Romer v. Evans: A Legal and Political Analysis

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Introduction

Despite the Supreme Court's role as final arbiter of the "law of the land," its power to effect social change is limited. For example, school desegregation, mandated by the Court in 1954, was not actually implemented until years later when Congress and the President finally took action.[1] As a result, prayer in public schools, repeatedly deemed illegal by the Court, continues in many parts of the country even today.[2] To some degree, whether the Court's po-

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1. Several studies have demonstrated that *Brown v. Board of Education*, 347 U.S. 483 (1954), produced little school desegregation by itself. One of the earliest of these was J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961) (demonstrating how district court judges evaded the decision, leaving school segregation largely in place). For a more recent analysis, see GERALD N. ROSENBERG, THE HOLLOW HOPE 46-49 (1991) (observing that *Brown* could not be enforced until Congress and the President joined the effort in 1964 with the passage of the 1964 Civil Rights Act). *But see* CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 257 (1984) (arguing that though *Brown's* direct effect was necessarily limited because the Court lacks enforcement powers, the decision had a significant psychological impact).

2. The Court's initial pronouncements on this issue came in *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down a prayer written by New York officials for recitation in the New York public schools), and *Abington School District v. Schempp*, 374 U.S. 203 (1963) (invalidating state-mandated Bible reading in Pennsylvania public schools). Following these decisions, compliance with the Court's prohibition of religious activities in public schools varied across the country. *See* Robert H. Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision*, *in* 1 PRAYER IN THE PUBLIC SCHOOLS AND THE CONSTITUTION 1961–1992 440 (Robert Sikorski ed., 1993) (analyzing possible reasons for Tennessee schools' partial compliance with *Schempp*); KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE (1971) (investigating the failure of five towns in one midwestern state to conform to the Court's outlawing of prayer in public schools); H. Frank Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, *in* 1 PRAYER IN THE PUBLIC SCHOOLS AND THE CONSTITUTION 1961–1992, *supra*, at 457 (finding proscribed religious practices in public schools, with the exception of Southern schools, had largely disappeared). *But see* WILLIAM K. MUIR, JR.,

sition prevails in the long run is beyond its control. Presidents may respond to the Court's actions in ways that are helpful or in ways that impede realization of the Court's objectives.[3] Moreover,

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PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE 113-17 (1967) (showing substantial implementation of the Court's mandate to remove prayer from public schools when the school board was prodded by a local lawyer).

For further discussions regarding uneven judicial compliance with the Supreme Court's prohibition on religious activities in schools, see JOHNSON & CANON, *supra* note 1, at 65-66 (discussing possible reasons for noncompliance by lower federal judges); KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES 149-50 (3d ed. 1997) (discussing how the religious backgrounds of judges affect their decisions regarding separation of church and state).

Express noncompliance continues to be a problem, as is demonstrated in the case of one Kentucky principal who led his students in Christian prayer over the public announcement system. *See Attacks on the Freedom to Learn*, PRESS RELEASE (People for the American Way, Washington, D.C.), Sept. 4, 1996. In another instance, the American Civil Liberties Union (ACLU), acting on behalf of parents and students in Santa Fe, Texas, filed suit against religious exercises in the public schools including grade school teacher-led prayers. *ACLU of Texas Files a Complaint Against Santa Fe ISD*, PRESS RELEASE (ACLU of Texas), Apr. 4, 1995.

Other school districts have attempted to avoid the Court's decisions, which following *Lee v. Weisman*, 505 U.S. 577 (1992), include a prohibition on school-initiated graduation prayers by encouraging student initiated prayer. So far, policies permitting students to lead prayer during regular school hours have been struck down by the courts. *See, e.g.*, Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir. 1996) (invalidating a Mississippi statute that permitted public school students to initiate nonsectarian, nonproselytizing prayer at compulsory and noncompulsory school events); Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902 (N.D. Miss. 1995) (enjoining a school district's practice of allowing student organizations to broadcast prayers over the school intercom and to initiate student-led prayer during school hours).

3. The President's ability to alter judicial policy through appointments depends on how many appointments can be made, the divisions on the Court, attention given to ideology in making appointments and the willingness of the Senate to allow the President leeway in appointments. *See* JOHNSON & CANON, *supra* note 1, at 161-62. Presidents at times have turned the Court's decisions into a political issue. In 1968, Richard Nixon campaigned against the Court's criminal justice decisions. *See id.* at 3-4. Nixon then used his appointment power to place men on the Court who agreed with his position. *See generally* LEONARD W. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE (1974) (detailing the profound changes in criminal procedure brought about by Nixon appointees).

Presidents can affect judicial policies in other ways as well. Failure to endorse the Court's position may provide encouragement to those who would resist it, as Eisenhower's silence following *Brown v. Board of Education* apparently stalled the process of desegregation. *See* PELTASON, *supra* note 1, at 46-55. For example, Eisenhower may have inadvertently encouraged Governor Faubus' resistance to desegregation in Little Rock. JOHNSON & CANON, *supra* note 1, at 157-58. Clinton may have helped defuse the political issue generated in the *Romer* decision by agreeing to the initiative barring same sex marriage, though it is believed that Clinton's motive for supporting the ban on same sex marriages was to "blunt[ ] an issue the Republicans had hoped to use against him in the election," not to influence the Court. *The Senate's Vote on Gay Rights*, N.Y. TIMES, Sept. 13, 1996, at A34.

presidential appointments can affect the composition of the Court and allow earlier decisions to be modified or reversed.[4]

Even though the Court does not have the final word on enforcement, it can act in ways that maximize its influence and strengthen its power. The Court's power is weakest when its decision is opposed to a broad national consensus on a matter of policy.[5] Its influence is also diminished when its decisions are weakly argued or ambiguous because this leaves the Court vulnerable to professional criticism which might later be exploited by political opponents.[6] Finally, for cases which have a strong political dimension,[7] the Court weakens its position when it fails to address those objections to its action most likely to resonate in the public debate.[8]

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4. *See generally* LAURENCE TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT SHAPES OUR HISTORY (1985) (examining the importance of presidential appointments on the direction of the law). Despite the importance of presidential backing, the President is but one political actor. The school prayer experience demonstrates the significance of support from other participants in the political process. In the aftermath of *Brown* and its progeny, for example, it mattered a great deal whether local political leaders spoke out for compliance or instead looked the other way as school authorities followed their own preferences. *See* William M. Beaney & Edward N. Beiser, *Prayer and Politics: The Impact of* Engel *and* Schempp *on the Political Process*, *in* 1 PRAYER IN THE PUBLIC SCHOOLS AND THE CONSTITUTION 1961–1992, *supra* note 2, at 411.

5. *See* DAVID M. O'BRIEN, 1 CONSTITUTIONAL LAW AND POLITICS, STRUGGLES FOR POWER AND GOVERNMENT ACCOUNTABILITY 180 (2d ed. 1995) (arguing that public opinion constrains the Court from going too far or too fast). The judgment that the Court hurts itself by going "too far, too fast" is apparently shared by Justice Ruth Bader Ginsburg. *See* Linda Greenhouse, *An Issue for a Reluctant High Court*, N.Y. TIMES, Oct. 6, 1996, at E3; *see also* Thomas R. Marshall, The Rehnquist Court and Public Opinion: The First Decade, Paper Given at the American Political Science Association Annual Meeting (Aug. 31–Sept. 2, 1996) (on file with *Law & Inequality: A Journal of Theory and Practice*) (offering evidence that a slight majority of the Rehnquist Court's rulings reflect majority popular opinion); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution?: The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993) (arguing that there was a strong link between public opinion and the Court's decisions from 1956–1981 that was later weakened by the strongly ideological appointments of Presidents Reagan and Bush). *But see* Helmut Norpoth & Jeffrey Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994) (challenging Mishler & Sheehan's methodology and conclusions).

6. *See* PELTASON, *supra* note 1, at 18 (attributing the failure to enforce desegregation at least in part to the ambiguity and reasoning of *Brown*).

7. I refer here to those cases which receive wide attention in the media and become the focus of partisan and interest group politics. *Roe v. Wade*, 410 U.S. 113 (1973), is the most obvious example.

8. *See, e.g.*, GUIDO CALABRESI, IDEAS, BELIEFS, ATTITUDES, AND THE LAW 93-114 (1985) (arguing that an approach to *Roe v. Wade* taking account of the concerns of those who opposed abortion would have generated more acceptance); LIEF H. CARTER, REASON IN LAW 229-33 (4th ed. 1994) (arguing that the judiciary gains

This Comment analyzes one of the more highly-charged cases of the 1996 term, *Romer v. Evans*,[9] from both a legal and a political perspective. In *Romer*, the U.S. Supreme Court struck down an amendment to the Colorado Constitution (Amendment 2) prohibiting all legislative, executive and judicial action designed to protect homosexuals.[10] Amendment 2, which was approved in a statewide referendum, overruled local laws that barred discrimination based on sexual orientation.[11] Rejecting Colorado's assertion that Amendment 2 merely prevented gays, lesbians or bisexuals from obtaining special privileges under state law, the Court's 6-3 majority held that the law was discriminatory.[12] The Court reasoned that the Fourteenth Amendment prohibits states from broadly disadvantaging an identifiable group solely because the group is unpopular.[13] The Court held that Amendment 2 violates the Equal Protection Clause because a state may not make a "class of persons a stranger to its laws."[14] In dissent, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) accused the majority of taking sides in "cultural debate[s]" and of exercising power in a way contrary to democratic decision making.[15]

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legitimacy and authority through good legal reasoning which includes an open weighing of the arguments on both sides of an issue). *But see* JOHNSON & CANON, *supra* note 1, at 208 (arguing that there is little empirical evidence that supports the proposition that reasoning matters).

9. 116 S. Ct. 1620 (1996).

10. *Id.* at 1623. The author recognizes that Amendment 2 was intended to eliminate protections to gay man, lesbians and bisexuals; however, for clarity and brevity, the single term "homosexuals" will be used throughout this Comment. The reader should remain aware that the term is meant to encompass all three of the groups targeted by Amendment 2.

11. *Id.* Denver, Aspen and Boulder passed legislation that protected individuals from discrimination due to their sexual status. *Id.*

12. *Id.* at 1624-27.

13. *Id.* at 1628.

14. *Id.* at 1629.

15. *Id.* A few weeks later, with the same Justices as in *Romer* comprising a 6-3 vote, the Supreme Court vacated a Sixth Circuit Court of Appeals decision upholding a 1993 Cincinnati referendum which, like Colorado's Amendment 2, repealed any existing laws protecting against discrimination based on sexual orientation and barred new legislation on that subject. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 116 S. Ct. 2519 (1996), *vacating* 54 F.3d 261 (6th Cir. 1995). The case was remanded to the lower court for consideration not inconsistent with *Romer*. *Id.*

Only the dissent, again charging the majority with unduly interfering with democratic decisionmaking, wrote an opinion. *Id.* (Scalia, J., dissenting). Reaffirming its opposition to the *Romer* decision, Justice Scalia nevertheless pointed out that the circumstances in Cincinnati were distinguishable. *Id.* A decision invalidating Cincinnati's charter amendment would be more intrusive on the democratic process than invalidating a state constitutional amendment since it would overrule a decision by the lowest electoral body. *Id.*

From a legal standpoint, this Comment argues that while the majority had ample justification for its ruling, it did not defend its position as well as it should have, and as a result, *Romer* is open to future attack. This Comment also takes issue with those observers who claim *Romer* effected a sweeping revision of constitutional law[16] and critics who argue that the Court's opinion was undemocratic.[17] This Comment concludes that *Romer* neither provides homosexuals with a broad array of rights nor endorses homosexuality. The Court also did not elevate sexual orientation to a suspect or semi-suspect classification as a guideline for future Fourteenth Amendment litigation. What the Court did do in *Romer* was re-enter the debate over whether the Constitution had anything to say about how homosexuals should be treated. In that sense, the Court's holding that the State cannot make homosexuals "strangers to its laws"[18] was very important. Homosexuals surely ended up in a better position politically than before the decision. The decision also raised questions about the continuing vitality of *Bowers v. Hardwick*,[19] a case in which the Court refused to invalidate a Georgia statute criminalizing sodomy.

From a political standpoint, this Comment argues that it was important for the Court's legitimacy for it to decide *Romer* narrowly, in a way that did not place it far outside majority public opinion. While the Court partially accomplished this task, it could have made an even narrower ruling had it tracked the opinion of the Colorado Supreme Court more closely.[20] A narrower decision would have been just as firmly grounded in law, yet less inviting of future litigation and less subject to political manipulation. It also would have allowed a stronger defense in democratic theory. To the extent the dissent's effort to portray the Court as undemocratic

16. *See, e.g.*, Jan Crawford Greenburg, *Court Strikes Anti-Gay Amendment*, CHI. TRIB., May 21, 1996, § 1, at 1.

17. *See, e.g.*, Jan Crawford Greenburg, *Gay Rights Ruling Short on Guidance*, May 22, 1996, § 1, at 4 (quoting Professor Dan Polsby of Northwestern University School of Law). "It opens up all kind of litigation possibilities. I will say this is among the sorriest performances—as an exercise of judicial craftsmanship—that I have ever seen from the Supreme Court." *Id.*; *The Supreme Court Overreaches*, CHI. TRIB., May 21, 1996, § 1 (Editorial), at 16 ("[I]t is a defeat for democratic governance that may ultimately inflame rather than erode opposition to gay rights.").

18. *Romer*, 116 S. Ct. at 1629.

19. 478 U.S. 186 (1986) (upholding a Georgia law criminalizing sodomy challenged under of the Due Process Clause).

20. *See* Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *aff'g* 854 P.2d 1270 (Colo. 1993), *aff'd*, 116 S. Ct. 1620 (1996). For a discussion of the Colorado Supreme Court's reasoning, see *infra* Part II.B.

and elitist can be made to stick, there will be negative future effects for the rights of homosexuals and for other minority groups.

