1308, 1312-13 (N.D. Fla. 1998) (discussing the requirements of a "strong basis in evidence").

74. Hudgins, *supra* n. 57 at 817.

remedy should not be affirmative action in the employment setting."⁷⁵

"[W]hen special qualifications are required to fill particular jobs, comparison to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."⁷⁶ Additionally, the Commission discounted the importance of the Church's overall mission by rejecting the Church's belief that knowledge of Lutheran doctrine and of classical music were valid employment criteria. Discrediting the special qualifications that the Church felt were necessary distorted the Commission's perceptions of the relevant work force. This distortion ignored the concept that "the racial composition of those holding at-issue jobs [should be] compared with the racial composition of qualified applicants or qualified persons in the labor market."⁷⁷ Non-proportionality does not necessitate a finding of discrimination.⁷⁸

Even well-meaning expansions of affirmative action prove too much when the policy is stretched beyond its intended purpose,⁷⁹ distorting the remedy into the very evil it abhors. The narrowing of affirmative action is not so much the destruction of a time-honored legal mechanism, but rather a return to the original purpose of the policy.⁸⁰ *Lutheran Church-Missouri Synod* is an example of the federal judiciary stripping away years of glossed-over policies, inspecting them to see if the means employed are accomplishing the intended result. Even if the short-term goal is being attained, the means used must be scrutinized to see if the result also brings an

75. *Id.*

76. *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 21 (1st Cir. 1998) (quoting *Crosen*, 488 U.S. at 501). *See also*, *Middleton*, 92 F.3d at 402.

77. *Lutheran Church-Missouri Synod*, 154 F.3d at 494 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (O'Connor, J., plurality opinion)).

78. *See id.* at 494.

79. *See Messer v. Meno*, 130 F.3d 130, 136 (5th Cir. 1997) ("Diversity programs, no matter how well-meaning, are not constitutionally permissible absent a specific showing of prior discrimination, because "'good intentions" alone are not enough to sustain a supposedly "benign" racial classification.'" (quoting *Adarand* 515 U.S. at 227 (1995))).

80. While *Adarand* did not necessarily lead to the end for all affirmative action programs, "the courts may be more willing to inquire as to whether race-neutral legislation could achieve the same compelling government interest." Stephanie P. Guiste, *Adarand Constructors, Inc. v. Pena: Strict Scrutiny—One Standard of Review for All Racial Classification Legislation*, 22 J. CONTEMP. L. 172, 172 (1996).

unintentional backlash. In addition to overt discrimination, that very backlash is the evil which cannot be forgotten. If it is, for every step forward, we take two steps away from the goal. Race should not be the basis for classification, be it for discrimination or for granting preferences. Affirmative action should be based on a theory of victim-specificity, individualizing remedies rather than classifying by race. By granting racial preferences, we give those who believe in racial stereotypes a hook on which to hang their hatred—the “equalizing” process reassures them that the preferred group could not achieve without extra help in the form of affirmative action.⁸¹ At the same time, we give those who are “benefiting” a crutch on which to lean—a support which gives a sense of entitlement or worse, which makes them question their ability to achieve without affirmative action.⁸² At first it may not seem noticeable, after all these steps are taken in the noble name of affirmative action. Continuing to give racial preferences—no matter how they are packaged—will only thwart the vision Justice Harlan articulated a century ago of a color-blind nation which “neither knows nor tolerates classes among citizens.”⁸³

Erin E. Patten

81. “Classifications based on race carry a danger of stigmatic harm . . . they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” *Croson*, 488 U.S. at 493 (1989) (O’Connor, J., joined by Chief Justice Rehnquist and Justice White).

82. “There is a special irony in the stereotypical thinking that prompts [affirmative action programs] Although it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries.” *Croson*, 488 U.S. at 516-17 (Stevens, J., concurring in part and concurring in the judgment).

83. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

The Sixth Circuit Navigates the Post-Romer Wreckage:
Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,
128 F.3d 289 (6th Cir. 1997)

When the Supreme Court handed down its landmark decision in *Romer v. Evans*¹ in May of 1996, some Court watchers perceived the beginning of a monumental transformation of the treatment of homosexuals in American law. Thomas Grey thought *Romer* implicitly overturned *Bowers v. Hardwick*.² Matthew Coles predicted that the decision meant that the "loathesome device[s]" of "anti-gay, anti-civil rights initiatives" were dead.³ Louis Michael Seidman called *Romer's* potential for achieving broad equality for homosexuals "breathtaking."⁴ This term, the Supreme Court denied certiorari to *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.⁵ In so doing, the Court passed on its first chance to give effect to the supposed groundbreaking momentum of the holding in *Romer*, and it left open to policy-makers across the country several avenues for restricting grants of special rights and privileges to homosexuals.

The Sixth Circuit's decision in *Equality Foundation* and the subsequent denial of certiorari were surprising to most observers because the result in the case had appeared to be a foregone conclusion. The Supreme Court instructed the Sixth Circuit to reconsider its original decision in light of *Romer*, which invalidated substantially the same language as the Cincinnati measure. The Sixth Circuit nonetheless upheld for a second time the Cincinnati municipal charter amendment in question by finding enough of a distinction between it and Colorado's Amendment 2, the state constitutional amendment in *Romer*. Of course, denials of certiorari have no precedential value. After *Equality Foundation*, however, *Romer* might be best

1. 517 U.S. 620 (1996).

2. See Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 374 (1997).

3. Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343, 1346 (1997).

4. See Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 81 (1996).

5. ___ U.S. ___, 1998 WL 248349 (U.S. 1998).

viewed not as the beginning of a major reassessment of the constitutional treatment of homosexuality, but as no more than another political process case under traditional Equal Protection doctrine marking an outer boundary in the application of rational basis scrutiny. As new legislation is passed and old statutes are challenged, a clearer delineation of that boundary may provide valuable insights into how policy makers may implement their preferences by staying on the constitutional side of that line. The Sixth Circuit's logic in *Equality Foundation* may be useful in this regard.

In 1991 and 1992, the Cincinnati City Council passed two municipal ordinances prohibiting public and private discrimination on the basis of various factors, including "sexual orientation."⁶ In response, a citizen's group calling itself "Take Back Cincinnati" (later "Equal Rights Not Special Rights") drafted an amendment to the City Charter of Cincinnati, known as "Issue 3" (and once passed, "Article XII"), that removed sexual orientation from the list of protected classes in the municipal ordinances and prevents members of the City Council from passing similar legislation regarding sexual orientation in the future.⁷ Cincinnati voters passed the amendment in a public referendum held on November 2, 1993, giving it 62% of the vote.

Shortly after the referendum, several openly homosexual Cincinnatians and two organizations, Equality Foundation of Greater Cincinnati, Inc. and H.O.M.E., Inc., sought a

6. Ordinance No. 79-1991, the "Equal Employment Opportunity Ordinance," prohibited the City of Cincinnati from discriminating in its own hiring practices on the basis of "race, color, sex, handicap, religion, national or ethnic origin, age, sexual orientation, HIV status, Appalachian regional ancestry, and marital status." Ordinance No. 490-1992, the "Human Rights Ordinance," set up criminal and civil penalties for private discrimination based on "race, gender, age, color, religion, disability status, sexual orientation, marital status, or ethnic, national or Appalachian regional origin" in "employment, housing, and public accommodations." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292 (6th Cir. 1997).

