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I. INTRODUCTION

As discrimination law has evolved in this country, homosexuals have joined the increasing number of identifiable groups seeking protection through antidiscrimination ordinances. The homosexual community’s success in adding sexual orientation to many state and local antidiscrimination laws has provoked a heretofore unseen response:

1. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620, 1626 (1996)(identifying traits that have been protected against discrimination: age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or his or her associates, and sexual orientation).

laws such as amendments to state constitutions or city charters that forbid inclusion of homosexuality in antidiscrimination laws.\(^3\)

The latest enactment of these "trumping" laws was Colorado's Amendment Two.\(^4\) Amendment Two prohibited any level of Colorado government from enacting or enforcing any law granting protected status on the basis of homosexuality. Specifically, it provided:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.\(^5\)

Amendment Two was immediately challenged in the District Court for the City and County of Denver as violative of the Equal Protection Clause of the Fourteenth Amendment\(^6\) and was subsequently struck down by the Colorado Supreme Court.\(^7\) The State of Colorado appealed, and the United States Supreme Court affirmed the Colorado

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3. Examples to date include the following:  
   Title XII, City Charter of Cincinnati, Ohio (1993), which voided existing ordinances giving protected status to homosexuals and precluded any similar future legislation. This amendment was upheld by the Sixth Circuit Court of Appeals. See Equality Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995). The United States Supreme Court granted certiorari and summarily vacated the Sixth Circuit decision, remanding the case for reconsideration in light of Romer. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 116 S. Ct. 2519 (1996). On remand, the Sixth Circuit again upheld the validity of Title XII in light of the Sixth Circuit's reading of Romer. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, Nos. 94-3855, 94-3973, and 94-4280, 1997 WL 656223 (6th Cir. Oct. 23, 1997).

   Oregon Measure 9, which would have amended the Oregon Constitution to prohibit recognition of sexual orientation or sexual preference as a civil rights category, but was defeated by a vote of 56% to 44% in 1992. Oregon Measure 13, a similar antigay rights initiative, was defeated by a vote of 53% to 47% in 1994. See Daniel A. Butterman, Comment, Evans v. Romer: The Political Process, Levels of Generality, and Perceived Identifiability in Anti-Gay Rights Initiatives, 29 NEW ENG. L. REV. 915, 916 n.9 (1995).

4. Amendment Two was enacted on Nov. 3, 1992, by a vote of 813,966 (53.4%) to 710,151 (46.6%). Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993). These laws are dubbed "trumping" laws because they override, or trump, the ability of political subdivisions to choose whether to include groups under antidiscrimination laws, rules, or ordinances.

5. COLO. CONST. art. II, § 30b. Although the enforcement of Amendment Two has been permanently enjoined, it remains a part of the Colorado Constitution.

6. The Equal Protection Clause states that "No State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Supreme Court's decision, although under a different equal protection analysis than that utilized by the Colorado Supreme Court. 8

This Note analyzes the decision of the United States Supreme Court in Romer v. Evans and predicts its practical impact. First, the majority and dissenting opinions and the major arguments on both sides are summarized. Second, these arguments are analyzed as applied to homosexual groups, as well as other groups that potentially may be affected. Finally, this Note predicts the impact that Romer will have on future attempts to "trump" state or local antidiscrimination laws, as applied to homosexuals or other identifiable groups.

II. ROMER V. EVANS

Each court that considered the constitutional challenge to Amendment Two analyzed it under the Equal Protection Clause. Equal protection analysis differs depending on the type of legislation or state action involved. Generally, courts use three different standards of review when legislation is challenged under the Equal Protection Clause. Strict scrutiny, the highest standard, is used only when legislation classifies by a "suspect" class or infringes a fundamental right. 9 To survive strict scrutiny, a law must be narrowly tailored to meet a compelling state interest. Intermediate scrutiny, used when a law classifies by a "quasi-suspect" class, requires a substantial relation to an important state interest. 10 The lowest standard of review, often referred to as the rational basis test, is used in all other circumstances and requires only some rational relation to a legitimate state interest. Determining the applicable level of review is critical, as decisions often turn on the standard of review that is applied.