Part I of this Comment provides a brief discussion of the political setting surrounding *Romer*. Its purpose is to identify the issues of greatest political salience so that the Court's response to them can be evaluated. Part II sets out the legal issues involved in the decision and summarizes the reasoning of both the majority opinion and of the dissent. Part III provides a legal and political critique of *Romer*. Finally, Part IV offers suggestions on how the Court could have made a stronger argument, again from the perspectives of both law and politics. This Comment concludes that although *Romer* was correctly decided, the majority opinion was not argued as persuasively as it might have been, and this shortcoming may have negative future consequences for the civil rights of minorities.

I. Political Setting

Romer was about more than the civil rights of homosexuals. It was part of a larger argument over the proper role of religion and family values in public policy making. As with abortion, the gay civil rights debate[21] often has led to partisan political feuds.[22]

In recent years, a growing number of states and local communities have adopted policies prohibiting discrimination based on sexual orientation in public accommodations, employment, insurance and education.[23] The referendum movements, such as the

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21. As with "homosexual," the term "gay civil rights" is meant to refer to the legal interests of those targeted by Amendment 2, namely gay men, lesbians and bisexuals.

22. *See e.g.*, Katia Hetter, *The New Civil Rights Battle: The Supreme Court Hands Gays a Win in the Struggle Between Tolerance and Tradition*, U.S. NEWS & WORLD REP., June 3, 1996, at 28 (anticipating that social conservatives would use the Court's ruling to "energize their grass-roots activists and make homosexuality a wedge issue in the [fall 1996 election] campaign"). *Id.*

Some Republicans saw political gain whichever way the Court went. At the May 3-4 meeting of the New England Political Science Association, Hadley Arkes, an Amherst professor and prominent supporter of the anti-gay initiatives, anticipated that the Court would strike down Amendment 2. He expressed the hope that the decision would be sweeping, in which case he believed that it would produce a realignment toward the Republican party similar to the one provoked by *Roe v. Wade*, 410 U.S. 113 (1973).

23. Laws barring employment discrimination against homosexuals have been enacted in nine states: California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, Wisconsin and Rhode Island. *See* Eric Schmitt, *Anti-Discrimination Proposal Delays Senate Vote on Bill Opposing Same-Sex Marriage*, N.Y. TIMES, Sept. 6, 1996, at A24. A similar measure narrowly failed to pass the Senate. *See The Senate's Vote on Gay Rights*, *supra* note 3, at A34. For a thorough review of the law in this area, see Robert B. Mison et al., *Sexual Orientation*

one that produced Amendment 2, are strategic attempts by anti-gay forces to reverse this trend.[24] In Colorado, the referendum was designed to remove the power of local governments to include gay men, lesbians and bisexuals within the protection of their anti-discrimination laws.[25] Amendment 2 also would have cemented the anti-gay policy by requiring that future changes be made only by constitutional amendment rather than conventional legislation.[26]

The campaign for Colorado's Amendment 2 was waged largely on the theme of repealing "special rights" for homosexuals.[27] Amendment 2's supporters put forth the proposition that anti-discrimination laws provided "special rights" for the listed groups, while suggesting that protection from discrimination was unavailable to anyone not listed.[28] The impression of "specialness" was reinforced by Amendment 2's references to "protected status," "minority status" and "quota preferences"—all code words evocative of affirmative action.[29] The "special rights" label allowed pro-

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Discrimination in the Workplace: A Legal Reference Guide, 1 NAT'L J. SEXUAL ORIENTATION L. 33, 50-76 (1995) <http://sunsite.unc.edu/gaylaw/>.

24. Jurisdictions in which similar amendments had been voted on or were pending include Arizona, California, Florida, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Missouri, Montana, Ohio, Oregon and Washington. *See* Daniel J. Garfield, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 691 n.7.

25. *See* Samuel A. Marcosson, *The "Special Rights" Canard in the Debate over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 137 n.1 (1995).

26. *See* Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 96 (1995).

27. *See* Marcosson, *supra* note 25, at 138-39 nn.6-7 (pointing out the importance of the "special rights" label to strategy and electoral success of initiative campaigns).

28. *See* Hubert Morken, "No Special Rights": The Thinking Behind Colorado's Amendment #2 Strategy, Presented at Annual Meeting of the American Political Science Association 6 (Sept. 1–4, 1994) (on file with the *Journal of Law & Inequality: A Journal of Theory and Practice*) (quoting Anton Marco, co-founder of Colorado for Family Values, the organization that initiated Amendment 2, as pointing out that "almost everyone gets fired sometime or other in their lifetime"). *Cf.* Duncan & Young, *supra* note 26, at 94 n.7 ("[H]omosexuals already have the same rights everyone else has—the right to be protected against discrimination on the basis of their race, gender, religion, age, and disability."); Marcosson, *supra* note 25, at 140 ("For example, if gay men and lesbians were granted the right to commit murder, that would be a 'special right' in the sense that it is not possessed by heterosexuals.").

29. Amendment 2 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 orienta-

ponents of Amendment 2 to maintain that they were not hostile to homosexuals, but only supportive of "fairness" to all by eliminating "special rights" for some.[30] This argument proved politically potent to many centrist voters who did not fall clearly into either the anti-gay or gay civil rights camps.[31] Such voters can be described as opposed to discrimination in employment and public accommodations, but hostile to anything perceived as "preferences."[32]

Opponents of gay civil rights made a number of other arguments in support of Amendment 2. For example, Amendment 2 was described as a cost-cutting measure, as important to the maintenance of community order, as promoting family autonomy, as advancing religious liberty and as protective of children from psychological and physical harm.[33] By the time the case reached the United States Supreme Court, however, the significance of some of these arguments had begun to wane among practitioners[34] and the

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> tion, 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.

COLO. CONST. art. II, § 30b (emphasis added).

30. Anton Marco, co-founder of Colorado for Family Values, a leading proponent of Amendment 2, champions a similar approach called the "silent solution." *See* Morken, *supra* note 28, at 1. Marco would have government adopt a "neutral silence that refuses to grant homosexuals preferred status . . . yet maintains equal protection for all persons." *Id.* at 7. The politically important "special rights" argument proved central in the ensuing litigation as well. Writing for the majority, Justice Kennedy identified it as Colorado's "principal argument." Romer v. Evans, 116 S. Ct. 1620, 1624 (1996). Justice Scalia incorporated much of the "special rights" rhetoric into his dissent. *See, e.g., id.* at 1630 ("The amendment prohibits the *special treatment* of homosexuals, and nothing more."); *see also infra* Part II.D.

It is not difficult to foresee that the argument over "special rights" will endure as an important component of anti-discrimination cases. In objecting to the Supreme Court's grant of certiorari in a case involving a city charter amendment similar to Colorado's constitutional amendment, Justice Scalia expressed his belief that "the people [may] decide, in democratic fashion, not to accord *special protection* to homosexuals." Equality Found. of Greater Cincinnati v. City of Cincinnati, 116 S. Ct. 2519 (1996) (Scalia, J., dissenting) (emphasis added).

31. *See* Marcosson, *supra* note 25, at 138 n.6.

32. *Id; cf.* Morken, *supra* note 28, at 7 ("Some moderates reject the whole civil rights emphasis on group rights and see voting yes on Amendment 2 as their opportunity to stop the further expansion of legal entitlements.").

33. *See* Evans v. Romer, 882 P.2d. 1335, 1339-40 (Colo. 1994), *aff'd*, 116 S. Ct. 1620 (1996).

34. Colorado did not assert the child protection rationale, arguably the most emotionally-charged argument, before the Court. *See Evans*, 882 P.2d. at 1340 n.2. The Court summarily rejected Colorado's other justifications—that Amendment 2 protected "other citizens' freedom of association" and "conserv[ed Colorado's] resources to fight discrimination against other groups"—saying, "[T]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." Romer v. Evans, 116 S. Ct. 1620, 1629 (1996).

public[35] alike. An argument that remained important involved the position of homosexuals in society as a disadvantaged minority.[36] Proponents of Amendment 2 argued that because homosexuals were economically "privileged" they did not need the protection of anti-discrimination laws.[37] For example, the leading supporter of Amendment 2 argued that "gays are one of the most privileged groups in the country, sporting average annual household incomes over $55,000."[38] In the context of the litigation, the fictitious eco-

35. Proponents of Amendment 2 may have been following the lead of Anton Marco. He believed that the "special rights" description of anti-discrimination laws justified the amendment far more effectively in the political arena than other arguments. *See* Morken, *supra* note 28, at 4, 9. Support for Amendment 2 declined when, against Marco's advice, the moral arguments based on disapproval of homosexuality were given greater prominence. *Id.* at 4. Moreover, Marco took the defeat of Oregon's similar (though more morally condemning) initiative as proof of his assessment's validity because proponents of Oregon's initiative utilized a morally-based strategy. *Id.*

36. *See* Brief for Petitioner at 42, Romer v. Evans, 116 S. Ct. 1620 (1996) (No. 94-1039) (defending Colorado's conclusion that gay men and lesbians are "politically powerful and relatively privileged"). The continued salience of this argument is understood as a rational response to prevailing equal protection doctrine. By casting gays and lesbians as *privileged*, proponents of Amendment 2 complicated the legal argument for their opponents because equal protection jurisprudence has for some time been influenced by Justice Harlan Fiske Stone's now famous "footnote 4" in *Carolene Products*. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (suggesting that judicial invalidation of legislative line-drawing is particularly justified where political action disadvantaging a "discrete and insular" minority renders the political process defective). Though minority status is no longer the only trigger to heightened scrutiny by the Supreme Court, minority status, disadvantage and a history of discrimination still serve as prominent triggers to Court attention to classifications under equal protection. *See infra* notes 56-63 and accompanying text.

37. *See* Morken, *supra* note 28, at 6, 9 (discussing Marco's use of this argument). Cincinnati voters recently approved a city charter amendment similar to Colorado's Amendment 2 in its objective and wording. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 422 (1994), *aff'd in part, vacated in part*, 54 F.3d 261 (1995), *cert. granted*, 116 S. Ct. 2519 (1996). Professor James David Woodward, a political scientist at Clemson University, testified in defense of the charter amendment that gays, lesbians and bisexuals were not politically powerless because of their affluence, education and intense feelings on certain political issues. *Id.* at 426.

38. *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 292 (1994) (quoting Will Perkins, Executive Chairman of the Board of Colorado for Family Values). *But see* Eric Heinze, *Gay and Poor*, 38 HOW. L.J. 433 (1995) (asserting that "gays are economically disadvantaged in the United States due to "direct" and "indirect" discrimination"); *cf.* M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, INDUS. & LAB. REL. REV. 726 (1995) (finding significant wage disparity between homosexual and heterosexual men of similar education, experience and occupation, and also finding that lesbian and bisexual women earned less than their heterosexual counterparts).

nomic well-being of homosexuals was used to argue that judicial protection was unjustified.[39]

Once Amendment 2 moved to litigation, the fact that it had passed by referendum[40] allowed anti-gay forces to emphasize the right of the people to govern themselves. Referendum supporters argued that gay civil rights policy was a matter that rightly belonged to the "people," not to a court of unelected officials.[41] Amendment 2's proponents hoped to persuade the Court to defer to the judgment of the Colorado electorate.[42] The immediate public reaction suggested that at least part of this populist argument had some influence.[43]

Another argument likely to be important in the larger political debate for similar reasons is Justice Scalia's claim, made in the dissent, that the Court has taken sides in a "culture war."[44] Court interventions aimed at assuring an open and fair political process carry a much greater legitimacy than court actions which seem to take a position on substantive policy.[45]

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39. *See* Brief for Petitioner at 42 n.30, *Romer* (No. 94-1039).

40. Amendment 2 passed by a vote of 813,966 (53.4%) to 710,151 (46.6%) on November 3, 1992. Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993).

41. *See* Duncan & Young, *supra* note 26, at 97. "Grassroots initiatives like Amendment Two are the product of a populist revolt against restrictive homosexual rights laws." *Id.* at 134. *See also* Morken, *supra* note 28, at 7 (arguing for democratic legal reform rather than "government intrusion into what ought to be left to private opinion and the negotiations of the market").

42. *See* Brief for Petitioner at 7-8, 10, *Romer* (No. 94-1039). "[T]he people approved Amendment 2 after a spirited campaign which the trial court found to be a classic example of *democratic self-government.*" *Id.* at 7 (emphasis added). "The reasoning of the [Colorado Supreme Court] does profound violence to settled understandings of the authority of, and respect for, *popular government* at the state level." *Id.* at 10 (emphasis added).

43. *Cf. supra* note 17 (discussing the reaction of a Northwestern University School of Law professor).

44. *See* Romer v. Evans, 116 S. Ct. 1620, 1637 (1996).

45. Court actions that defend democracy have the greatest legitimacy. Studies repeatedly conclude that the Supreme Court is most likely to be followed when its decision taps into a long held public value, even if the value has not been implemented. For example, one commentator attributed the ultimate ability of *Brown v. Board of Education*, 347 U.S. 483 (1954), to persuade Congress to join in effecting social change to the fact that "*Brown* carried with it the moral conscience of the American people." HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 469 (1988). Similarly, David M. O'Brien, a well-known scholar of the Court, has observed: "At its best, the Court appeals to the country to respect the substantive value choices of human dignity and self-governance embedded in our written Constitution." DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 321 (1986).

Much of the debate surrounding proper modes of constitutional interpretation starts from the proposition that the Court's power becomes suspect when it questions the actions of the majority. *See* ALEXANDER M. BICKEL, THE LEAST

The "special rights" and governance arguments put forth were for both public consumption and to persuade the Court of the constitutionality of Amendment 2.[46] The legal argument, however, was for the Court alone; it was, and had to be, more complicated because it needed to address the prevailing standards under the equal protection doctrine. For example, proponents of Amendment 2 needed to argue the proper standard of review, a matter little understood within, and of little relevance for, the public debate. A discussion of these arguments follows.