7. The text of the amendment reads as follows: "NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect." *Id.* at 291.

preliminary injunction against enactment of the amendment from the United States District Court in the Southern District of Ohio. The plaintiffs challenged the amendment on the ground that it violated their constitutional rights under the Equal Protection Clause and the First Amendment to the United States Constitution.⁸ The District Court granted a preliminary injunction to the plaintiffs on November 19, 1993.⁹ After a five day trial the following August, the District Court granted a permanent injunction holding, *inter alia*, that Issue 3 infringed plaintiffs' fundamental right to equal participation in the political process (triggering and failing *Carolene Products*' strict scrutiny),¹⁰ and that gays, lesbians, and bisexuals belong to a quasi-suspect category necessitating the application of intermediate scrutiny, which Issue 3 failed.¹¹ The court also held that Article XII was aimed at harming a political minority on such a broad scale that it lacked any rational relationship to a legitimate government interest.¹²

The City appealed the injunction to the Sixth Circuit Court of Appeals and won a reversal on May 12, 1995.¹³ The Sixth Circuit held that the District Court had mistakenly perceived Article XII as a threat to a "Fundamental Right to equal participation in the political process" that merited strict scrutiny.¹⁴ The Sixth Circuit held that Article XII did not merit such review, citing *Bowers v. Hardwick*.¹⁵ The Court noted that "Since *Bowers*, every circuit court which has addressed the

8. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F.Supp. 1235, 1236 (S.D. Ohio 1993).

9. See *id.* at 1243.

10. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

11. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F.Supp. 417, 449 (S.D. Ohio 1994). For an example of intermediate scrutiny, see *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 (1982) (noting that "a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981))).

12. See *id.* at 441.

13. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

14. *Id.* at 268. ("As the realization of their political agenda is not constitutionally guaranteed, the narrow restriction created by the Amendment upon the political avenues available to the unidentifiable and non-protected class of homosexuals and their allies respecting a narrow spectrum of substantive issues clearly does not rise to constitutional dimensions. Those who opposed Issue 3 simply lost one battle of an ongoing political dispute.") *Id.* at 269.

15. 478 U.S. 186 (1986).

issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected."¹⁶ Therefore, the Sixth Circuit held that Article XII did not deserve heightened scrutiny. The court reasoned that conduct, not identifiable or immutable characteristics, defined sexual orientation, and that therefore homosexuals and bisexuals were not suspect classes.¹⁷ The Appeals Court held that Article XII met the low threshold of rational basis scrutiny, because it potentially furthered each of the following legitimate government interests: 1) promoting the associational liberties of the citizens of Cincinnati; 2) restoring the neutrality of municipal ordinances with regard to sexual orientation; 3) reducing government regulation of the private sector; and 4) saving taxpayer money.¹⁸

The case was appealed to the Supreme Court, and, following its decision in *Romer*, the Court vacated the decision of the Sixth Circuit and remanded it to the Appeals Court for reconsideration in light of its decision.¹⁹ *Romer*, written by Justice Anthony Kennedy, upheld the invalidation of Colorado's "Amendment 2," an amendment to Colorado's state constitution passed by statewide referendum and very similar in language to Cincinnati's Article XII.²⁰ Just as in the Cincinnati case, Colorado's ballot initiative was aimed at overturning laws already on the books, this one at both the

16. *Equality Foundation*, 54 F.3d at 266.

17. *See id.* at 267. ("Those persons having a homosexual 'orientation' simply do not, as such, comprise an identifiable class. Many homosexuals successfully conceal their orientation. Because homosexuals generally are not identifiable 'on sight' unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because 'they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group [.]'" (citation omitted).

18. *See id.* at 270.

19. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).

20. Colorado's Amendment 2 read: "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." *Evans v. Romer* 882 P.2d 1335, 1338-39 (Colo. 1994).

state and municipal levels, granting protected status to homosexual and bisexual persons. Like Article XII, it also prevented state officials in any department of government from enacting measures that would grant protected status to homosexuals in the future.²¹