A. Facts and Background

Immediately following its enactment, Amendment Two was challenged in district court. 11 The plaintiffs to the suit included a group of homosexual persons, municipalities that had enacted antidiscrimination ordinances, and other governmental entities affected by Amendment Two. These plaintiffs filed suit in the District Court for the City and County of Denver seeking a declaration of invalidity of Amend-

9. The "suspect" classes identified to date include race, alienage, and national origin. Fundamental rights are those personal rights enumerated in the Constitution. See Loving v. Virginia, 388 U.S. 1 (1967); Graham v. Richardson, 403 U.S. 365 (1971).
11. Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993). Suit was filed on Nov. 12, 1992, 9 days after Amendment Two's enactment.
The plaintiffs contended that Amendment Two violated a number of constitutional rights, primarily the rights to equal protection of the laws under the Fourteenth Amendment and freedom of expression under the First Amendment.\footnote{12}

The district court rejected the plaintiffs' request for an expedited hearing on the merits, but instead granted a preliminary injunction.\footnote{14} Under Colorado law, a trial court may issue an injunction if the moving party meets a six-part test and, as a threshold requirement, clearly demonstrates that injunctive relief is necessary to protect an existing fundamental constitutional right.\footnote{15} The district court held that the plaintiffs met this threshold requirement because Amendment Two violated a fundamental right, primarily not to have the State endorse and foster private biases.\footnote{16} Upon a further determination that the plaintiffs met all of the elements of the six-part test, the court issued the preliminary injunction.\footnote{17}

The State of Colorado appealed the preliminary injunction to the Colorado Supreme Court (Evans I), alleging that the district court erred in finding that the plaintiffs met the threshold requirement to obtain an injunction.\footnote{18} Specifically, the State of Colorado complained that the fundamental right relied upon by the district court was nonexistent.\footnote{19} In response, the plaintiffs contended that Amendment Two violated the fundamental right of gays and lesbians to participate in the political process.\footnote{20}

The Colorado Supreme Court struck down the amendment.\footnote{21} In reaching its conclusion, the court applied a series of United States

\begin{itemize}
\item[\footnote{12}]{Id.}
\item[\footnote{13}]{Id. Other constitutional rights initially alleged by plaintiffs to be violated by Amendment Two included the right to petition government for redress of grievances; the constitutional prohibition against the establishment of religion; unconstitutional vagueness; violation of the Guarantee Clause of Article IV, § 4 of the United States Constitution; and violation of the Supremacy Clause and Due Process Clause of the United States Constitution. \textit{Id.} at 1272-73 n.2.}
\item[\footnote{14}]{Id. at 1273-74.}
\item[\footnote{15}]{Rathke v. MacFarland, 648 P.2d 648 (Colo. 1982). To satisfy the 6-part test, the moving party must demonstrate the following: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury that may be prevented by injunctive relief; (3) no plain, speedy, and adequate remedy at law; (4) if a preliminary injunction is granted, it will not disserve the public interest; (5) the balance of equities favors the injunction; and (6) the injunction will preserve the status quo pending a trial on the merits. \textit{Id.} at 653-54.}
\item[\footnote{16}]{Evans v. Romer, 854 P.2d 1270, 1273-74 (Colo. 1993).}
\item[\footnote{17}]{Id. \textit{See supra} note 15.}
\item[\footnote{18}]{Evans v. Romer, 854 P.2d 1270 (Colo. 1993).}
\item[\footnote{19}]{Id. at 1274.}
\item[\footnote{20}]{Id.}
\item[\footnote{21}]{Id. at 1286.}
\end{itemize}
Supreme Court decisions involving voting rights, discriminatory reapportionment of political power, and the rights of minority political parties. It relied most heavily, however, on a series of cases involving attempts to limit the ability of certain groups to implement desired legislation through normal political processes.

Two such cases in particular are applicable to an analysis of Amendment Two. First, in *Hunter v. Erickson*, the United States Supreme Court invalidated an Akron, Ohio charter amendment that required fair housing ordinances to be approved by a citywide referendum. All other city ordinances could be approved by a vote of the city council. The Supreme Court held that the amendment violated the equal protection rights of racial minorities by placing special burdens on them before they could participate in the governmental process.

Second, in *Washington v. Seattle School District No. 1*, the constitutionality of a Washington initiative prohibiting school districts from using mandatory busing as a means to affect school desegregation was questioned. Relying on *Hunter*, the Washington Court held that the initiative impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secure public benefits.

One common thread running through *Hunter* and *Washington* is that both of the invalidated laws impermissibly affected the rights of racial minorities. Citing *James v. Valtierra*, the State of Colorado argued that Amendment Two should be upheld because the *Hunter* holding was limited to racial issues. In *James*, the Supreme Court upheld a California constitutional amendment requiring a community vote for approval of any new low-rent housing project. The Court declined to find that poor individuals' fundamental rights to participate

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27. Id. at 391.