II. The Decision

A. Constitutional Environment

The core legal issue in *Romer* was whether Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[47] The core principle of the Equal Protection Clause is, as Justice Kennedy stated in *Romer*, a "commitment to the law's neutrality where the rights of persons are at stake."[48] This means that government must treat those who are similarly situated the same.[49] There are two basic ways in which this constitutional pro-

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DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (2d ed. 1986) (describing this problem as the "countermajoritarian difficulty"). John Hart Ely's theory of representation-reinforcement was designed to resolve this difficulty by confining legitimate Court decision-making to correcting defects in the democratic process. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77-80, 101-04, 135-79 (1980). For a defense of Ely's position, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768-819 (1991).

Some of Ely's critics would accept representation-reinforcement as legitimate only if coupled with a theory protective of fundamental liberties. *See, e.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072-77 (1980). The view that Court action removing defects in the democratic process is especially justified originated in Justice Harlan Fiske Stone's footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). *See* Klarman, *supra*, at 749 (calling the footnote "the seminal statement of political process theory"); *see also supra* note 36 (discussing the now famous footnote 4 in more detail).

46. *See supra* notes 27-28, 30 and accompanying text.

47. U.S. CONST. amend. XIV, § I.

48. *Romer*, 116 S. Ct. at 1623.

49. RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2, at 7 (2d ed. 1992). This formulation of the Fourteenth Amendment principle and the similar equal protection component of the Fifth Amendment appears, with some minor wording variations, in several cases. *See, e.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[T]he classification must be reasonable, not arbitrary, and must rest upon some

tection can be violated.[50] First, "equality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated in terms of the relevant equal protection principles."[51] In addition, "equality can be denied when government *fails* to classify with the result that its rules or programs do *not* distinguish between persons who, for equal protection purposes, should be regarded as differently situated."[52]

There often is difficulty, however, in determining whether an apparent difference in situations is meaningful or not. Problems also arise in attempting to draw lines with such precision that only those—and all those—who share the characteristics important to the achievement of the government's ends will be singled out by legislation.[53] Because of these difficulties, a legislature must be given broad latitude if it is to successfully assess a social problem, weigh competing concerns and remedy the ill.[54] Thus, if government is to function effectively it must classify citizens even though the unavoidable result is that some individuals will be treated less favorably than others.[55]

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ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."); United States Dep't of Agric. v. Murry, 413 U.S. 508, 517 (1973) (Marshall, J., concurring) (arguing that the Due Process Clause of the Fifth Amendment requires that "individuals similarly situated must receive the same treatment by the Government").

50. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 1438 (2d ed. 1988).

51. *Id.*

52. *Id.*

53. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 539 (2d ed. 1991). The author describes the equal protection difficulties inherent in statutory construction as follows:

> For almost in all cases, the classifications will not be perfectly efficient, but will be either "overinclusive" or "underinclusive" or both. A classification is "overinclusive" if it disadvantages some people who do not in fact threaten the state's interest. It is "underinclusive" if some people are not disadvantaged even though they threaten the state's interest.

Id. The legislative determination of the age at which one can drive a car provides a good example. Presumably, the primary objective is to foster traffic safety. Whatever the age set, there will be some individuals who would be safe drivers although they are younger than the set age and there will be some individuals over the set age who are unsafe drivers.

54. Plyler v. Doe, 457 U.S. 202, 216 ("A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.").

55. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (arguing that the practical problems of effective governing may justify a classification even if in practice it results in some inequality).

To address the need "to reconcile the principle with the reality"[56] as well as the need to minimize the Court's intrusion into the political process, the Court has developed an analytic framework for assessing claims under the Equal Protection Clause. Until the 1940s, the Equal Protection Clause was effectively invoked only as a protection against discrimination based on race or national origin.[57] From the 1940s to the 1970s, the Court employed a two-tiered analytic approach. Most classifications were upheld as long as they were reasonable, and the Court deferred to the legislative or executive judgment as to what was reasonable.[58] Government action assessed under this "rational basis" test was permissible if there was any conceivable basis for it.[59] Most classifications were reviewed under this rationality standard; under such deferential review, invalidation of legislation was rare.[60] However, no similar

56. Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

57. The first case to invalidate a racial classification was *Strauder v. West Virginia*, 100 U.S. 303 (1880) (invalidating a West Virginia law that limited jury duty to white males), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975). Shortly thereafter, the Court held that the Equal Protection Clause protected Chinese aliens residing in San Francisco from discrimination in the administration of the law. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding Yick Wo's imprisonment for violation of a San Francisco ordinance barring laundries in wooden buildings without a variance to be invalid because only Chinese were denied such variances).

At the same time, however, the Court often allowed classifications based on race and national origin that were disadvantageous to minorities. The best known example of this is *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding a Lousiana law that required the separation of the races on railroad cars), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954). *Plessy* set into motion the "separate but equal" era, a period in which the Court's view of the equality prong was often strained. *See, e.g.*, Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899) (finding no equal protection violation in a decision by Richmond County, Georgia to fund a white but not a black high school, thereby denying black school children an opportunity to receive a high school education).

58. *See* Railway Express Agency v. New York, 336 U.S. 106 (1949) (upholding a New York traffic regulation prohibiting advertising on business vehicles but permitting an exception for vehicles operated by the owner of the business being advertised).

59. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (upholding a law that required opticians, but not sellers of ready-to-wear glasses, to obtain a prescription before replacing a customer's glasses); McGowen v. Maryland, 366 U.S. 420 (1961) (upholding, with an extremely deferential review, exemptions for some businesses from Sunday closing laws). The Court has not always used such deferential language, however. In *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), the Court asserted that to be rational the classification had to have a "fair and substantial relationship to the object of the legislation." *Id.* (upholding a Virginia tax law that distinguished between businesses that had some dealings within the state and those whose operations were conducted wholly outside the state).

60. One of the exceptions was *Morey v. Doud*, 354 U.S. 457 (1957) (invalidating an Illinois statute regulating "currency exchanges" but exempting the American Express Company), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297

presumption of constitutionality existed when the government used a classification that the Court had designated as "suspect"[61] or when government action affected the exercise of a "fundamental right."[62] In those circumstances, the Court has required the State to demonstrate that it has a compelling interest in the classifica-

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(1976). *See also* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (striking down an Alabama tax scheme that favored its own residents).

61. The notion that some types of classifications may be "suspect" and require heightened scrutiny has its origin in *Korematsu v. United States*, 323 U.S. 214 (1994). Writing for the Court, Justice Black stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Id.* at 216. The Court went on, however, to uphold the removal of Japanese-Americans from designated military zones without requiring the evidence that strict scrutiny would seem to require. *Id.* at 219.

Since *Korematsu*, the Court has been more rigorous in applying the strict scrutiny standard, invalidating almost all classifications that come under it. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984) (invalidating a Florida Court order awarding custody to the father of a child when the mother became involved in an interracial marriage); Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia's laws against interracial marriage).

62. The first such decision was *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down on equal protection grounds Oklahoma's Habitual Criminal Sterilization Act, which required that persons convicted two or more times of felonies be sterilized but exempted those convicted of embezzlement and other "white collar" crimes from such punishment). Like the right to procreate, access to the ballot was deemed a fundamental interest warranting heightened scrutiny in later cases. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (invalidating election where voting rights were limited to property owners); Cipriano v. City of Houma, 395 U.S. 701 (1969) (striking down a Louisiana law limiting voting rights to property owners); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (striking down a New York law limiting voting in school board elections to parents or property owners); Harper v. Virginia Bd. of Electors, 383 U.S. 663 (1966) (striking down a poll tax). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (upholding a statutory scheme limiting voting rights in water storage districts to landowners).

The right to travel interstate was recognized as fundamental in *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down various state statutes prohibiting welfare benefits to residents of less than one year as violative of their right to interstate movement), *overruled on other grounds by* Edelman v. Jordan, 416 U.S. 1000 (1974). The right to travel interstate played a part along with concern for ballot access in the invalidation of a Tennessee year-long residency requirement for voting in *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Access to the courts has also been treated as fundamental in some circumstances. *See* Griffin v. Illinois, 351 U.S. 12 (1956) (holding that indigent criminal defendants can not be denied appellate review allowed other defendants because they lack the means to pay for a transcript); Boddie v. Connecticut, 401 U.S. 371 (1971) (invalidating Connecticut's refusal to waive court costs for indigent couples seeking a divorce because the interest involved, i.e., marriage, is fundamental). As recently as 1996, the Court struck down a Mississippi requirement making the appeal of a judgment terminating parental rights contingent upon the advance payment of $2,352.36. *See* M.L.B. v. S.L.J., 117 S. Ct. 555 (1996).

tion, and that the means it selected were narrowly tailored to effect that interest.[63]

If the Court still used this two-tiered approach, the plaintiffs in *Romer* would have had to convince the Court either that sexual orientation should be considered a suspect classification or that Amendment 2 limited a fundamental right. There were three reasons why it was unlikely that the *Romer* Court would add sexual orientation to the suspect classification category. First, the Court had already indicated its great reluctance to broaden the suspect classification category in its analysis of gender and illegitimacy.[64] Second, such a holding might seem to be in direct conflict with the Court's ruling in *Bowers v. Hardwick*,[65] although that case turned on the Due Process Clause.[66] Third and most importantly, designating sexual orientation a suspect classification would transform laws throughout the nation and surely cause political turmoil. Such a course was not one this fairly cautious Court was likely to take.[67] Foregoing a suspect classification argument and instead convincing the Court that Amendment 2 encroached on a fundamental right seemed the more promising approach.[68]

However, this two-tiered analysis has given way to a more complicated system. In the 1970s, the Court created an intermediate level of review. Originating with gender classifications, the

63. *See, e.g., In re* Griffiths, 413 U.S. 717, 721-22 (1973). The strict scrutiny standard as been described as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

64. This reluctance with regard to illegitimates can be seen in *Labine v Vincent*, 401 U.S. 532 (1971) (upholding state intestate succession statutes that favored legitimate over illegitimate children). Rather broaden the suspect classification category, the Court has applied an intermediate level of review to these classifications. This new standard, which the Court has described as falling somewhere between strict scrutiny and rational basis review, was openly acknowledged in *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that a statute that classifies based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives"). Although not recognized until *Craig*, the standard was actually used in earlier decisions such as *Reed v. Reed*, 404 U.S. 71, 76 (1971) (invalidating Idaho probate code provision that preferences men over women in appointment as administrator of an estate).

65. 478 U.S. 186 (1986).

66. In *Bowers*, the Court held that a Georgia law criminalizing sodomy did not violate the Due Process Clause of the Fourteenth Amendment. Though the law applied to all sodomy, the majority focused on whether the right of privacy extended to provide homosexuals with a fundamental right to engage in gay sex. *Id.* at 190.

67. *See infra* notes 190-202 and accompanying text; *see also* TRIBE, *supra* note 50, § 16-3, at 1445.

68. A fundamental rights argument did persuade the trial court and the Colorado Supreme Court. *See infra* notes 80-87 and accompanying text.

notion has been extended to other categories.[69] For classifications falling within this intermediate category, government must demonstrate an "important" interest and a "substantial" relationship of the classification to the interest.[70]

Moreover, rational basis review itself has been refined. No longer does the rational basis test automatically result in the validation of the government's action.[71] There have been circumstances, although not clearly defined, in which the Court has been less willing than it once was to credit the legitimacy of government purposes.[72] Obviously, whatever the framework, the "special rights" controversy in *Romer* was pivotal;[73] if Amendment 2 had been viewed as not treating homosexuals unfavorably, then none of the equal protection criteria would have applied.

B. Procedural History

Colorado voters adopted Amendment 2 in November 1992.[74] Shortly thereafter Richard Evans, along with several other individuals and adversely affected local governmental entities, petitioned the Denver district court for an order declaring Amendment 2 unconstitutional and an injunction barring its enforcement.[75]

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69. TRIBE, *supra* note 50, § 16-33, at 1610.

70. *See* Craig v. Boren, 429 U.S. at 197 (striking down an Oklahoma statute barring the sale of 3.2% beer to males, but not to females, under the age of twenty-one); Trimble v. Gordon, 430 U.S. 762 (1977) (striking down an Illinois law that prevented children born out of wedlock from inheriting from their fathers unless paternity had been acknowledged in a judicial proceeding prior to the father's death).

71. *See, e.g.*, United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that unrelated persons occupying one household could not be denied food stamps).

72. *Compare* Railway Express Agency v. New York, 336 U.S. 106 (1949) (where the court strongly deferred to a New York traffic regulation prohibiting advertising on business vehicles but making an exception for vehicles operated in the business of the owner), *with* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (holding the City's denial of a use permit for a group home for mentally retarded individuals violated the equal protection clause). For a further discussion of the Court's enhanced rational basis test, see Part III.A.

73. For a discussion of the "special rights" controversy, see *infra* Part III.C.

74. Romer v. Evans, 116 S. Ct. at 1620, 1623 (1996). The cities of Aspen, Boulder and Denver had ordinances that protected gays and lesbians which were consequently repealed by Amendment 2. *Id.* Amendment 2 repealed all laws and policies barring discrimination of homosexuals and forbidding the adoption of "all legislative, executive or judicial action at any level of state or local government designed to protect the named class." *Id.*

75. *See* Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) (*Evans I*) (explaining the plaintiffs' request that the court "enjoin the enforcement of Amendment 2" and declare it to be unconstitutional), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 116 S. Ct. 1620 (1996).