Unlike the District Court in *Equality Foundation*, the Supreme Court in *Romer* did not apply either strict or heightened scrutiny analysis in addressing the issue of the removal of protections for homosexuals.²² The Court applied rational basis scrutiny and held that "Amendment 2 faile[d], indeed defie[d], even this conventional inquiry."²³ It found the amendment too broad to serve a legitimate state purpose. Amendment 2 prevented homosexuals from enacting their political goals into law "no matter how local or discrete the harm [to the public from the laws protecting homosexuals], no matter how public or widespread the injury."²⁴ The Court even raised the possibility that Amendment 2 might be read to deprive homosexuals of protection even of laws of general application, but then quickly declined to rest its holding on such reasoning.²⁵ No interests the state offered, including protecting the associational liberties of landlords and preserving government resources, could justify to the Court the breadth of the amendment.²⁶ Indeed, the Court held that its sheer breadth made Amendment 2 invidiously discriminatory and "inexplicable by anything but animus toward the class that it affects."²⁷

Despite the strongly-worded and controversial *Romer* opinion, the Sixth Circuit once again upheld Article XII on remand and vacated the District Court's injunction in October 1997.²⁸ The Sixth Circuit explained that the cases "involved

21. See *Romer v. Evans*, 517 U.S. 620, 624 (1996). Specifically, Amendment 2 would have invalidated municipal statutes on the books in Denver, Boulder, and Aspen.

22. See *id.* at 631-632.

23. *Id.* at 632.

24. *Id.* at 631.

25. See *id.* at 630 ("If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we.").

26. See *id.* at 635.

27. *Id.* at 632.

28. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures" and did not require a different result from its earlier decision in *Equality Foundation*.²⁹

The Sixth Circuit distinguished Article XII on two grounds. First, it read the amendment more narrowly than it believed the Supreme Court had read Amendment 2. The Sixth Circuit said Article XII was not a removal of all protections of laws of general applicability, as the Supreme Court suggested Amendment 2 could have been interpreted, but rather was a prohibition of special privileges for homosexuals. The importance of making such a distinction is unclear, however, considering that the Supreme Court explicitly refused to rest its holding in *Romer* on this bold assertion regarding Amendment 2.

The second and much more important distinction drawn between the two measures had to do with the levels of government at which the two pieces of legislation operated. The Sixth Circuit emphasized the *Romer* Court's focus on the overturning of municipal legislation and the prevention of all state action from being taken on the subject of homosexual classification in the future, leaving proponents of such measures without recourse to any lawmaking arm of the state short of the state constitutional amendment process.³⁰ This disadvantage, aimed as it was at an unpopular minority and effective at every level of state government, was so patently inequitable the Sixth Circuit reasoned that it must have violated equal protection principles.³¹

The following passage reveals the caution with which the Sixth Circuit undertook to distinguish Article XII from Amendment 2, covering both arguments despite *Romer's* explicit refusal to use the first argument as a basis for its holding:

[T]he language of the Cincinnati Charter Amendment, read in its full context, merely prevented homosexuals, as homosexuals, from obtaining special privileges and

29. See *id.* at 295.

30. See *id.*

31. See *id.* at 297.

preferences (such as affirmative action preferences or the legally sanctioned power to force employers, landlords, and merchants to transact business with them) from the City. In stark contrast, Colorado Amendment 2's far broader language could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans, thus rendering gay people without recourse to any state authority at any level of government for any type of victimization or abuse which they might suffer by either private or public actors.³²

The salient portion of this argument therefore must be the following: unlike Coloradans under Amendment 2, Cincinnatians who seek to overturn or mitigate the effects of the provision in question on a local level would not have to undertake "the monumental political task" of passing a state constitutional amendment.³³ Many other avenues, like petitioning the county government, the state legislature, or even state agencies, remain available to aggrieved Cincinnatians who seek to enact "special protections" for homosexuals.³⁴ The operative level of government appears to be the deciding difference between the two cases; lower and local is constitutional while higher and statewide is not.³⁵

The court also emphasized the deference it owes to direct expressions of the public will enacted at the lowest level of government, especially when, as here, those expressions do not infringe on any fundamental rights or interests of any suspect or quasi-suspect class.³⁶ The court held that it would be illogical to claim that municipal government can be broken down into separate levels of government such that it would be more difficult for a disadvantaged minority to petition one