29. Id. at 467-70.


in the political process had been violated, stating that the initiative was not aimed at racial minorities.\textsuperscript{32}

The Colorado Supreme Court rejected this argument, finding \textit{James} to be "best understood as a case declining to apply suspect class status to the poor, and not as a limitation on \textit{Hunter}."\textsuperscript{33} Holding that Amendment Two violated a fundamental right of political participation under \textit{Hunter} (and thus warranting strict scrutiny), the case was remanded to the district court to determine if Amendment Two was narrowly tailored to serve a compelling state interest.\textsuperscript{34}

On remand, the district court considered six compelling state interests presented by Colorado as justifications to uphold Amendment Two.\textsuperscript{35} Ultimately, the court held that Amendment Two was not narrowly tailored to any compelling state interest offered and permanently enjoined its enforcement.\textsuperscript{36}

On appeal (\textit{Evans II}), the Colorado Supreme Court affirmed the district court's application of strict scrutiny, noting that Colorado failed to offer any arguments for a lesser standard of scrutiny that the Colorado Supreme Court had not previously rejected in \textit{Evans I}.\textsuperscript{37} The court also affirmed the district court's holding that Amendment Two failed to satisfy strict scrutiny,\textsuperscript{38} finding that the unconstitutional portions of the amendment were not severable from the remainder.\textsuperscript{39} The court further rejected the State's argument that Amendment Two was a valid exercise of state power under the Tenth Amendment.\textsuperscript{40}

The United States Supreme Court subsequently granted certiorari.\textsuperscript{41}

\begin{itemize}
  \item \textsuperscript{32} James v. Valtierra, 402 U.S. 137, 141 (1971).
  \item \textsuperscript{33} Evans v. Romer, 854 P.2d 1270, 1282 n.21 (Colo. 1993).
  \item \textsuperscript{34} Id. at 1286.
  \item \textsuperscript{35} The State of Colorado offered as compelling state 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 the government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado children. Evans v. Romer, 882 P.2d 1335, 1339-40 (Colo. 1994).
  \item \textsuperscript{36} Id. at 1339-41.
  \item \textsuperscript{37} Id. at 1341.
  \item \textsuperscript{38} Id. at 1341-49.
  \item \textsuperscript{39} Id. at 1349-50.
  \item \textsuperscript{40} Id. at 1350.
  \item \textsuperscript{41} Romer v. Evans, 513 U.S. 1146 (1995)(mem.). Because Amendment Two amended the Colorado Constitution, the Colorado Supreme Court had to base its analysis on federal grounds. This guaranteed that the United States Supreme Court would ultimately have jurisdiction. In contrast, a statute passed by the Colorado Legislature could have been invalidated under the Colorado Constitution. Had that occurred, the decision could not have been appealed to the United States Supreme Court, so long as the Colorado Supreme Court's decision rested
\end{itemize}
B. The Opinions

1. Majority Opinion

The majority opinion in *Romer v. Evans*, written by Justice Kennedy and joined by five other Justices, held Amendment Two violative of the Equal Protection Clause of the Fourteenth Amendment. The Court declined, however, to follow the Colorado Supreme Court's application of strict scrutiny. Applying instead the rational relation test, the Court struck down the amendment on two grounds. First, the majority reasoned that the imposition of a broad and undifferentiated disability on a single named group was a form of legislation outside of the American constitutional tradition. Second, the breadth of the amendment led the Court to believe that the amendment was motivated by animus for homosexuals, rather than by any legitimate state concern.

At the outset of their discussion, the majority examined Colorado's argument that Amendment Two merely prevented granting special rights to homosexuals. Focusing on the protections withheld by Amendment Two, the Court rejected this contention, reasoning that "[t]hese are protections taken for granted by most people either because they already have them or do not need them." This determination cleared the way for the remainder of the Court's decision, where the majority articulated its reasons for invalidating Amendment Two. Rejecting the "special rights" characterization was essential to invalidating Amendment Two since a state is not constitutionally required to grant any such rights.

The first basis for invalidating Amendment Two was the majority's notion that the amendment was outside of the American constitutional tradition. In other words, the majority objected to the form of the legislation, rather than to the classification it used. As the Court stated, Amendment Two imposed "a broad and undifferentiated disability on a single named group, an exceptional and... invalid form of legislation." In essence, the Court disagreed with the State of Colorado's edict that one group of its citizens could not protect themselves from discrimination, while leaving that door open to all other groups.

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43. *Id.* at 1627-28.
44. *Id.* at 1628-29.
45. *Id.* at 1624-27.
46. *Id.* at 1627.
47. *Id.* at 1627-28.
48. *Id.* at 1627 (emphasis added).
The Court also held that Amendment Two failed to bear a rational relationship to a legitimate state interest.\textsuperscript{49} Colorado asserted that the purpose of the law was twofold. The first included respect for the freedom of association of its citizenry, particularly landlords and employers with a personal or religious objection to homosexuality. The second asserted purpose was to conserve resources that could be used to combat other forms of discrimination.\textsuperscript{50} The breadth of the amendment, however, led the Court to conclude that the overriding motive behind Amendment Two was animosity for homosexuals.\textsuperscript{51} Stating that "a bare... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," the Court concluded that the amendment did not survive rational basis scrutiny.\textsuperscript{52}