As already suggested, Evans first had to convince the Court that there had been discrimination against gay men, lesbians and bisexuals. Because the more traditional and widely used rational basis test generally results in deference to voters and the legislature, Evans and his co-plaintiffs next had to persuade the Court to apply some form of heightened scrutiny.[76]

At the Denver district court, Evans argued that a classification based on sexual orientation should be considered suspect or quasi-suspect.[77] Alternatively, Evans argued that the court should use rational basis review and that "the state's purported compelling interests are not rationally related to the enactment of Amendment 2."[78] The trial court refused to place sexual orientation in the suspect category;[79] however, it still held that strict scrutiny was warranted because Amendment 2 burdened the fundamental right "not to have the State endorse and give effect to private biases."[80] The trial court concluded that Amendment 2 must be reviewed under the strict scrutiny standard.[81] Because there was a reasonable probability plaintiffs would prevail under that standard, the district court issued a preliminary injunction preventing enforcement of Amendment 2 pending a trial on the merits.[82] Colorado appealed.[83]

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76. *See supra* notes 56-63 and accompanying text (discussing rational basis review as a traditionally deferential standard); *but see supra* notes 69-70 and accompanying text (explaining that rational basis no longer automatically results in deference to the government).

77. Evans v. Romer, 882 P.2d 1335, 1341 n.3 (Colo. 1994) (*Evans II*), *aff'd*, 116 S. Ct. 1620 (1996).

78. *Id.* at 1341; *see also Evans I*, 854 P.2d at 1273.

79. *Evans II*, 882 P.2d at 1341 n.3 (noting that the trial court rejected the plaintiffs' argument that sexual orientation is a suspect class because that group is not politically powerless).

80. *Evans I*, 854 P.2d at 1274.

81. *Id.* The court stated, "A legislative enactment which infringes on a fundamental right or which burdens a suspect class is constitutionally permissible only if it is '*necessary* to promote a *compelling* state interest' . . . and does so in the least restrictive manner possible." *Evans II*, 882 P.2d at 1341 (citing Dunn v. Blumstein, 405 U.S. 330, 342 (1972)).

Under prevailing Equal Protection Clause jurisprudence, the Court looks more closely at some classifications than at others. *See supra* notes 55, 59 and accompanying text (identifying suspect classifications). Under strict scrutiny, the state must show a compelling interest and a means closely tailored to that interest. *See supra* notes 59-61 and accompanying text (explaining strict scrutiny and the burden of proof it imposes on the government). Strict scrutiny is applied if the classification is one the Court has designated as suspect or if the interest regulated is fundamental. *See supra* notes 59-60 and accompanying text (explaining when strict scrutiny applies).

82. *Evans I*, 854 P.2d at 1273.

83. *Id.* at 1274.

The Colorado Supreme Court's first review of the case (*Evans I*) focused on the standard of review. The state supreme court agreed with the trial court's finding that Amendment 2 implicated a fundamental right and even recharacterized it as a fundamental right to have an equal voice in government.[84] The supreme court remanded the case to the district court "to determine whether [Amendment 2] is constitutionally valid under the Equal Protection Clause."[85] On remand, the trial court held that the State failed to meet its heavy burden under the strict scrutiny test.[86] Colorado offered a number of additional justifications for Amendment 2, each of which the trial court dismissed as either not compelling or not necessary to the interest at stake.[87]

On appeal, the Colorado Supreme Court affirmed its *Evans I* holding regarding the standard of review.[88] It also agreed with the trial court's disposition on the merits. Although acknowledging that some of the interests Colorado advanced were compelling, the Colorado Supreme Court agreed with the trial court that Amendment 2 was not narrowly tailored to effect those ends.[89] Thus, while the supreme court recognized that the State had a compelling interest in religious liberty, it reasoned that "an equally effective, and substantially less onerous way of accomplishing that purpose simply would be to require that anti-discrimination laws

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84. *Id.* at 1276.

85. *Id.* at 1286.

86. *See* Evans v. Romer, 882 P.2d 1335, 1340-41 (Colo. 1994), *aff'd*, 116 S. Ct. 1620 (1996).

87. *Id.* at 1339-40. Colorado asserted the following compelling interests:

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

Id. at 1339. The trial court held these either not compelling or not narrowly tailored to achieve the purported objectives. *Id.*

88. *Id.* at 1341.

89. The Colorado Supreme Court reviewed each of the State's claims *de novo*. *Id.* at 1341-50. It agreed with the trial court's position that the State's asserted interests were either insufficiently compelling or were achievable by less intrusive means. *See id.* (detailing which state interests were insufficiently compelling or too intrusive). For example, the asserted interest in religious freedom was compelling but was not the least restrictive means because religious freedom could be achieved by providing an exemption based on religious convictions. *See id.* at 1340-41.

which include provisions for sexual orientation also include exceptions for religiously-based objections."[90]

Similarly, the Colorado Supreme Court noted that although the State might have a compelling interest in protecting family privacy, the interest was not implicated in the case at hand.[91] Moreover, such an interest would not extend to having the State endorse one set of moral values over another.[92] Additionally, the court was not convinced that Amendment 2 was justified as a necessary means for protecting associational privacy.[93] Unmoved by these arguments and others,[94] the Colorado Supreme Court dismissed the State's justifications as not compelling.[95]

C. The U.S. Supreme Court Opinion

Justice Kennedy, writing for the United States Supreme Court, began his remarks in *Romer v. Evans* by invoking Justice John Harlan's dissent in *Plessy v. Ferguson*—"the Constitution neither knows nor tolerates classes among citizens"[96]—followers of the case must have anticipated that Evans would win. Continuing, Justice Kennedy explained that these words signify a "commitment to the law's neutrality where the rights of persons are at stake."[97] However, those who thought the reference meant that sexual orientation would be treated as a suspect or quasi-suspect classification requiring heightened scrutiny were mistaken.

The U.S. Supreme Court affirmed the Colorado Supreme Court's result, but it did so on quite different grounds. Whereas the Colorado Supreme Court had subjected Amendment 2 to a searching review, which Amendment 2 failed, the U.S. Supreme Court not only held that Amendment 2 failed constitutional analy-

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90. *Id.* at 1343.

91. *Id.* at 1343-44.

92. *Id.* at 1343.

93. *Id.* at 1344-45. The Colorado Supreme Court noted that Amendment 2 prohibited protection of gays and lesbians in activities that had little or no connection to intimate relationships. *Id.* at 1345.

94. The court stated that "the preservation of fiscal resources, administrative convenience, and the reduction of the workload of governmental bodies" were not compelling interests. *Id.*

95. *Id.*

96. Romer v. Evans, 116 S. Ct. 1620, 1623 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (upholding a Louisiana law that required the separation of races on railroad cars), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954)).

97. *Id.*

sis[98] but also that it "was not within our constitutional tradition to enact" the law.[99] Whereas the state supreme court agreed that some of Colorado's justifications were compelling even though it held that they could be advanced less intrusively,[100] the U.S. Supreme Court did not take the State's justifications seriously because they were too far removed from Amendment 2 itself.[101]

Section I of the U.S. Supreme Court's opinion provided a straightforward account of the law's provisions and the history of the litigation.[102] The substantive analysis began in Section II with the consideration and rejection of Colorado's "special rights" claim.[103] The Court stated that the State's assertion that Amendment 2 did no more than put homosexuals "in the same position as all other persons" was "implausible."[104] There was the undeniable fact that Amendment 2 placed gays, lesbians and bisexuals in a less favorable position than they had been before its adoption.[105] Moreover, the harm imposed was extensive, as documented by the state supreme court.[106]

The Court then explained that civil rights laws cannot be viewed as providing "special" advantages to those covered because in most cases, people do not face arbitrary exclusions from everyday activities.[107] This presumption of non-discrimination is reflected in the common law rule that "innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer."[108] While this rule might have served the majority well enough, it was often insufficient to protect some identifiable and unpopular groups.[109] Civil rights laws were designed to cope with this sort of group disadvantaging.[110]

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98. *Id.* at 1627.

99. *Id.* at 1628.

100. *See supra* notes 87-89 and accompanying text.

101. 116 S. Ct. at 1629.

102. *Id.* at 1623-24.

103. *Id.* at 1624-25. The State's "special rights" claim asserted that Amendment 2 "does no more than deny homosexuals special rights." *Id.* at 1624.

104. *Id.*

105. *Id.* at 1625. The Court explained that the "amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination." *Id.*

106. *Id.*

107. *Id.* at 1627.

108. *Id.* at 1625 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. ___, ___, 115 S. Ct. 2338, 2346 (1995)).

109. *Id.*

110. *See id.* (explaining that Colorado's state and municipal laws "enumerate

Furthermore, Justice Kennedy noted that Amendment 2 also repealed regulations forbidding discrimination based on sexual orientation in public employment.[111] Even though he did not explain the importance of this point, the argument responded to Colorado's claim, implicit in the "special rights" argument, that Amendment 2 incorrectly placed the right to be free from discrimination ahead of the liberty rights of those who wished to discriminate.[112] Finally, Justice Kennedy wrote that Amendment 2 denied homosexuals the "safeguards others enjoy."[113] Moreover, unlike others gay men, lesbians and bisexuals could only secure equal rights by amending the state constitution or "by trying to pass helpful laws of general applicability;"[114] that is, laws barring the arbitrary disadvantaging of any individual.

Having argued that Amendment 2 did indeed harm homosexuals, the Court then turned its attention to the case's second principal issue: whether such harm is barred by the Fourteenth Amendment.[115] It is worth repeating that notwithstanding Justice Kennedy's opening remarks, the Court has never required the government to act with perfect neutrality.[116] As Justice Kennedy acknowledged, if government is to function effectively, it must classify citizens, even though the unavoidable result is that some groups will be treated less favorably than others.[117] The need "to

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the groups or persons" which the laws protect and that these groups are not limited to those which receive heightened equal protection scrutiny in the courts).

111. *Id.* at 1626. The Court explained the breadth of Amendment 2 by stating that it applies to public employment, public accommodations and various private transactions. *Id.*

112. *See* Evans v. Romer, 882 P.2d 1335, 1342 (Colo. 1994), *aff'd*, 116 S. Ct. 1620 (1996) (explaining the defendants' argument that private citizens, such as landlords, would have to unfairly compromise their "deep-seated and profound religious objections to homosexuality" in order to comply with the amendment).

113. *Romer*, 116 S. Ct. at 1627. Justice Kennedy summed up the Court's position as follows:

> 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.

Id.

114. *Id.*

115. *Id.*

116. *See* discussion *supra* notes 47-55 and accompanying text (discussing judicial review of equal protection claims and explaining that if the government satisfies the applicable constitutional standard, then it may use a given classification, even if that classification has uneven or non-neutral effects).

117. *Romer*, 116 S. Ct. at 1627. The Court explained that while the requirement of a "link between classification and objective" guides and limits government action, ordinarily a "law will be sustained if it can be said to advance a legitimate government interest, even if the law . . . works to the disadvantage of a particular

reconcile the principle with the reality"[118] led the Court to develop the two-tiered analytic approach described previously: If a law either burdens a fundamental right or targets a suspect class then the Court should examine it using strict scrutiny; if not, then the Court need only ensure that the classification "bears a rational relationship to some legitimate end."[119]

However, given the exceptional nature of Amendment 2, the Court perceived no need to utilize its traditional two-tiered analytic framework nor did it need to explicitly invoke either strict scrutiny or a rational basis test. Instead, the Court implicitly drew elements from each. It was important that Amendment 2 affected participation in the political process, but the Court's decision was not grounded in the fundamental rights component of equal protection analysis. In fact, if it had been, the Court indicated that it might go further than had the Colorado Supreme Court.

Whereas the state supreme court took the position that a law limiting the exercise of one's "fundamental right to participate equally in the political process" would be invalid unless justified by a compelling interest and by a means necessary to promote that interest,[120] Justice Kennedy seemed to suggest that such a law was never permissible.[121] Although it was also important that the law was aimed at an identifiable and unpopular group,[122] the Court avoided holding that sexual orientation was a suspect classification calling for strict scrutiny.[123] Finally, the Court considered the breadth of the inflicted harm to be an important factor.[124]

The Court noted that under ordinary circumstances, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[125] However, even deferential analysis implies the pursuit of

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group." *Id.*

118. *Id.*

119. *Id.* *See also* discussion *supra* notes 58-63 and accompanying text.

120. Evans v. Romer, 854 P.2d 1270, 1276 (Colo. 1993), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 116 S. Ct. 1620 (1996).

121. *See Romer*, 116 S. Ct. at 1628. In writing for the majority, Justice Kennedy remarked that a law which makes it "more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.*

122. *See id.* at 1628.

123. *Id.* at 1629. Rather than imposing strict scrutiny, the Court only applied rational basis review to Amendment 2, and it held that the law was not "directed to any identifiable legitimate purpose or discrete objective." *Id.*

124. *See id.* Completely denying protection of the laws to a group of persons based upon one trait is "unprecedented in our jurisprudence." *Id.*

125. *Id.* at 1627 (citation omitted).

a legitimate end.[126] Moreover, the state may not be partial for its own sake, and it may not pass a law "for the purpose of disadvantaging the group burdened by the law."[127] Finally, the Court asserted that equal protection means that "a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[128]

The Court then concluded that Colorado had pursued an illegitimate end.[129] "[H]omosexuals . . . are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[130] Furthermore, Colorado created this "solitary class" not only without adequate justification but without any credible justification. The Court could not take the State's justifications seriously given the undifferentiated, broad reach of the Amendment.[131] Therefore, Colorado failed to show that it had a proper purpose. "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[132]

One final aspect of Justice Kennedy's opinion warrants mention. As the Court gave only passing attention to precedent, its ruling was vulnerable to Justice Scalia's charge that it was without foundation in the law.[133] One exception was the Court's effort to distinguish *Romer* from cases such as *Williamson v. Lee Optical*[134] and *Railway Express Agency v. New York*[135]—decisions which upheld classifications that were at best loosely connected to the state's objectives. Justice Kennedy distinguished the classify-

126. *See supra* note 72 and accompanying text.