32. *Id.*

33. *Id.*

34. *Id.*

35. If this interpretation is correct, the question remains why Coloradans aggrieved by Amendment 2 could not have appealed to the United States Congress for redress, much as Cincinnatians may now appeal to their state legislature. Is there something constitutionally different about the burden on a Boulder, Colorado resident having to petition his or her Member of Congress or Senators, and perhaps traveling to Washington, D.C. to have the issue heard and the burden on a Cincinnati resident who must petition his state representative or senator, and perhaps travel to Columbus to be heard? If the "level-of-government" argument is correct, maybe so. Representation on the state level is more direct and less diluted than the federal level, and travel to the state capital would in almost every case be much less difficult and probably more productive than travel to the nation's capital.

36. *See id.*

department than for it to petition the council, or even the electorate.³⁷

To the Sixth Circuit, Amendment 2's nullification of local protections for homosexuals could not be rationally justified on cost or associational liberty grounds, because, when local voters had granted special protections to homosexuals in their communities, they had chosen to spend municipal money and forego those associational liberties within the limits of their own towns.³⁸ State residents would have no legitimate interest in interfering with these laws on behalf of communities who already had agreed on them.³⁹ The Sixth Circuit thought it important to point out, however, that

Romer should not be construed to forbid local electorates the authority, via initiative, to instruct their elected representatives, or their elected or appointed municipal officers, to withhold special rights, privileges, and protections from homosexuals, or to prospectively remove the authority of such public representatives and officers to accord special rights, privileges, and protections to any non-suspect and non-quasi-suspect group.⁴⁰

With Article XII distinguished, the Sixth Circuit easily found for it a rational justification. The court found the cost savings to municipal government from reduced enforcement and regulatory operations was itself a sufficient basis on which to legitimate the law.⁴¹ It also suggested that the proffered justifications of associational liberty and community moral disapproval of homosexuality could be alternative constitutional justifications for Article XII, though it declined to rest its holding on them.⁴²

Plaintiffs applied for a rehearing *en banc* and were denied.⁴³ In a concurrence to the denial, Judge Boggs pointed out what was in his view the very limited holding of *Romer*: that absent a rational reason, no state may structure its governance so as to

37. *See id.* at 298, n. 9.

38. *See id.* at 300.

39. *See id.*

40. *Id.* at 298.

41. *See id.* at 301.

42. *See id.*

43. *See* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 1998 WL 101701 (6th Cir. 1998).

uniquely burden any group.⁴⁴ He also emphasized the importance of encouraging the lowest levels of government to exercise home rule, and offered several hypotheticals in which Cincinnati residents could be considered more than rational for voting for Article XII.⁴⁵

A six-judge dissent to the denial of rehearing raised several objections to Judge Krupansky's reasoning in the Sixth Circuit's original opinion. It suggested that the Sixth Circuit's decision on remand was incorrect because it, *inter alia*, read *Romer* as being based on the possibility that Amendment 2 would deny homosexuals the protections of laws of general applicability. The dissent also suggested that the *Romer* Court drew no distinction between redress from a state amendment process and redress from a lower level of government.⁴⁶

The Supreme Court denied certiorari on October 13, 1998.⁴⁷ Justice Stevens issued a rare comment on the denial of certiorari in which he emphasized that "[T]he denial of a petition of certiorari is not a ruling on the merits. Sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue."⁴⁸ Justice Stevens was joined by Justice Souter and Justice Ginsburg. Significantly, Justice Kennedy, author of the *Romer* opinion, and Justices Breyer and O'Connor, the rest of the six-member majority in *Romer*, did not join the comment.