2. Dissenting Opinion

Any issue worthy of the title "controversial" has at least two sides, and the debate over the constitutional validity of Amendment Two is no exception. In the dissenting opinion of \textit{Romer v. Evans}, Justice Scalia vigorously argued that Colorado was well within its bounds when enacting Amendment Two.\textsuperscript{53} The dissent defended Colorado's "special rights" argument,\textsuperscript{54} reasoning that "[t]he amendment prohibits special treatment of homosexuals, and nothing more."\textsuperscript{55} Justice Scalia offered several examples to demonstrate that Amendment Two would only prevent homosexuals from obtaining preferential treatment vis-à-vis the general (heterosexual) population.\textsuperscript{56} This characterization of Amendment Two was emphasized throughout the dissent and was utilized in later arguments advanced by the dissent.

Accepting that discrimination protection for homosexuals gives homosexuals special rights, the dissent emphatically disagreed with the majority's reasoning that Amendment Two fell outside of American constitutional tradition.\textsuperscript{57} Justice Scalia asserted that \textit{every} law has exactly the same effect as Amendment Two, at least to the extent that laws at one level of government cannot be contradicted by laws at a lower level.\textsuperscript{58} He summarized the Court's thesis as stating that "any group is denied equal protection when, to obtain advantage (or, pre-
sumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others.\textsuperscript{59} Scalia concluded that it would be "most unlikely that any multilevel democracy can function under such a principle."\textsuperscript{60}

Citing \textit{Davis v. Beason}\textsuperscript{61} as a close, congressionally-approved precedent for upholding Amendment Two, Scalia reasoned that homosexuality falls within the confines of legislative authority.\textsuperscript{62} In \textit{Beason}, the Supreme Court upheld a statute of the Idaho Territory that denied bigamists and polygamists the right to vote.\textsuperscript{63} Analogizing polygamy to homosexuality, Scalia argued that \textit{Beason} supported the proposition that homosexuality can be criminalized and that those engaging in that crime can be denied the right to vote.\textsuperscript{64} Scalia noted that the Idaho Territory statute at issue in \textit{Beason}, "which went much further than Amendment [Two], denying polygamy not merely special treatment but the right to vote," was not open to any constitutional or legal objection.\textsuperscript{65} Using a greater-includes-the-lesser type of argument, this reading of \textit{Beason} would directly support upholding Amendment Two.

Finally, the dissent contended both that Colorado had a legitimate state interest, independent of animus, in discouraging homosexuality and that Amendment Two was rationally related to that interest.\textsuperscript{66} Justice Scalia accepted Colorado's justifications for enacting Amendment Two and dismissed what the majority called animus as "moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in \textit{Bowers}."\textsuperscript{67}

Justice Scalia was referring to \textit{Bowers v. Hardwick},\textsuperscript{68} a case in which the United States Supreme Court upheld a Georgia law prohibiting homosexual sodomy.\textsuperscript{69} In \textit{Bowers}, the Court cited historical and traditional moral disapproval of homosexual sodomy to establish a legitimate state interest in its prohibition.\textsuperscript{70} The \textit{Romer} dissent reasoned that if a legitimate state interest exists for prohibiting homosexual conduct, then surely there exists an equally legitimate

\begin{itemize}
\item \textsuperscript{59} Id. at 1630.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} 133 U.S. 333 (1890).
\item \textsuperscript{63} Davis v. Beason, 133 U.S. 333, 346-47 (1890).
\item \textsuperscript{64} Romer v. Evans, 116 S. Ct. 1620, 1636 (1996)(Scalia, J., dissenting).
\item \textsuperscript{65} Id. at 1636 n.3. Note the reference to "special treatment."
\item \textsuperscript{66} Id. at 1633.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} 134 S. Ct. 1003 (2004).
\item \textsuperscript{69} Id. at 1017 (Scalia, J., dissenting).
\item \textsuperscript{70} Id. at 195.
\end{itemize}
state interest in denying special rights to people who engage in such conduct.\footnote{71. Romer v. Evans, 116 S. Ct. 1620, 1631-32 (1996)(Scalia, J., dissenting).}

III. DISAGREEMENTS IN ROMER V. EVANS

The decision in \textit{Romer v. Evans} was not an exercise in subtle distinctions. The majority and the dissent disagreed on almost every point, displaying an ideological partisanship more commonly seen in Congress. Essential to understanding the meaning of \textit{Romer} is whether these disagreements were founded upon differing views of homosexuality or instead would have been resolved similarly had Amendment Two targeted another group.