127. *See Romer*, 116 S. Ct. at 1627 (citation omitted).

128. *Id.* at 1628 (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

129. *Romer*, 116 S. Ct. at 1629.

130. *Id.* at 1625.

131. "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.* at 1629.

132. *Id.*

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

134. 348 U.S. 483 (1955) (upholding a state law that discriminated between opticians and licensed ophthalmologists or optometrists based on the supposition that the regulation bore a rational relationship to public health).

135. 336 U.S. 106 (1949) (upholding a state law that discriminated between owners and non-owners when regulating advertisements on the sides of trucks in the name of traffic safety).

ing statutes challenged in these cases on the basis of their restricted scope and "sufficient factual context."[136]

Another exception was Justice Kennedy's discussion of *Davis v. Beason*.[137] He criticized the dissent's reliance on *Davis* for the proposition that Amendment 2 was "within our constitutional tradition."[138] In *Davis*, an 1890 decision, the Court observed no constitutional infirmity in a territorial statute that denied voting and office holding rights to, inter alia, persons practicing or advocating polygamy.[139] According to Justice Kennedy, *Davis* did not provide authority upholding Amendment 2.[140] He declared that the 1969 case of *Brandenburg v. Ohio*[141] invalidated *Davis*' holding "that persons advocating a certain practice may be denied the right to vote."[142] Justice Kennedy also stated that *Davis*' holding, allowing deprivation of voting rights based on status, would require and likely fail strict scrutiny analysis.[143] Finally, Kennedy cited *United States Department of Agriculture v. Moreno*[144] for the proposition that "the desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[145]

D. The Dissent

Where the majority saw animus, the dissent saw tolerance, a polity sensitive to the interests of homosexuals.[146] This was apparently because Coloradans no longer send homosexuals to jail for sodomy.[147] What the majority saw as an analysis of a classifi-

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

137. 133 U.S. 333, 347 (1890), *overruled by* Romer v. Evans, 116 S. Ct. 1620 (1996).

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

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

140. *Romer*, 116 S. Ct. at 1628 ("*Davis* . . . is not evidence that Amendment 2 is within constitutional tradition.").

141. 395 U.S. 444 (1969) (per curiam) (reversing the criminal conviction of a Ku Klux Klan leader under a criminal syndicalism statute as violative of the First and Fourteenth Amendments).

142. *Romer*, 116 S. Ct. at 1628. However, Justice Kennedy explicitly addressed *Davis*, emphasizing that *Davis*' holding involving the denial of rights based on criminal convictions was left undisturbed by *Romer*, and that this aspect of the *Davis* holding was irrelevant to Amendment 2. *Id.*

143. *See id.* at 1628.

144. 413 U.S. 528 (1973) (striking down a federal regulation denying benefits to unrelated members of food stamp collecting households).

145. *Romer*, 116 S. Ct. at 1628 (quoting *Moreno*, 413 U.S. at 534) (emphasis omitted).

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

147. *See id.* at 1633 (Scalia, J., dissenting) (citing the fact that Colorado had been one of the first states to repeal its sodomy laws as proof of Colorado's toler-

cation and the end toward which it is applied,[148] the dissent saw as an argument over policy and morality, one having little to do with status.[149] What the majority described as "sweeping and comprehensive," [150] the dissent described as "modest."[151]

Justice Scalia authored the dissent, and was joined by Chief Justice Rehnquist and Justice Thomas.[152] Like the majority, Scalia used the "special rights" issue as the starting point for considering the constitutionality of Amendment 2.[153] Unlike the majority, he paid no attention to the Amendment's effects on the coverage of gays, lesbians and bisexuals under civil rights legislation.[154] Scalia even argued that Amendment 2 did not disfavor Coloradans engaging in homosexual sex.[155] In support, he offered his own characterizations of both the amendment's consequences[156] and the civil rights laws. [157]

In considering the consequences of Amendment 2, Justice Scalia contended that homosexuals, like everyone else, continued to enjoy the protections of laws of general applicability, including laws against arbitrary discrimination.[158] Drawing support from the Colorado Supreme Court,[159] Scalia maintained that "general laws and policies that prohibit arbitrary discrimination would continue to prohibit discrimination on the basis of homosexual conduct as well."[160] Asserting that the majority "does not dispute all

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ance).

148. *See id.* at 1627 (applying this "conventional inquiry").

149. *See id.* at 1633-34 (Scalia, J., dissenting) (arguing that Amendment 2 does not prohibit favored status for homosexual individuals, but rather it prohibits favored status for homosexuality).

150. *Id.* at 1625.

151. *Id.* at 1629 (Scalia, J., dissenting). Minimizations of this order run throughout the dissent. At the outset, Justice Scalia described Amendment 2 not as aimed at harming homosexuals but as "rather 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." *Id.* at 1629. Later on, he characterized the action taken in Amendment 2 as "the smallest conceivable. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled 'gay bashing' is so false as to be comical." *Id.* at 1633.

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

153. *See id.* at 1629-31.

154. *See id.*

155. *Id.* at 1637.

156. *See id.* at 1630; *see also infra* text accompanying notes 158, 160-62.

157. *See Romer*, 116 S. Ct. at 1637; *see also infra* text accompanying note 163.

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

159. *Id.* (pointing to the Colorado Supreme Court's determination that Amendment 2 would have no effect on laws protecting against discrimination based on such factors as age, marital or family status, veterans status and for any legal, off-duty conduct, such as smoking tobacco).

160. *Id.* Scalia notes, for example, that Amendment 2 would not affect a state

this, but assumes it to be true,"[161] Scalia concluded that the majority's primary thesis was the argument "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."[162]

In this discussion, Scalia made no mention of the impact of Amendment 2 on coverage for homosexuals under civil rights laws. This omission implicitly asserts that the protections of civil rights laws are "special." That is, those not covered by civil rights laws, i.e., most individuals, enjoy no protection from the arbitrary actions of those upon whom they depend for employment, housing and access to public accommodations. Scalia objected to the hiring policy of the Association of American Law Schools, for example, because it would allow employment to be denied "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; [or] because is a womanizer," but not because the applicant is homosexual.[163] By distinguishing the last rationale, Scalia insisted, civil rights laws confer "special" status.

Justice Scalia also took issue with the majority's argument that requiring homosexuals but no one else to use the more difficult process of constitutional amendment to obtain coverage under civil rights laws involved a denial of equal protection.[164] According to Scalia, "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."[165] "Requiring that laws singling out homosexuals be henceforth made by constitutional amendment rather than by local or state officials no more violates the Equal Protection Clause than would moving the power to make drug policy or smoking policy from the locality to the state government."[166] The Federal Constitution in fact dictates that some

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law requirement "that pensions be paid to all retiring state employees with a certain length of service." What Amendment 2 prohibited, he asserted, was policies that would provide a benefit to homosexuals that others did not receive, such as "death benefit payments to the 'life partner' of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee." *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1637.

164. *Id.* at 1630-31.

165. *Id.* at 1630.

166. *Id.* at 1634. According to Scalia, the majority's position "is proved false 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 smok-

groups such as theists will find it more difficult than others to obtain favorable policy.[167]

Justice Scalia's position depended upon a blurring of the line between a characteristic that attaches to a person and a characteristic that attaches to a person's conduct or circumstance. His view that the class (of gay men, lesbians and bisexuals) was defined by behavior emerged most clearly a few pages later where he argued that Amendment 2 did not "prohibit giving favored status to people who are homosexuals; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status *because of their homosexual conduct*—that is, it prohibits favored status *for homosexuality*."[168]

The defining of a group by its behavior bears also on the question of the applicable standard of review and the analysis of rationality.[169] If a state could criminalize gay sex, as the Supreme Court said it could in *Bowers v. Hardwick*,[170] a case Justice Scalia accused the Court of ignoring,[171] then surely it could level less onerous burdens on homosexuals. But even if *Hardwick* did not foreclose heightened scrutiny, Scalia claimed that gays and lesbians were not a politically powerless group that merited Court protection.[172] If rationality is the standard, the dissent argued, then Amendment 2 should be constitutional.[173] Under the rational basis test it does not matter if the classification is imperfect, and it would therefore be permissible even if it included some who did not engage in the discouraged conduct but had only the inclination to do so.[174] Scalia also took up the governance argument, calling Colorado's process the "most democratic of procedures."[175]

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ers, or gun owners, or motorcyclists—from changing the policy thus established in 'each of [the] parts' of the State." *Id*

167. The First Amendment's Establishment Clause, applied against state action through the Fourteenth Amendment, prevents those who would wish to establish a state church from doing so without a constitutional amendment. *See* U.S. CONST. amend. I.

168. *Id.* at 1633 (emphasis added).

169. *See* discussion *supra* Part II.A.

170. 478 U.S. 186 (1986).

171. *Romer*, 116 S. Ct. at 1631, 1632 (Scalia, J., dissenting).

172. *Id.* at 1637.

173. *Id.* at 1632.

174. *See id.*

175. *Id.* at 1634.

III. Legal and Political Issues

In *Romer*, the Court confronted for the first time an Equal Protection challenge to a classification based on sexual orientation. The issue of homosexuality had been before the Court once before in *Hardwick*,[176] but the plaintiffs in that case had leveled a challenge based on the Due Process Clause.[177] If little else, *Romer* signaled that there were limits to the disadvantages that could be placed on homosexuals. But the decision provided little guidance beyond that.

The Court considered but did not adopt the state supreme court's position that Amendment 2 affected the fundamental right of gays and lesbians to participate in the political process, and therefore, required strict scrutiny.[178] It did, however, agree that Amendment 2 made it more difficult for gays and lesbians to have an effective voice in the political process, and that this in itself was "a denial of equal protection of the laws in the most literal sense."[179]

The Court also did not elevate sexual orientation to a suspect or semi-suspect status, as a number of lawyers and commentators had urged it to do.[180] Justice Kennedy did not link the decision in *Romer* to the growing number of cases that purport to apply the rationality standard, but instead conducted a review that was clearly more searching than the traditional test required.[181] Justice Kennedy took great care to confine the decision to its facts.

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

177. *Hardwick* involved a challenge to Georgia's sodomy statute by Michael Hardwick who had been charged, though not ultimately prosecuted, with violating the law. *Id.* at 187-88. *Hardwick* asserted that the statute violated the right of privacy protected under the Due Process Clause of the Fourteenth Amendment insofar as it criminalized consensual sodomy. *Id.* at 188. Hardwick did not raise a claim under the Equal Protection Clause. *Id.* at 198 n.8.

178. *See* Romer, 116 S. Ct. at 1624.

179. *Id.* at 1628.

180. This argument appeared in both the briefs on behalf of gays and lesbians and in testimony in the trials challenging the Colorado and Cincinnati initiatives. *See e.g,* Equality Found. of Greater Cincinnati, Inc., v. City of Cincinnati, 860 F. Supp. 417, 424-26 (S.D. Ohio 1994) (challenging a citizen-initiated amendment to the City Charter barring laws protecting gays and lesbians from discrimination), *aff'd in part, vacated in part,* 54 F.3d 261 (6th. Cir. 1995), *vacated,* 116 S. Ct. 2519 (1996).

Many commentators see homosexuality as a suspect classification, or at least a semi-suspect classification. *See, e.g.,* ELY, *supra* note 45, at 162-64; Bruce A. Ackerman, *Beyond Carolene Products,* 98 HARV. L. REV. 713, 742 (1985), *Constitutional Limits on Anti-Gay-Rights Initiatives,* 106 HARV. L. REV. 1905, 1906-07 (1993); John F. Niblock, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny,* 41 UCLA L. REV. 153, 188-97 (1993).

181. *See* discussion *infra* Part III.A.

The Court purposely described its analysis as "exceptional," mentioning twice that Amendment 2 defied traditional analysis and was instead outside both heightened scrutiny and traditional rational basis analysis.[182] Because of these disclaimers, it is clear that the Court did not settle on an approach to classifications based merely on sexual orientation in *Romer*.

The opinions in this decision were remarkable in several respects. What is striking about the majority's opinion is its conscious effort to divorce itself from existing equal protection doctrine. As a consequence, its action appears to be much broader and far less grounded in the law than it actually is, and therefore much more vulnerable to attack. What is also striking about the majority opinion is its apparent indifference to the politics surrounding the case. With the exception of the issue of "special rights," Justice Kennedy failed to confront the dissent's arguments. This will give the dissent an advantage in the dialogue sure to follow in the lower courts, legislatures and public opinion. The dissenting opinion was also unusual because of the extent to which it accepted and expanded upon the political arguments made by the anti-gay forces in the campaign for Amendment 2.

A. Equal Protection and the Enhanced Rational Basis Test

Justice Kennedy treated Amendment 2 as if it could not be analyzed within existing equal protection doctrine. Had the choices been only to apply either strict scrutiny or highly deferential review, that would have been true. The analysis that Justice Kennedy chose fit neither of these models. His analysis was less rigorous than strict scrutiny, involving no requirement of compelling interests or narrowly tailored means; yet it was more searching than the traditional rational basis test. Had Colorado only been required to show that it had some conceivable basis for its action, the Amendment almost assuredly would have survived.[183]

A majority of justices still do not acknowledge that they are applying "something more than minimum rationality review."[184]

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182. *Romer*, 116 S. Ct. at 1627-28.

183. For example, Colorado's interest in advancing religious liberty was at least tangentially connected to the law. The trial court rejected this governmental interest as a defense because it was insufficiently tailored to the ends; however, no such precision is needed under the rational basis test. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106, 109-10 (1949) (commenting that it is not the function of the Court to "pass judgment on the wisdom [of the ordinance in question]"). *See also supra* notes 58-59 and accompanying text.

184. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 459 (1985) (Marshall, J., concurring) (noting that the Court had previously upheld similar

In practice, however, rationality review now seems to represent more than one standard. It looks increasingly like the sliding scale proposed by Justice Thurgood Marshall in *Dandridge v. Williams*:[185] The less important the interest, the less likely a classification is based upon prejudice, the more likely it is connected with some legitimate state objective and the more deferential the review.[186] The more important the interest, the higher the "degree to which it is infringed,"[187] the more likely the classification is based on prejudice and the stricter the review.[188] Some classifications seem more problematic than others. These include classifications involving a group that "has been subjected to a 'tradition of disfavor'"[189] and classifications that, although sometimes relevant to a valid public purpose, most often are not.[190]

However, while the Court in deciding *Romer* did not conform to the most deferential type of rational basis analysis, the approach it took was not without precedent. As noted, the Court has increasingly been unwilling to abdicate totally a review which is outside the areas of suspect or semi-suspect classifications or of fundamental rights.[191] This "move away from near-absolute deference to legislative judgment"[192] has been particularly evident over the past decade. The Court began moving away from its traditional deference in *United States Department of Agriculture v. Moreno*,[193] in which, purporting to apply the rational basis test, the Court struck down a regulation which prevented unrelated individuals living together from collecting food stamps.[194] A year later in *Jimenez v. Weinberger*,[195] the Court invalidated a provision of the Social Security Act which made some but not all illegitimate children ineligible for a parent's disability benefits.[196]

Since that time, several other cases have found violations of the Equal Protection Clause while purporting to use the rational

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imprecision in ordinances under mere rationality review).

185. 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (upholding a Maryland law capping AFDC payments regardless of the size of the family).

186. *See id.* at 521-22.

187. TRIBE, *supra* note 50, § 16-33, at 1610.

188. *City of Cleburne*, 473 U.S. at 460-61 (Marshall, J., concurring).

189. *Id.* at 453 (Stevens, J., concurring).

190. *Id.* at 454.

191. *See supra* notes 184-90 and accompanying text. *See also* discussion *supra* Part II.A.

192. TRIBE, *supra* note 50, § 16-3, at 1445.

193. 413 U.S. 528 (1973).

194. *Id.*

195. 417 U.S. 628 (1974).

196. *Id.*

basis test.[197] In *Hooper v. Bernalillo County Assessor*,[198] the Court invalidated a New Mexico statute which treated Vietnam veterans who were New Mexico residents prior to 1976 differently from other Vietnam veterans by allowing them a $2,000 annual tax exemption not available to the later residents in the state.[199] Alaska's effort to favor long-term over short-term residents met an identical fate for similar reasons in *Zobel v. Williams*.[200] Texas' law barring the children of illegal aliens from receiving a free public education was struck down in *Plyer v. Doe*.[201] In *City of Cleburne v. Cleburne Living Center, Inc.*, [202] the Court found that the city acted unconstitutionally when it denied a special use permit for the operation of a group home for the mentally retarded.[203] However, most classifications challenged under the Equal Protection Clause still were reviewed under the more deferential standard.[204] Despite this tendency toward deference, the Court would sometimes apply *de facto* heightened scrutiny, giving the *Romer* decision a foundation in the law.

A strong argument can be made that Amendment 2 was just the sort of measure for which the heightened scrutiny of the type described by Justice Marshall was appropriate.[205] Gays, lesbians

197. *Cf.* discussion *supra* Part II.A (indicating that the traditional and most commonly used rational basis test means essentially no review at all).

198. 472 U.S. 612 (1985).

199. *Id.*

200. 457 U.S. 55, 56-58 (1982) (invalidating an Alaska law which favored long-time residents in the distribution of income from natural resources) *See also* Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989) (invalidating a system of assessing property tax which discriminated against recent home purchasers); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (holding that a state cannot discriminate between out-of-state and instate insurance companies in imposing a gross premiums tax rate); Williams v. Vermont, 472 U.S. 14 (1985) (striking down a Vermont automobile use tax that favored residents over non-residents).

201. Plyer v. Doe, 457 U.S. 202 (1982) (employing a rationality test after finding that education was an important but not fundamental interest and that illegal aliens did not constitute a suspect class).

202. 473 U.S. 432 (1985).

203. *Id.* at 447, 450.

204. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979) (upholding a mandatory retirement age that applied to Foreign Service Officers but not to Civil Service employees, including those stationed abroad); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (upholding a law that gave a windfall in retirement benefits to some workers whose service was less than others but denied the windfall depending on whether they had worked for the railroad in 1974).

205. *See* Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (advocating inquiry into the "facts and circumstances behind the law"). *See also supra* notes 185-87 and accompanying text.

and bisexuals have clearly been traditionally disfavored groups.[206] For most of the country's history, homosexuality and homosexual sex have been seen as deviant and immoral.[207] The medical community long viewed homosexuality as a disease.[208] Even now, those whose homosexual orientation becomes known often face discrimination in employment, housing, school and religion.[209] Legal discrimination against gays, lesbians and bisexuals has been extensive.[210] Although it was argued in *Romer* that regardless of the historical discrimination, gays and lesbians no longer face discrimination, and that they have indeed become privileged groups,[211] this does not reflect reality. Sexual orientation is often still a permissible basis for discrimination both in the public and private spheres, and many gays and lesbians still experience discrimination and even violence.[212] Sexual orientation is often irrelevant to legitimate policy aims having little to do with the individual's ability to function in a job or part of civic life.

With respect to Amendment 2, the degree of harm inflicted on homosexuals was severe and far-reaching, as noted by the majority opinion.[213] It therefore was not necessary (Justice Scalia's dissent notwithstanding) that homosexuals be politically powerless or

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206. This is the argument made by those who have favored treating sexual orientation as a suspect classification. *See supra* notes 61-68. Cass Sunstein agrees that heightened scrutiny is appropriate for some of the same reasons but has argued against suspect classification analysis because of the belief that moving too much beyond public opinion would generate a backlash, which in the end would result in fewer rights for homosexuals. *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L. REV. 1, 7-9 (1994).

207. *See* Stephen Zamansky, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. REV. 221, 244, n.248 (1993).

208. *Id.*

209. *Id.* at 245 n.252 (citing *Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 97th Cong., 2d Sess. 23 (1982) (statement of Rep. Paul Tsongas of Massachusetts).

210. Same-sex intimate relationships are not recognized by law. *See* Niblock, *supra* note 180, at 159. That in turn has economic and social consequences. Same-sex domestic partners are not entitled to health insurance benefits, to share pensions, to inherit absent direct instructions in a will, to visit their partner when ill and so on. *Id.* at 160. Adoptions by gay and lesbian couples are disfavored. *Id.* Homosexuals are often disfavored as well in custody disputes. *Id.* Homosexuals cannot openly serve in the Armed Forces. *Id.* at 161.

211. *See* Romer v. Evans, 116 S. Ct. 1620, 1637 (Scalia, J., dissenting).

212. For an extensive examination of sexual orientation discrimination in employment, see Mison et al., *supra* note 23, at 33. *See also* Zamansky, *supra* note 207, at 244-49 (describing status issues still confronting homosexual men and women in society); Garfield, *supra* note 24, at 730-32 (arguing that homosexuals continue to face difficulties in participating in the political process).

213. *Romer*, 116 S. Ct. at 1624-27.

have low incomes in order to qualify for enhanced rational basis review.[214] Ample factors were present to support such heightened review.[215]

Although Justice Kennedy did not invoke precedent as a prominent feature of his analysis in *Romer*, he could have used a number of the cases already mentioned to strengthen his arguments. For example, *Romer* was not the first case to indicate that antipathy toward the group that is harmed is an unacceptable basis for government action. When the Court invalidated the City of Cleburne's denial of a special use permit for a group home for the mentally retarded, it did so because it believed that the city's decision "rest[ed] on an irrational prejudice against the mentally retarded."[216] *Romer* bears a marked resemblance to *City of Cleburne*, *Moreno* and *Plyler*, cases in which there was concern that prejudice operated in the creation of the classification.[217]

In recognizing that there is a difference between disadvantaging a group in the pursuit of a larger goal and disadvantaging the group for the sole purpose of treating them differently, the Court also had ample support in prior commentary regarding the Equal Protection Clause.[218] The interpretation of this clause has been based on a principle of fairness: the idea that government should treat individuals equally unless there is a legitimate and

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214. *See* Dandridge v. Williams, 397 U.S. 471, 521 (1969) (Marshall, J., dissenting) (suggesting that the severity and breadth of a regulation are relevant factors triggering more searching inquiry).

215. As District Judge Spiegel wrote, "[R]elative political power cannot even be a particularly weighty factor, let alone a controlling one. For example, it cannot be said that males, as a group, have been relegated to such a position of political powerlessness as to require special judicial protection." Equality Found. for Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994). Justice Powell's comments in *San Antonio Independent School Board v. Rodriguez*, 411 U.S. 1, 28 (1973), indicate that he considered political powerlessness to be but one of the factors triggering heightened scrutiny. Explaining why heightened scrutiny was not necessary in *Rodriguez*, he noted that the inhabitants of the poor districts were saddled with "none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, *or* relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28 (emphasis added). *But see* Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. OF BOOKS. Aug. 8, 1996, at 44 (asserting that access to the political process is not a fundamental right).

216. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985).

217. *See* discussion *supra* notes 184-97 and accompanying text.

218. *See e.g.*, ELY, *supra* note 45, at 159-70 (explaining the characteristics that make a classification worthy of more searching inquiry under the Equal Protection Clause); Kenneth L. Karst, *Suspect Classifications, in* CIVIL RIGHTS AND EQUALITY 285, 285-87 (Leonard W. Levy et al. eds., 1989) (giving a brief overview of classes treated as "suspect" by the Court).

non-prejudicial reason to do otherwise.[219] The concept of "suspect" classifications arose in part out of the understanding that some classifications carry a high risk of prejudicial decisionmaking.[220] As Justice White wrote in *City of Cleburne*, the general deference accorded legislative choice of classifications "gives way . . . when a statute classifies by race, alienage, or national origin."[221] Justice White reasoned that such classifications "are seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy of a view that those in the burdened class are not as worthy or deserving as others."[222]

The highly deferential rational basis review which controls most classifications was based upon concerns about governability, federalism and democracy.[223] But even the "theory of rationality as governing the relation between means and ends assumes that all legislation must have a legitimate public purpose or set of purposes based on some conception of the general good."[224] Therefore, even under rational review, "the legislature is not entitled to pick out a group it disfavors, declare that group to be different and then impose a special . . . burden on the disfavored group."[225] Or in the words of Justice Stevens, "the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."[226]

It is not clear why the Court chose to ignore these cases and commentary.[227] The Court may have felt that treating *Romer* as

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219. Karst, *supra* note 218. *See also* Kenneth L. Karst, *Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

220. TRIBE, *supra* note 50, § 16-2, at 1445.

221. *City of Cleburne*, 473 U.S. at 440.

222. *Id.*

223. TRIBE, *supra* note 50, § 16-2, at 1446-50 (mentioning considerations of governance and democracy); San Antonio Indep. Sch. Bd. v. Rodriguez, 411 U.S., 44 (1973) (explaining the need to recognize the effect that claims arising under the Equal Protection Clause have on the relationship between national and state power under our federal system).

224. TRIBE, *supra* note 50, § 16-2, at 1440.

225. ROTUNDA & NOWAK, *supra* note 49, § 18-3, at 36.

226. *City of Cleburne*, 473 U.S. at 452 (Stevens, J., concurring).

227. The origin of the Court's position that Amendment 2 created a situation that was unprecedented is not hard to locate. It looked much like the argument that Laurence Tribe had advanced in an amicus brief. *See* Brief of Laurence H. Tribe et al., as amici curiae in support of Respondents at 1-3, Romer v. Evans, 116 S. Ct. 1620 (1996) (No. 94-1039). Locating the argument's source, however, does little to explain why it was adopted or why other clearly significant cases were ignored or simply not discussed.

exceptional confined its reach. No doubt the Justices saw the danger in taking a step that was too bold in this highly controversial area. However, treating the decision as if it had little relationship to precedent exposed the Court to just the type of attack that Scalia leveled in his dissent.[228]

B. Homosexuals as an Independently Identifiable Group

The Court's opinion in *Romer* assumes as a premise that a law singling out individuals on the basis of their sexual orientation identifies them by their personal status. From this perspective the debate over the law was whether there had been discrimination, and if so, whether the discrimination was permissible. The dissent challenged this framework. Justice Scalia essentially defined homosexuality as conduct rather than status, and thus depicted Amendment 2 as aimed at conduct rather than personal identity.[229] Such a formulation profoundly alters the argument and the outcome. If Amendment 2 merely targeted behavior, the Equal Protection Clause would not apply, and the Constitution would be silent unless the targeted activity was protected under the Due Process Clause of the Fourteenth Amendment.[230] In addition, there could be no claim based on limiting access to the political process.

Justice Scalia, however, was not correct. There is an appropriate line to be drawn between a classification based on status and a classification based on behavior. The difference can best be seen by reference to characteristics about which there would be no dispute, such as race and gender. These characteristics define who we are. They are personal traits that transcend any position on a particular issue, and which do not change. At the other end of the

228. *See supra* Part II.D (discussing Justice Scalia's criticisms and arguments).

229. This offered apparent advantages for Justice Scalia because merging status and conduct casts a more favorable light on classifications that single out homosexuals for disfavorable treatment. *Cf.* Holmes v. California Army Nat'l Guard, 920 F. Supp. 1510 (N.D. Cal. 1996). The district court, ordering the reinstatement into the California National Guard of First Lt. Andrew Holmes, saw the "don't ask, don't tell" policy in a similar vein. *Id.* at 1534. The court in its review of that case observed that the drafters of the "don't ask, don't tell" policy "merged the concepts of status and conduct in an attempt to circumvent the constitutional proscriptions." Joining conduct and status has been used elsewhere to defend such policies. *See, e.g.*, Cammermeyer v. Perry, 97 F.3d 1235, 1237 (9th Cir. 1996) (discussing the relationship between homosexual status and homosexual sexual conduct).