The comment leaves one to speculate about the negative inferences that may be drawn regarding Justices Kennedy's, O'Connor's, and Breyer's refusal to join the comment. Are they backing off the controversial *Romer* decision? Do they endorse the Sixth Circuit's logic? Do they simply not endorse Justice Stevens' reason for not reviewing the case, which was his hesitation to review a state law interpretation by a federal Appeals Court?⁴⁹ Are they waiting for a more "appropriate forum" but are reluctant to say it? The comment and denial of certiorari provide no answers to the underlying questions

44. *See id.* at 1.

45. *See id.* at 1-3.

46. *See id.*

47. *See Equality Foundation __ U.S. __, 1998 WL 248349 (U.S. 1998).*

48. *Id.* (footnote omitted).

49. *See id.*

surrounding *Romer* and *Equality Foundation*, only more questions. In any event, issuance of the comment ended the long and complicated litigation surrounding Article XII five years after its passage.

Although the *Romer* Court refused to write its decision so as to make it patently another in a line of its political process cases,⁵⁰ the result in *Equality Foundation* may imply that this is in fact how *Romer* should be understood.⁵¹ In the wake of *Romer*, many commentators believed the Court had begun the legal process of recognizing lesbians and gay men as suspect or quasi-suspect classes, and they excused it for not being able to designate them so explicitly just yet.⁵² As noted above, however, the Court did not explicitly grant or deny such protected status in *Romer*; instead it analyzed Amendment 2 under rational basis scrutiny.

Consider the line of political process cases.⁵³ The Court has been clear about how to treat political process disadvantages: if they affect suspect or quasi-suspect classes, they receive strict or heightened scrutiny and are usually invalid.⁵⁴ If they do not, they receive rational basis scrutiny and are usually valid.⁵⁵ Rather than being of the first category, it seems likely that *Romer* was the exception to the second category: a process

50. See *Romer* 517 U.S. at 626.

51. The Colorado Supreme Court had decided *Evans v. Romer*, 882 P.2d 1335, (Colo. 1994) based on this line of cases, holding that Amendment 2 failed to pass strict scrutiny based on the infringement of gays' and lesbians' fundamental right to participate equally in the legislative process. In *Romer*, the Court affirmed the Colorado court's judgment, "but on a rationale different from that adopted by the State Supreme Court." *Romer*, 517 U.S. at 626. The question is, is the Supreme Court's different rationale a rejection of the political process logic altogether, or simply a rejection of the Colorado court's granting of suspect or quasi-suspect classification status to homosexuals? If it is the former, this note's argument is severely weakened. If it is the latter, which seems plausible, perhaps the argument that follows in the note may offer a unique perspective.

52. See Jay S. Bybee, *The Equal Protection Clause: A Note on the (Non)Relationship Between Romer v. Evans and Hunter v. Erickson*, 6 WM. & MARY BILL RTS. J. 201, 228 ("If Amendment 2 violates the Equal Protection Clause, it does so because, under the Court's jurisprudence, homosexuals are entitled to strict or heightened scrutiny. Whether, however, homosexuals are entitled to strict or heightened scrutiny is the one thing the Court could not bear to ask, much less answer."); Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 81-82 (1997); Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343, 1361 (1997) ("To the Court, sexual orientation discrimination is the moral (if not the legal) equivalent of race and sex discrimination.").

53. For a discussion of these cases see Bybee, *supra* note 52, at 207-16.

54. See *id.*

55. See *id.*

disadvantage that did not affect a suspect class but was held invalid nonetheless.

Hunter v. Erickson,⁵⁶ arguably the most important of the process decisions, was a case in which another Ohio municipality, Akron, passed a city charter amendment that required a voter referendum to pass any antidiscrimination law dealing with private housing in the city. The Court held the amendment violative of the Equal Protection clause because it disadvantaged a suspect class—racial minorities—and was therefore subject to, and failed, strict scrutiny.⁵⁷