If these disagreements turned solely on each Justice's personal understanding and acceptance of homosexuality, \textit{Romer} has much more weight as a harbinger of future decisions regarding gay rights. If, on the other hand, the same conclusions would be reached regardless of the group targeted in the amendment, then \textit{Romer}'s application is less about gay rights than it is about efforts to trump antidiscrimination laws. In examining the three major areas of disagreement between the majority and the dissent, this Note concludes that the latter characterization is more accurate, leaving the future of gay rights legislation uncertain.

A. Basic Protections or Special Rights

The majority and dissent first disagreed on the effect of the antidiscrimination ordinances that Amendment Two repealed. The dissent agreed with the State of Colorado that antidiscrimination laws grant special rights to the class against whom discrimination is forbidden. Therefore Amendment Two merely places homosexuals in the same position as everyone else in society.\footnote{72. \textit{Id.} at 1629-30.} The majority disagreed, however, reasoning that such laws are protective measures taken to prevent unjust discrimination in public accommodations, housing, and the workplace.\footnote{73. \textit{Id.} at 1624-27.}

The "special rights" argument, as applied to the various Colorado antidiscrimination ordinances affected by Amendment Two, implies that only homosexuals benefit from laws banning discrimination on the basis of sexual orientation. This argument, however, is simply not true. In plain language, these ordinances protect every citizen within the reach of jurisdiction from discrimination based on their sexual orientation.\footnote{74. See supra statutes cited note 2.} The protection is the same whether one is heterosexual, homosexual, or somewhere in between. Indeed, a heterosexual denied
employment, housing, or service based solely on his or her heterosexuality would have a valid claim under these laws.\textsuperscript{75}

The dissent offered two examples of the special rights supposedly conferred on homosexuals by antidiscrimination legislation.\textsuperscript{76} On closer examination, however, neither example shows that homosexuals would obtain any benefit that similarly situated heterosexuals would not.

In the first example, the "life-partner" of a homosexual would be eligible for state death benefits when the longtime roommate of a heterosexual employee would not.\textsuperscript{77} The flaw in this analogy, however, assumes that roommates and life partners are similarly situated. The two parties in this example are not similarly situated unless the terms "roommate" and "life-partner" are synonymous. Yet if one term is utilized to describe both relationships in the example, then there is no longer a difference in the result. Homosexual roommates, if that is what they opt to be, are no more entitled to death benefits than the heterosexual roommates. If, however, homosexual "life-partners" are eligible to receive their partner's death benefits, it is because they are in a relationship analogous to a heterosexual marriage. Heterosexual "life-partners" possess, and often exercise, the option of marriage.\textsuperscript{78} The difference in the two couples is that one has the option of marrying to secure death benefits while the other does not. The dissent would parlay this difference into a "special right" for homosexuals.

The dissent offered a second example, referring to an alleged receipt of special rights when insurance companies are required to ignore sexual orientation when determining rates or insurability.\textsuperscript{79} The special right conferred on homosexuals, Justice Scalia argued, is that "distinctive health insurance risks associated with homosexuality (if there are any)" cannot be taken into account by health insurance providers.\textsuperscript{80} Yet, this ignores the distinctive health insurance risks associated with heterosexuality (if there are any) that must also be ignored under Colorado law.\textsuperscript{81} As such, both homosexuals and heterosexuals are treated equally in the insurance arena.

\textsuperscript{75} If this seems like an unlikely scenario, consider the current debate over affirmative action. Laws that forbid discrimination on the basis of race and sex were clearly enacted to protect racial minorities and women. Yet these same laws are now being used to fight reverse discrimination against white males. See David Michael McConnell, Comment, \textit{Title VII at Twenty—The Unsettled Dilemma of "Reverse" Discrimination}, 19 \textit{Wake Forest L. Rev.} 1073 (1983).

\textsuperscript{76} Romer v. Evans, 116 S. Ct. 1620, 1630 (1996).

\textsuperscript{77} Id.

\textsuperscript{78} Presumably, to be both "life-partners" and heterosexual, a couple would have to be of the opposite sex.


\textsuperscript{80} Id.

Ultimately, antidiscrimination laws grant “special rights” to a group only to the extent that individuals wish to discriminate against that group. Such laws take a particular classification of people and forbid unequal treatment based upon that classification. In doing so, the laws grant “special rights” only in the eyes of those who believe that unequal treatment is warranted. Those who believe equal treatment is warranted do not see “special rights,” but instead merely a codification of their preexisting beliefs. For this reason, the Court does not reject the “special rights” argument across the board. Rather, the argument will be accepted or rejected in future cases based on the Court’s attitude concerning the classification at issue and whether equal treatment within that classification is warranted.