230. This potential exposure is most apparent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which determined that the *conduct* of homosexual sodomy was not constitutionally protected.

spectrum would be legislative categories that distinguish between types of economic activities. Whether or not a person is allowed to organize a business in a particular manner certainly affects that person, but it does so without any attention to the individual's personal attributes.

It is inaccurate to say that any attribute which involves behavior is merely a personal choice of conduct, rather than a personal trait. Some characteristics tied to personal identity can have a behavioral component. Perhaps the clearest example of such a trait is religion. It often affects behavior but it neither totally predicts it nor is confined to it. Religion involves choice to some extent, but for most people it is a choice that is determined by the religious affiliation of their family. There is a sense of permanence to it. This trait is semi-permanent, only partially a matter of choice, potentially disconnected from behavior, and descriptive more of who the person is than what the person does. Even when legislation aims at behavior, which arose from choice and may be amenable to change, it may still involve a regulation of status.[231]

Sexual orientation is likewise a personal attribute that goes beyond conduct. One need not hold that sexual orientation is immutable or biologically determined to see it as a personal attribute. Moreover, there is increasing evidence that supports the view that sexual orientation often involves a genetic component.[232] Like religion, it is often a central aspect of an individual's identity and it is more or less permanent.[233] Sexual orientation is separate from

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231. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (holding unconstitutional a law that criminalized drug addiction, a status). Justice Powell's clerks apparently tried to use the case to convince him to support Hardwick. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 520 (1994). According to Jeffries, had Georgia "punished the status of being homosexual," the ruling would have been applicable. "[But] that the State had not tried to do." John C. Jeffries, *Changing Times: Gay Rights, in* HOMOSEXUALITY 103, 110 (Robert M. Baird & M. Katherine Baird eds., 1995) [hereinafter *Changing Times*].

232. The biological determinants of sexual orientation are not yet well understood, but as discussed earlier, there is a growing body of evidence that, for many, homosexual orientation is a trait which becomes manifest early in life, is not freely chosen, and is not amenable to change. *See* Zamansky, *supra* note 207, at 241-44 (surveying scientific evidence that homosexuality is immutable).

233. Many commentators have argued that sexual orientation should be treated as an immutable characteristic. *See id.* For Samuel Marcosson, what matters is not whether sexual orientation is immutable for all, but that it is so for many:

> Admittedly, sexual orientation may not be immutable for *all* gay men and lesbians. The point is that the testimony of countless people regarding their perceptions of their sexual orientations, together with emerging evidence of a link between biology and sexual orientation, makes it clear that *at least for many gays*, sexual orientation is immutable, an essential aspect of self.

particular policy positions. It often bears no relationship to the ability to participate in the general activities of social and economic life. Such a trait suffices to define an "independently identifiable group," i.e., a group whose characteristics in some real sense transcend "the mere support for a single political issue, such as race, gender or sexual orientation."[234]

Amendment 2 explicitly includes within its scope not just people engaging in homosexual sex, but also those of homosexual, lesbian or bisexual *orientation*.[235] Anti-gay forces have argued that this is a distinction without a difference.[236] Justice Scalia endorsed this view in his dissent.[237] However, there are significant periods of time in people's lives when they do not engage in any sexual activity regardless of their orientation. The dissent glossed over this difficulty by fusing the discussion of Amendment 2 as a regulation of conduct with a discussion of the rationality of singling out gays, lesbians and bisexuals for disfavorable treatment even if they have not engaged in homosexual sex.[238] This approach was improper because Amendment 2 does not directly address homosexual orientation as it affects the workplace or any other area of potential discrimination. Instead, it aims at an entire class of people having an attribute arguably beyond their free choice, irrespective of their conduct.

Marcosson, *supra* note 25, at 177; *see also The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1302 & n.91 (1985) (arguing that uncertainty as to the origin of homosexuality favors treatment as an immutable characteristic).

234. Equality Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 434 n.12 (S.D. Ohio 1994).

235. COLO. CONST. art. II, § 30b ("Neither the State of Colorado . . . nor any of its agencies . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual *orientation*, conduct, practices or relationships . . . [shall] entitle any person . . . [to] claim . . . discrimination.") (emphasis added).

236. *See, e.g.*, Romer v. Evans, 116 S. Ct. 1620, 1632 (1996) (Scalia, J., dissenting) ("Some courts of appeals have concluded that, with respect to laws of this sort at least, that is a distinction without a difference.") (citing Equality Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995)).

237. *Id.* at 1632 (Scalia, J., dissenting) (supporting the Supreme Court of Colorado's assertion that the personal characteristics of sexual orientation, conduct, practices and relationships are "not truly severable from one another because each provides nothing more than a different way to identify *the same class of persons*") (quoting Evans v. Romer, 882 P.2d 1335, 1349-50 (Colo. 1994) (emphasis added)).

238. *See id.* at 1632 (Scalia, J., dissenting) (arguing that because *Bowers v. Hardwick*, 478 U.S. 186 (1986), established that "it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct").

C. "Special Rights" or "Equal Protection"?

The question of whether civil rights laws provide "special rights" was as central to the constitutional controversy as it had been to the political controversy over Amendment 2. In the context of homosexual rights, the "special rights" label was particularly inaccurate. As Justice Kennedy indicated, the reason that states and localities enacted anti-discrimination laws was to counter discriminatory practices.[239] There would be no need for such laws if general prohibitions against arbitrary action were sufficient to put all citizens on an equal footing. The "special rights" language used by anti-gay forces suggests that gays, lesbians and bisexuals were seeking rights that others did not have. In fact, what they were asking for was decision-making in which sexual orientation would not count.[240] Put differently, what homosexuals sought when they argued for protection against discrimination was to be treated like everyone else.

One argument that supports the notion of "special rights" is that an employer has a right to run his business as he pleases, and that "a person can ordinarily be fired for a wide range of reasons but not for being a member of a protected group."[241] As a result, "the government is choosing to favor the equality-based right of one person over the liberty-based right of another—thus conferring a 'special right' for the former."[242] This argument is flawed in at least two respects. First, as the Court pointed out in *Romer*, common law limited the so-called private right to discriminate.[243] Second, the comparison between employer and employee is one between differently situated people, and thus not relevant to equal protection analysis. The civil rights laws were passed in response to discriminations that the majority of people do not face.[244] Such

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239. *Id.* at 1624-25.

240. *See id.* at 1626 ("It 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 that prohibit arbitrary discrimination in governmental and private settings."). For example, Amendment 2 might be construed to strip homosexuals of such general protections as judicial review of agency action under the "arbitrary and capricious" standard. *Id.*

241. Schacter, *supra* note 38, at 304-05.

242. Marcosson, *supra* note 25, at 145.

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

244. *See, e.g.*, Sperling v. Hoffman-La Roche, Inc., 24 F.3d 463, 472 n.14 (3d Cir. 1994) (asserting that many civil rights laws exist to ban age discrimination in employment); *cf.* Casey v. City of Cabool, Mo., 12 F.3d 799, 805 (8th Cir. 1993) (articulating Congress' intent regarding civil rights actions as including the desire to shift the cost of attorneys' fees to guilty parties and thus enable an individual to act as a "private attorney general").

laws merely put groups with recognized disadvantages on an equal footing with other groups.

Whatever could be said for the "special rights" view regarding private discrimination loses considerable force when applied to the government. This is because government has no cognizable liberty interest against which the interest in equal treatment competes. Thus Justice Kennedy's observation that Amendment 2 was "[n]ot confined to the private sphere" is important.[245] In fact, the Colorado Supreme Court itself gave two examples.[246]

Amendment 2 mischaracterizes anti-discrimination laws as vehicles for preferences and quotas.[247] It purports to right these wrongs by barring laws that take account of *any* sexual orientation, whether homosexual, bisexual or straight, as a basis for decision.[248] The Court might have pointed out that striking this seemingly neutral language had little, if any, connection to quotas or preferences. By ignoring the affirmative action mischaracterization, the Court's opinion failed to avert "the public's hostility toward the most powerful symbol of civil rights backlash,"[249] and thus compromised some of its persuasiveness.

D. Animus/Moral Disapproval as a Basis for Discrimination

The dissent's most compelling argument turns out to be one that was downplayed in the political campaign for Amendment 2: that discrimination is in fact permissible. Justice Scalia claimed first that that the Court's position in striking down Amendment 2 was inconsistent with its willingness to allow States to criminalize homosexual sodomy as it had in *Bowers v. Hardwick*.[250] According to Justice Scalia the removal of homosexuals from protected status was certainly less severe than actually punishing them for their

245. *Romer*, 116 S. Ct. at 1626.

246. *Id.* ("The State Supreme Court cited two examples of protections in the government sphere that are now rescinded and may not be reintroduced."). The rescinded protections had prohibited discrimination in the areas of state employment and state colleges. *Id.* (citing Evans v. Romer, 854 P.2d 1270, 1284-85 (Colo. 1993)).

247. *See* COLO. CONST. art. II, § 30b (mentioning preferences and quotas explicitly despite their tenuous relation to anti-discrimination laws).

248. *See* Marcosson, *supra* note 25, at 141-42 (pointing out that such classifications are, in a sense, facially neutral).

249. Schacter, *supra* note 38, at 304.

250. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting) (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

sexual conduct, as had been allowed earlier.[251] Under this reasoning, Amendment 2 helped Coloradans express their disapproval of homosexual orientation at a level clearly permitted by the Constitution.

Bowers v. Hardwick[252] was a due process case, however, and there is some question whether *Hardwick* would have come out the way it did if an equal protection claim had been made.[253] As one prominent constitutional scholar has written, "[b]ecause of the independence of the lines of analysis under the two clauses, the conclusion in *Hardwick* does not dispose of the issue."[254] But even if the Court were to conclude that a state may punish homosexual and not heterosexual sodomy, it does not follow that a state may broadly disadvantage anyone who might merely be *inclined* to commit such sodomy. It would be a violation of due process to punish someone for an act they have not yet committed.[255] Also, the penalty exacted under Amendment 2 was arguably more severe than those under the criminal laws. Amendment 2 was very broad and burdened gays and lesbians in a vast array of activities. Additionally, to the extent that the *Romer* Court relied on the right to political participation in reaching its decision, the *Hardwick* case had no relevance.

Similar objections can be made to Justice Scalia's analogy to polygamy.[256] Society can indeed enact laws which punish polyga-

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251. *Id.* at 1631 (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.").

252. 478 U.S. 186 (1986).

253. The Court's rejection of the due process claim included a comment that no equal protection issue had been presented, thus leaving open the possibility that such a claim might be mounted in the future. *Id.* at 196 n.8. Obviously, the fact that a bare majority (5-4) decided *Hardwick* enhances this possibility. The majority, moreover, was particularly unstable. *See Changing Times*, *supra* note 231, at 105-18 (pointing to Justice Powell's ambivalence throughout the deliberations and his later recantation). Had equal protection arguments been presented in *Hardwick*, the outcome may well have been different.

254. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

255. The Court is currently grappling with whether it is permissible to restrain sex offenders who appear to be a threat to the community. *See In re* Care and Treatment of Hendricks, 912 P.2d 129 (Kan. 1996), *cert. granted*, Kansas v. Hendricks, 116 S. Ct. 2522 (1996). A decision for the State would probably characterize the restraint as noncriminal and non-penal. It would nevertheless be based on predicted future behavior, though in circumstances where the State's interest was compelling.

256. *See Romer*, 116 S. Ct. at 1635 (Scalia, J., dissenting) (likening homosexuality to polygamy).

mists, but such laws involve conduct, not inclination. While most gays and lesbians are likely to engage in sexual acts with persons of the same sex, surely there are some who do not, just as there are some heterosexuals who do not engage in sex. There are in fact many gays and lesbians who are not sexually active at any particular time. The Court did make clear that a law disadvantaging those of polygamous orientation—those who would practice polygamy if they could—would not withstand constitutional scrutiny.[257]

Regardless of precedent, there remains the broader assertion that discrimination is permissible for no reason other than the majority's desire to disapprove of homosexuality.[258] This argument concerns the proper reading of the Constitution. One side assumes, as did Justice White in *Hardwick*, that it is "legitimate for a state to impose a disadvantage on a particular group just to express the majority's moral contempt for that group's practices, even when there is no other proper purpose."[259] The other side believes that the state can impose disadvantage only in the face of actual harm from the group's activities.[260] Even if one accepts the former position, though, the argument is not compelling in the context of homosexual rights. As noted previously, Amendment 2 burdened not just homosexual conduct, but homosexual orientation as well.[261] Simple fairness demands that "people should not be ill-treated based on a characteristic or status they are unable to

257. *Id.* at 1628.

258. The dissent erroneously characterized the Court's position as having "placed the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." *Id.* at 1629. Had this characterization been accurate, sexual orientation would have been elevated to a suspect classification. *See supra* notes 61-63 (discussing the importance of such a classification with respect to the standard of review).

259. Dworkin, *supra* note 215, at 49 (characterizing Justice White's opinion in *Hardwick*).

260. *See id.* (characterizing Justice Kennedy's opinion in *Romer*). The dissent in *Romer* argued that what Justice Kennedy called "animus" was nothing more than a statement of moral disapproval. *Id.* (citing *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting)). Justice Kennedy did not respond to this part of the dissent, possibly because the majority did not hold to one view. It is not unknown for justices who join an opinion to do so for reasons that are quite different. This often results in an opinion that is not reasoned as tightly as it otherwise might have been. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 702-05 (1975) (pointing to the terse, bland reasoning expressed in the controversial but unanimous opinion of *Brown*, 347 U.S. 483 (1954)).