Hunter's progeny made clear that its application of strict scrutiny to such process disadvantages was limited to racial classifications, or at least to other "discrete and insular minorities."⁵⁸ *James v. Valtierra*⁵⁹ upheld a California constitutional amendment mandating a local referendum before any low-income housing projects could be built in a community, because the amendment did not apply specifically to race. In *Gordon v. Lance*,⁶⁰ the Court upheld a West Virginia constitutional provision that required a supermajority in a local referendum for political subdivisions to raise taxes or incur debt, because the provision did not disadvantage a discrete and insular minority. In *Washington v. Seattle School District No.1*,⁶¹ the Court invalidated a state constitutional amendment, Initiative 350, that prohibited local school boards from forcing its students into busing programs. The Court held:

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. (emphasis added)⁶²

Without implicating the rights of discrete and insular

56. 393 U.S. 385 (1969).

57. See *id.* at 391-392 ("Because 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.'") (citations omitted).

58. *Carolene Products*, 304 U.S. at 153 n. 4.

59. 402 U.S. 137 (1971).

60. 403 U.S. 1 (1971).

61. 458 U.S. 457 (1982).

62. *Id.* at 474.

minorities, therefore, rational basis scrutiny is appropriate for a legislative or constitutional classification, and, since *Romer* did not grant "discrete" or "insular" minority status to homosexuals, Article XII, like Amendment 2, merited rational basis scrutiny.⁶³

After *Equality Foundation*, a more plausible reading of *Romer* may be that Amendment 2 in its scope (covering all three branches of the state government and of every political subdivision) and breadth (covering *all* laws and regulations regarding, *inter alia*, housing, employment, insurance coverage, education, and social welfare benefits) simply went too far.⁶⁴ It was unconstitutional not because it set up the political process so as to disadvantage homosexuals because the Court considers them a special minority; rather, it was unconstitutional because no such massive process disadvantage to any group can be rationally justified. Read this way, perhaps *Romer* hints at an outer boundary to rational basis review of political process equal protection cases that had been theretofore unknown.

Ultimately, both *Romer* and *Equality Foundation* were subjected to this political process analysis. The former, with its deep scope and wide breadth at the state constitutional level fell on the unconstitutional side of an outer boundary envisioned by Justice Kennedy. The latter, with its more shallow scope (if similarly wide breadth) falls on the constitutional side of that boundary. Knowing exactly where that boundary falls is the crucial point for policy-makers; *Equality Foundation* sheds light on where it may be. In searching for this boundary line, citizen activists and policy-makers may try several approaches likely to pass *Romer's* rational basis muster.

63. This is basically the argument put forward by Colorado in its brief to the Supreme Court in defense of Amendment 2. See Brief for Petitioner at 40-49, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039). The decision in *Romer* does not mean this argument lost. In fact, that the case was decided under rational basis enhances the logic. Colorado lost not because it was wrong about the level of scrutiny but because the Court applied rational basis scrutiny in a manner it had never used before.

64. For purposes of the rest of this note, "scope" is used to conceptualize the difference between levels of state and local governance, and "breadth" is used to conceptualize the various substantive areas of law the amendments would have affected (in the case of Amendment 2) or do affect (in the case of Article XII). The distinction is important for purposes described later. The distinction is not always clear in Judge Krupansky's Sixth Circuit *Equality Foundation* decision. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 298-99 (6th Cir. 1997).

First, and most obviously, broad local charter amendments aimed at preventing designation of homosexuals as a protected class have a better chance of passing constitutional muster after *Equality Foundation*. Proponents of such amendments may make straightforward applications of the case as precedent. Of course, such precedent is not binding outside of the Sixth Circuit, but it would serve as a useful authority nonetheless.

One caveat deserves mention. Several commentators pointed out after *Romer* that simple assertions of community moral standards would no longer suffice to pass rational basis scrutiny. They suggested that such assertions may be indicative of the "animus" that made Amendment 2 irrational.⁶⁵ It is not insignificant to note that, while *Equality Foundation* raised the possibility that Article XII passes rational basis scrutiny as an expression of "community moral disapproval of homosexuality," the Sixth Circuit rested its holding on the valid interests of the city in preserving financial resources.⁶⁶ If *Romer* does remove community moral disapproval of homosexuality as a justification for legislation under rational basis scrutiny, it is indeed a groundbreaking holding. However, it also does not mean other justifications of local measures, like economic efficiency, are not still valid.