B. Constitutional Tradition: Davis v. Beason

A second significant disagreement between the majority and the dissent revolved around Amendment Two’s function and whether it fit within the American constitutional tradition. The majority held it did not, stating that “[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.”82 Similarly, the majority recognized the absence of precedent for Amendment Two.83

The dissent, on the other hand, viewed Amendment Two simply as an effort by the majority of Colorado’s citizens to preserve its view of sexual morality against the efforts of a geographically concentrated minority’s efforts to undermine it.84 Justice Scalia reasoned that the treatment of polygamy under earlier constitutional practice was an almost indistinguishable precedent85 and criticized the majority for “heavy reliance upon principles of righteousness rather than judicial holdings.”86

In holding that Amendment Two fell outside of the American constitutional tradition, the Court utilized a different analysis than that employed by the Colorado Supreme Court.87 While not citing a single

83. Id.
84. Id. at 1635 (Scalia, J., dissenting).
85. Id. at 1635-36.
86. Id. at 1629. Justice Scalia referred to “principles of righteousness” stated by the majority throughout the majority opinion. See, e.g., id., at 1623 (“[T]he Constitution neither knows nor tolerates classes among citizens.” (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896)(Harlan, J., dissenting))); id. at 1628 (“Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.” (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))); id. at 1629 (“Class legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . .” (quoting Civil Rights Cases, 109 U.S. 3, 24 (1883))).
87. Id. at 1624. The Court’s decision to decline to follow the Colorado Supreme Court’s holding seems based on a desire to grant neither heightened scrutiny to
decision relied upon by the Colorado Supreme Court, the substance of the majority's "constitutional tradition" objection rested on the same considerations. For example, in Hunter v. Erickson, the Court stated that the City of Akron was free to enact each and every piece of municipal legislation by a majority vote, but in choosing to do otherwise, the city could not disadvantage any particular group by making it more difficult to enact legislation on such group's behalf. This is the same objection that the Romer majority made to Amendment Two under the guise of the constitutional tradition.

One reason Amendment Two was open to attack on "general principles of righteousness" was its lack of facial neutrality. Amendment Two plainly stated that it was to affect only legislation protecting "homosexual, lesbian or bisexual orientation, conduct, practices, or relationships." Neutrality was not attempted. The amendment divided the citizenry of Colorado into two classes: heterosexual and "other." At the very least, this one-sided approach opened an avenue for any objection based on the singling out of one particular group.

Amendment Two may have been facially neutral had it instead based its restrictions on a neutral term, such as "sexual orientation." Such wording would remove the majority's objection that Amendment Two targeted a single named group, as every citizen of Colorado possesses some degree of sexual orientation.

The only precedent dealing with constitutional tradition that was discussed in detail by either the majority or the dissent was Davis v. Beason. The Romer dissent cited the holding of Beason as a "close, congressionally approved precedent" for upholding Amendment Two.

In our judgment, § 501 of the Revised Statutes of Idaho Territory, which provides that 'no person ... who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into

sexual orientation classifications nor to enumerate any new fundamental rights. Yet, the Court distinguished between its "constitutional tradition" objection and its "rational basis" analysis, which indicates that some type of scrutiny other than "rational basis" is at work. In other words, the "constitutional tradition" objection must either be heightened scrutiny of the rational basis test under a new name or some new kind of equal protection analysis.

88. See supra cases cited notes 22-25.
90. Id. at 392-93.
91. "[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation." Romer v. Evans, 116 S. Ct. 1620, 1627 (1996). "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Id. at 1628.
92. See supra note 86.
93. COLO. CONST. art. II, § 30b.
94. 133 U.S. 333 (1890).
what is known as plural or celestial marriage, or who is a member of any
order, organization or association which teaches, advises, counsels, or encour-
ages its members or devotees or any other persons to commit the crime of
bigamy or polygamy, or any other crime defined by law . . . is permitted to vote
at any election, or to hold any position or office of honor, trust, or profit within
this Territory,' is not open to any constitutional or legal objection.95

Comparing polygamy to homosexuality, Justice Scalia read this as a
direct precedent for upholding Amendment Two.96

There are, however, several problems with this approach. First, as
Justice Scalia readily admitted, much of the holding in Beason has
been overruled by subsequent cases.97 Stripped of the language made
irrelevant by these decisions, the above quote essentially authorizes
the government to deny polygamists and bigamists the right to vote.