261. See Part III.B *supra* for arguments that orientation, not conduct, is the correct focus for analyzing homosexual discrimination issues.

change."[262] And there is increasing evidence "that at least for many gays, sexual orientation is immutable."[263]

IV. An Alternate Approach—Participation in the Political System as a Fundamental Right

Thus far, this Comment has argued that the Court's decision in *Romer v. Evans* was justified as a matter of law, but that its legal analysis would have been stronger if it had not treated *Romer* as an anomaly. There was ample precedent available within existing equal protection case law.[264] Such omissions are often of interest only to legal scholars, but this was a highly visible case that will probably have significant repercussions. Weakness in the majority opinion can result in insufficient guidance to lower courts and to other political actors.[265] It also can harm the Court's influence by making the Court appear unprincipled.

As noted earlier, the Court actually used an enhanced rational basis review in its *Romer* decision, although it did not say so explicitly.[266] Although this was defensible, the Court would have had an easier time had it followed the Colorado Supreme Court and declared that there was a fundamental right to equal participation in the political process which was limited by Amendment 2. Because such an approach involves a proven constitutional argument, it would have been stronger politically.

A. Position of the Colorado Supreme Court

The Colorado Supreme Court's analysis of Amendment 2 started from the proposition that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process."[267] "Any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny."[268] The court determined that:

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262. Marcosson, *supra* note 25, at 174.

263. *Id.* at 177 (emphasis omitted).

264. *See supra* Part III.A (providing several applications of enhanced rational basis review).

265. *See* TRIBE, *supra* note 50, § 1-9, at 15-17 (arguing that the fundamental indeterminacy of constitutional interpretation has been a significant contributor to the Court's role as the definitive interpreter of the Constitution).

266. *See supra* Part III.A.

267. Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994) (quoting Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993)), *aff'd*, Romer v. Evans, 116 S. Ct. 1620 (1996).

268. *Id.*

> Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw anti-discrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.[269]

Accordingly, the court applied strict judicial scrutiny, not because homosexuals constituted a suspect class, but because the right affected was fundamental. The court then held that Colorado had not offered sufficient justification to sustain the amendment.[270] The U.S. Supreme Court did not rely heavily on this fundamental rights analysis; however, Justice Kennedy's reference to the discriminatory nature of Amendment 2 and the obstacles it imposed on the ability of gays, lesbians and bisexuals to influence the political process reflects at least a limited recognition that the state Supreme Court's position had some merit.[271] Not suprisingly, Justice Scalia rejected this approach.[272]

Despite commentary to the contrary, the state court's position did not involve a novel proposition.[273] The U.S. Supreme Court consistently has been concerned when the State restructures its government in a way that makes it more difficult for an "independently identifiable group"[274] to have influence over the machinery of government. The Court's effort to assure a fair political process can be seen in a number of its voting rights cases.[275]

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269. *Id.*

270. For a discussion of the Colorado Supreme Court's position see *supra* Part II.B.

271. *Romer*, 116 S. Ct. at 1629.

272. *Id.* at 1634-35.

273. Ronald Dworkin's analysis necessarily accepts the argument that there is no difference between identifiable groups and independently identifiable groups. *See* Dworkin, *supra* note 215, at 44 (arguing against the Colorado Supreme Court's holding that Amendment 2 implicated a fundamental right).

274. Gordon v. Lance, 403 U.S. 1, 5 (1971) (using this terminology to signify particular minority groups—racial, religious or otherwise—subjected to Virginia's discriminatory voting policy).

275. *See* Davis v. Bandemer, 478 U.S. 109 (1986) (indicating that political gerrymanders might contravene equal protection principles); Lubin v. Panish, 415 U.S. 709 (1974) (invalidating a candidate filing fee as applied to indigents); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (striking down a state plan that limited voting in a school district to property owners or people with children in the schools); Williams v. Rhodes, 393 U.S. 23 (1968) (striking down a requirement that new parties file petitions nine months prior to the election); Reynolds v. Simms, 377 U.S. 533 (1964) (invalidating an apportionment scheme that failed to provide for one person/one vote, noting that vote dilution debased democracy).

The Fourteenth Amendment has been interpreted to protect against not only denials of the vote but also dilution of the vote. In *Gomillion v. Lightfoot*,[276] for example, the Court overturned Alabama's efforts to redraw voting districts based on its understanding that the purpose was to dilute the political power of African Americans.

The argument that these protections are confined to suspect classifications is inaccurate. It is true that cases in which the Court has invalidated initiatives have involved racial classifications;[277] however, the Court's language has suggested a broader reading. Consider the Court's observation that "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[278] The Court has also used the phrase "independently identifiable groups,"[279] which could certainly be applied to homosexuals. Finally, although *James v. Valtierra*[280] is generally used to support the notion that *only* racial classifications are forbidden, *James* is distinguishable from *Romer* because it did not deal with an independently identifiable group.[281]

The principle that the State should not make it more difficult for some citizens than others to influence the political process is

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276. 364 U.S. 339 (1960) (invalidating efforts to redraw the voting districts in and around Tuskeegee, Alabama, which were intended to dilute the voting power of African Americans).

277. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (invalidating a state initiative that shifted power to remedy de facto racial segregation from the City of Seattle to the State of Washington) *and* Hunter v. Erickson, 393 U.S. 385 (1969) (striking down a city charter amendment adopted by a citizen initiative which made the adoption of housing anti-discrimination legislation more difficult).

278. *Hunter*, 393 U.S. at 393.

279. *See* Gordon v. Lance, 403 U.S. 1, 5, 7 (1971) (linking the violation of the Equal Protection Clause to a voting provision's propensity to "fence out" a sector of the population).

280. 402 U.S. 137 (1971) (upholding the constitutionality of making it more difficult for low-income individuals to obtain housing).

281. There is language in *James* that suggested that the Court saw low-income individuals as different because they did not form a permanent, identifiable group but were rather one of many "*diverse and shifting* groups that make up the American people." *Id.* (emphasis added); *see also* Niblock, *supra* note 180, at 187 (noting that many commentators treat *James* "as an aberration, and not as a guide to how the Court should evaluate laws placing discriminatory political burdens on identifiable groups") (citation omitted). It is also important to keep in mind that *James* preceded *Davis v. Bandemer*, 478 U.S. 109 (1986), a decision in which a plurality of Justices indicated that the systematic exclusion of a political party from equal access to the political process would present a constitutional problem. *Davis*, 478 U.S. at 132.

not confined to cases involving initiatives or referendum votes. It also lies at the heart of the reapportionment cases where the mandated equality is unrelated to the individual's membership in a suspect class.[282] The Court's position with regard to political gerrymandering is also relevant. Though the state has authority to draw district lines, it may not do so in a way that systematically "degrade[s] . . . a group of voters' influence on the political process as a whole."[283]

B. *The Political Dimension—Advantages of the Fundamental Rights Approach*

The fundamental rights approach has a number of advantages over the enhanced rational basis review which the Court used in *Romer*. Many voters in Colorado supported Amendment 2 because they believed that it prevented gays and lesbians from obtaining special advantages.[284] This characterization of Amendment 2 was dismissed by the Court as "implausible."[285] As a result, the Court was accused of being elitist and undemocratic.[286]

The accusation with the greatest potential of doing political damage to the Court was the charge that it had usurped the people's rightful role.[287] The political danger is well illustrated in an editorial in the *Chicago Tribune*, which claims both sympathy for homosexuals and a lack thereof for the Court's action.[288] Even though the newspaper admitted that "homosexuals have been badly treated for most of American history and that the law should try to rectify that injustice,"[289] it asserted that *Romer* was "a defeat

282. *See* Reynolds v. Simms, 377 U.S. 533 (1964) (holding unconstitutional Alabama's state legislative apportionment, and in so doing, introducing the one-person, one-vote standard and noting that vote dilution debased democracy).

283. *Davis*, 478 U.S. at 110.

284. Marcosson, *supra* note 25, at 138 n.6.

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

286. *See id.* at 1629 (Scalia, J., dissenting).

287. *See supra* notes 40-43 and accompanying text. Rhetoric matters in politics; it affects how people think about problems. *See* MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 114-30 (1985) (examining how language affects politics). "Democracy" is a word of some particular potency. *See also* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 2 (1989). The notion of majority rule is particularly fundamental in the United States, though it at times runs counter to belief in individual rights. The charge that the people's power has been usurped thus threatens the legitimacy of the action and the agency that took it.

288. *The Supreme Court Overreaches*, *supra* note 17, at 16.

289. *Id.*

for democratic governance that may ultimately inflame rather than erode opposition to gay civil rights."[290]

Democracy is a word of considerable political potency. It is generally accepted by Americans that the people should in some sense rule, and that actions against the majority carry a presumption of illegitimacy. However, it is not always easy to reconcile the various rights, including minority rights, which we consider to be part of democratic government. Nor is it easy to determine which majority in a particular situation should be controlling. In *Romer*, for example, the city ordinances of Aspen, Denver and Boulder protecting homosexuals from discrimination and repealed by Amendment 2 were passed by normal democratic means.[291] It certainly could be argued that, at least for those localities, anti-discrimination laws represented the true will of the people.

But the scope of a conflict often determines its outcome. The defeated have an incentive to bring in other participants to shift the balance of power.[292] In Colorado the loss in some arenas, brought about by local majorities, led anti-gay forces to seek a statewide majority with a different political composition. Conceivably a still larger majority might someday be found, composed of the nation at large, which could if it chose enact national civil rights laws overruling legislation at the state level. Political structures establish a hierarchy of power, with larger majorities dominating smaller ones, but there is no moral imperative within democratic theory that this must be the case. While democratic theory asserts that "the people" must in some sense govern or hold those who do govern accountable, the theory does not define who "the people" should be.

Even as decided, *Romer* was not really *un*democratic. The will of local majorities was upheld in the Court. It could be argued as well, that to the extent that the campaign for Amendment 2 misled voters, the vote was not really a true reflection of what the people of Colorado wished.[293] However, there is a political dimension to U.S. Supreme Court decisions, as discussed earlier, and the influence of the Court is weakened when it loses public confidence

290. *Id.*

291. *See supra* notes 40-43 and accompanying text (discussing the passage of Amendment 2 by referendum and the importance of this fact in the litigation).

292. E.E. SCHATTSNEIDER, THE SEMI-SOVEREIGN PEOPLE 1-19 (1960) (discussing the difficulty in taking such steps to balance the power dynamic if one lacks the necessary resources and support).

293. I do not mean to suggest by this that votes ever accurately reflect majority sentiment.

in the legitimacy of its decisions. The use of the fundamental rights approach in *Romer* would have been clearer to the public than the reasoning actually employed by the Court. Moreover, it would have been just as valid as a matter of constitutional interpretation. Most importantly, the fundamental rights approach would have emphasized the Court's commitment to democratic processes and would have blunted the fact that it had overruled a statewide referendum.

In addition, the fundamental rights approach would have avoided a number of other legal and political problems in the Court's equal protection analysis. In holding that the State could not act out of "animus," the Court invited future litigation based on the motivation behind laws, which is often very difficult to determine.[294] The fundamental rights approach would have avoided such questions. The fundamental rights approach does not involve homosexual sexual conduct at all, and so the *Bowers* opinion used by the dissent would no longer be relevant.[295] Finally, such an approach would have allowed the Court to avoid the charge that it had taken sides in the "culture wars,"[296] since it would merely have been defending the openness of the democratic process.

Conclusion

The Supreme Court's decision in *Romer v. Evans* was correct in its outcome. The Court acted clearly within the tradition of keeping the political system fair. Amendment 2 deliberately singled out gays, lesbians and bisexuals regardless of their actual conduct, and placed them at a disadvantage in obtaining the benefits of society that other citizens take for granted. It was correctly overturned because it denied homosexuals the equal protection of the laws guaranteed by the Constitution.

Romer could have been argued more convincingly, however, either by providing more explicit support for the use of the enhanced rational basis test or by using a standard of review based upon fundamental rights. Not only would the Court have been better able to defend its holding against legal attacks, such as those raised by Justice Scalia in the dissent, but it also would have

294. Relying on impermissible motivations has been widely criticized at various times by many commentators and Justices. The criticism made here is not confined to those who hold any particular interpretative perspective. *See, e.g.*, TRIBE, *supra* note 50, § 12-6, at 821-25 (indicating some of the issues and objections that have been leveled).

295. *See supra* notes 165-71 and accompanying text; *see also* Part III.D.

296. Evans v. Romer, 116 S. Ct. 1620, 1629 (1996).

been better immunized from public criticism. In this high-profile and politically important case, it was particularly important that the public not come away with the notion that an amendment which purported only to bar "special rights" and "preferences," and which had been voted on directly by the people of Colorado in a referendum, was then blocked by an elitist Court promoting its own policy views. At the least, Justice Kennedy should have confronted the "special rights" argument more directly, in terms more easily understood by the public and by the news media.

At the same time, it is important to remember that any political damage to the Court caused by *Romer* is likely to be limited. The Court's action, while invalidating a citizen referendum, still showed support for a form of majority rule. It also did not step beyond how most Americans believe that gays, lesbians and bisexuals should be treated.[297] *Romer* was also a narrow decision, despite the broad reach of the amendment which was struck down. Specifically, the Court was urged by gay-rights supporters to declare sexual orientation to be a suspect classification, and it did not do so. If it had taken this course, its decision would have been "clearer—and more controversial,"[298] and would have resulted in its injecting itself directly into such emotional and politically charged "social" issues as single-sex marriage. The Court may well have wished to avoid such controversy, at least for the present.

297. Data show that there is strong public support for homosexuals regarding equal access to jobs, housing and public accommodations, but opposition on other issues such as same-sex marriage. *See* Marcosson, *supra* note 25, at 138 n.6 (discussing the language used in Amendment 2 and the public's reaction to some of its specific components).

298. Greenburg, *supra* note 17, at 4.