Much more interesting than how to write and litigate another Article XII, however, is how to write a valid state constitutional amendment like Amendment 2—one with broad (but not unconstitutionally broad) impact and restrictions on current and future actions of state legislators and officials. If prohibiting protective legislation of homosexuals in an undefined number of areas of substantive law at every level and department of state and local governance crosses the outer boundary of rational basis scrutiny, what might not?

If, as *Equality Foundation* implies, it was the wide scope and breadth of Amendment 2 that was the core of the *Romer* decision, then a state constitutional amendment of reduced scope should be permissible. To test this, an amendment might prohibit the state government from implementing protections on the basis of sexual orientation but allow the state's political subdivisions to do so. Such an approach would have several

65. See, e.g., Seidman, *supra* note 52, at 85.

66. *Equality Foundation*, 128 F.3d at 301.

advantages in passing rational basis scrutiny and staying on the constitutional side of *Romer*. It would allow cities that wish to implement such protections, like Boulder, Aspen and Denver, to pursue that policy, and avoid *Romer's* disdain for the "severe consequence" of removing the protections of municipal public accommodations laws in cities that have already passed them.⁶⁷ Rather than prohibit future enactments of similar municipal laws, it would preserve the right of state residents to petition departments of their local government for protection based on sexual orientation. Pro-gay rights advocates would not be as grossly disadvantaged as they were by Amendment 2.

At the same time, the state could make a tighter case for such a law's rational relationship to its legitimate interests: state resources would not be used to enforce any such rights on the state level, but municipalities would remain free to expend their resources on such protections if they so decided. State legislators could plausibly argue that, as representatives of the state as a polity, they are justified in preventing state agencies or courts from spending state funds on either litigating or monitoring claims of discrimination by a constitutionally non-suspect class. Furthermore, the state's citizens would also be spared an additional source of litigation.

A proposal of even smaller scope that prohibits only state executive agencies from issuing regulations *sua sponte* based on sexual orientation would be even more likely to pass constitutional muster.⁶⁸ Under such a proposal, any perceived harms to pro-homosexual rights advocates would occur only in the state executive branch, not in the state or local legislatures, and not at the local executive branch level. Redress would still be available from state courts and the state legislature, as well as all levels of local government. The cost factor could still be cited to justify the policy, and the state could further argue that its citizens prefer to have only elected legislators, and not unelected appointees, make law on such politically sensitive issues.

Another approach might be to reduce the breadth of a

67. *Romer*, 517 U.S. at 629.

68. Amendment 2 would have voided an executive order and various state university policies that prohibit discrimination on the basis of sexual orientation. *See id.* at 629-30.

proposed amendment by limiting the substantive areas of law that it covers. For example, a state could pass a measure prohibiting legislation that grants protections on the basis of sexual orientation in private and public housing, or, more narrowly still, just public housing. Here again homosexual-rights advocates would not suffer the same broad harms Amendment 2 visited upon them. Furthermore, various substantive restrictions on advocates of non-traditional lifestyles are already in place in many states.⁶⁹ Assuming that such provisions have always been constitutional, and remain so after *Romer*, it seems difficult to believe that similar measures sought to be enacted after *Romer* would be pursued in vain.

The hypotheticals could play themselves out endlessly. It is clear that in order to pass rational basis review under the federal Constitution, a state constitutional amendment must not affect every governmental unit in every political subdivision of the state. It also appears that affecting every branch of only the lowest level of government passes rational basis muster. Locating the boundary line between the two approaches will be important for state legislators and citizen activists if they are to avoid more Supreme Court rebukes.

James K. Webber, Jr.

69. See *id.* at 648-50 (Scalia, J. dissenting) (discussing treatment of polygamists).