Yet, it is unclear whether the moral aspect of polygamy or its ille-
gality can be used as a basis of disenfranchisement.98 Polygamy was
a crime in the Idaho Territory when Beason was decided. As a result,
even if Beason allowed the government to deny the right to vote to
those practicing, but not convicted of, polygamy, the fact remains that
the practice of polygamy was a felony. Conversely, no aspect of homo-
sexuality enumerated in Amendment Two has been illegal in Colorado
since the time of its passage.99 Unless Beason allows disenfranchise-
ment solely on the noncriminal, moral aspects of polygamy, it retains
no precedential value as applied to Amendment Two.100

Second, the analogy between polygamy and homosexuality is im-
perfect. Granted, some similarities exist: both are matters related to
sexuality and the family, and both traditionally are subject to moral
disapproval. There is, however, a crucial difference. Polygamy is a
status entirely defined by conduct.101 Homosexuality is no more de-


95. Id. at 1635 (quoting Davis v. Beason, 133 U.S. 333, 346-47 (1890)).
96. Id. at 1635-36.
98. Convicted felons can be denied the right to vote. See Richardson v. Ramirez, 418
U.S. 24 (1974). Homosexual sodomy can be criminalized. See Bowers v. Hard-
99. For example, no laws prohibiting homosexual orientation, conduct, practices, or
relationships have been passed in Colorado. COLO. CONST. art. II, § 30b.
100. Although such a reading seems to implicate the line of voting rights cases decided
by the United States Supreme Court in the 1960s (see supra cases cited note 22),
Justice Scalia correctly points out that the fundamental right to vote alone trigs
101. Black's Law Dictionary defines polygamy as "[t]he offense of having several wives
or husbands at the same time, or more than one wife or husband at the same
time." BLACK'S LAW DICTIONARY 1159 (6th ed. 1990). Black's declines to attempt
a definition of homosexuality.
C. The Animus Argument and Bowers v. Hardwick

A third major area of disagreement between the majority and the dissent was whether Amendment Two was rationally related to a legitimate state interest or instead was motivated solely by animus for homosexuals. Three distinct issues surfaced in the opinions of both the majority and the dissent: (1) which test to use; (2) whether the test was met; and (3) the effect of animosity on Amendment Two's validity.

Both the majority and the dissent used the "rational relation" test in analyzing Amendment Two, but each did so for different reasons. The dissent believed it was the appropriate test to adopt for its analysis. Although the majority did not state which test it felt was appropriate, it used the "rational relation" test as a sort of threshold test, the failure of which would mean the failure of any higher level of scrutiny. This allowed the majority to avoid justifying an application of heightened scrutiny, which would have required granting "suspect class" status to homosexuals, finding Amendment Two violative of existing fundamental rights, or enumerating a new fundamental right. The majority's implication that heightened scrutiny might be justified is tantalizingly vague. No further explanation is found in Romer, however.

Applying the rational basis test, the majority recognized that the primary interests of the state in enacting Amendment Two included respect for other citizens' freedom of association and the conservation of resources to fight discrimination against other groups. It held, however, that the breadth of Amendment Two made it impossible to credit those interests. The dissent, like the majority, also accepted the state's freedom of association and conservation of resources arguments, but instead focused its rational basis analysis on the "special rights" argument.

103. Id. at 1631.
104. "Amendment Two fails, indeed defies, even this conventional inquiry." Id. at 1627 (emphasis added). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." Id. (emphasis added).
105. "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Id. See, e.g., Heller v. Doe, 509 U.S. 312, 319-21 (1993).
107. Id.
108. Id. at 1631-32. "I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals. . . . The answer is . . . obviously yes." Id. at 1631 (emphasis added).
The majority found that animosity for homosexuals, rather than the rationales advanced by the State, was the actual motive behind Amendment Two. This finding contributed to the majority's conclusion that Amendment Two failed to satisfy the rational relation analysis, since "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." The dissent, however, classified any animosity behind Amendment Two as the same kind of animosity our society bears for any reprehensible conduct.

Several points emanate from the Court's analysis. First, at least as to homosexuality, the Court seemed unwilling to conclude that a general "homosexuality is immoral argument" satisfies the rational basis test, at least under equal protection analysis. Second, with respect to other groups whose discrimination protections might be trumped, the Court found its objections to Amendment Two in the nature of the law itself, rather than the targeted group.

The dissent cited Bowers v. Hardwick as precedent to determine whether there existed a "legitimate state interest" in discouraging homosexuality. In Bowers, the Court upheld a Georgia law forbidding homosexual sodomy against a Due Process challenge. In upholding the statute, the Court cited a long history of moral disapproval of homosexual sodomy and thus declined to find an individual right to engage in such behavior. Accordingly, the Court applied the "legitimate state end, rationally related" test and, finding both, upheld the law.

The major distinction between Bowers and Romer is that the former is a due process case, while the latter involves an equal protection analysis. Both of these analyses use the same basic test (legitimate state interest, a statute that is rationally related to that interest), but the protections they offer are quite different.

The Due Process Clause commonly has been interpreted as backward looking. Tradition and time-honored conventions are highly rel-
relevant under a due process analysis. The Equal Protection Clause, in contrast, is forward looking in that it protects groups from discriminatory state action despite a tradition to the contrary. Thus, Bowers' holding that homosexual sodomy can be criminalized is irrelevant to whether Amendment Two impermissibly targets homosexuals as a class.

IV. THE PRACTICAL IMPACT OF THE COURT'S DECISION

Romer v. Evans had the potential to be a far-reaching decision affecting gay rights. The opportunity was before the Court to emphatically declare the level of scrutiny that applies to homosexuals under an equal protection analysis. Instead, the Court narrowly focused on the challenged amendment before it, finding it unconstitutional without deciding on the class status of homosexuals.

To the extent Romer is a gay rights case, both sides of the issue can claim some degree of victory. Traditional forces can breathe a sigh of relief that the Court neither used Amendment Two as an opportunity to overrule Bowers, nor granted suspect or quasi-suspect status to homosexuals as a class. The Court focused mostly on the breadth of Amendment Two, giving some indication that a narrower law, more tightly focused on the interests that traditional forces wish to protect, would pass constitutional muster.

On the other hand, gay rights supporters, particularly those in Colorado, can celebrate the demise of Amendment Two. Beyond that, however, Romer should not be cause for much celebration. Those looking for a judicial legitimization of homosexuality will be disappointed, as the surface flaws of Amendment Two enabled the Court to avoid an assessment of the underlying subject matter.

Perhaps the only hint the Court provided as insight for potential future application of heightened scrutiny was its introduction to the discussion of the constitutional tradition. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." This statement implies that Amendment Two could implicate some higher level of scrutiny. In other words, Romer is not "the ordinary equal protection case calling for the most deferential of standards." Because Amendment Two failed to meet the lowest standard of review, the Court found it unnecessary to de-

119. Id. at 1163.
120. Id.
121. If Bowers was controlling precedent as to whether classifications based on homosexuality met the rational basis test, then Romer could be seen as implicitly overruling Bowers.
123. Id.
termine whether a higher standard should apply to homosexuals as a class.

*Romer* ultimately will have a greater effect on discrimination laws in general than on homosexuals as a class. Discrimination laws, whatever their subject, take a certain characteristic and remove it from the allowable decisionmaking process that employers, landlords, or other groups use in conducting their affairs. The more a particular group is in need of protection, the less popular that protection will be with the majority. This unpopularity of laws protecting homosexuals was the cornerstone in the enactment of Amendment Two, and no reason suggests that groups other than homosexuals could not be similarly targeted.

Amendment Two represented an attempt by a statewide majority to invalidate all the protections gained by homosexuals at the various levels of Colorado's governmental structure. *Romer* did not explicitly invalidate such "trumping" laws, but it did set forth some guidelines.

First, such a law can not be overly broad. Amendment Two denied relief from any discrimination against homosexuals, in any context, no matter how damaging or invidious. To avoid the *Romer* Court's objection to breadth, any future legislation seeking to limit the protections available to an identifiable group will have to be more closely targeted to a legitimate state interest than was Amendment Two. For example, a state could require an exception to laws banning sexual orientation discrimination in housing for those renting rooms in their own home or seeking roommates. A similar exception might apply to businesses smaller than a certain size or religious institutions promoting religious views that reject homosexuality.

Second, the Court seemed to object to Amendment Two's attempt to single out one group from the population as a whole. In other words, rather than eliminating the entire spectrum of sexual orientation from Colorado's discrimination law, Amendment Two only forbade protection for homosexuals. Even a facially neutral version of Amendment Two could be viewed as founded upon animosity, especially if the clear purpose of the law was to disadvantage the minority rather than to level the playing field. Nevertheless, a facially neutral law would avoid the objection that it singles out a particular named group.

Finally, on a broader level, *Romer* could be read as prohibiting even facially neutral laws if, like Amendment Two, they remove a classification from the possibility of antidiscrimination legislation while allowing all others to seek protection at the local level. Under this reading of *Romer*, a state could restrict passage of the state's discrimination law to the legislative or constitutional level and forbid smaller governmental subdivisions from enacting such legislation, but could not remove certain classifications from local consideration.
V. CONCLUSION

The Court’s decision in Romer v. Evans represents a tactical, but strategically hollow victory for gay rights. Bowers v. Hardwick stands unchanged, and although Amendment Two was invalidated, the Court declined to extend “suspect” or “quasi-suspect” class status to homosexuals. Neither possibility was expressly eliminated, but nevertheless the opportunity was squarely before the Court and yet politely declined. Proponents of future legislation, on either side of the issue, now have a clearer understanding of the Court’s reasoning on the issue of homosexuality and can rely on that understanding when producing appropriately tailored responses.

In hindsight, Romer v. Evans appears to be more of a denunciation of Colorado’s broad attempt to circumvent local discrimination ordinances than a judicial sanction of homosexuality. The real benefactors of this case may well be small or unpopular groups that can muster the votes to pass local antidiscrimination ordinances where they live. Gay rights supporters, on the other hand, must wait anxiously to see what the Court will say the next time it faces this controversial issue.

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