Scalia 18:22: Thou Shall Not Lie with the Academic and Law School Elite; It Is an Abomination--*Romer v. Evans* and America's Culture War

Steven A. Delchin
In 1986, the United States Supreme Court in Bowers v. Hardwick\(^2\) remarked that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed."\(^3\) In upholding a Georgia anti-sodomy statute and rejecting the claim that there is a fundamental right to engage in homosexual conduct, the Court added that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."\(^4\) Sadly, the Court may have gone barely a decade before it jettisoned its own advice. In Romer v. Evans\(^5\) the Court struck down a Colorado state constitutional amendment prohibiting preferential treatment for homosexuals—an amendment that was arguably the expression of traditional moral values by a majority of Colorado’s electorate.

This Comment examines how the recent Romer decision struck down Colorado’s amendment, popularly known as Amendment 2, as violating the Equal Protection Clause. Part I of the Comment provides a background on Amendment 2, including a synopsis of

---

1. Leviticus 18:22 ("Thou shall not lie with a male as with a woman; it is an abomination."). I would like to thank Professors George W. Dent, Jonathan L. Entin, and William P. Marshall for their helpful comments on earlier drafts of this Comment.
3. Id. at 196.
4. Id. at 197 (Burger, J., concurring).
the arguments for and against the amendment as well as a review of the majority and dissenting opinions. Part II offers a catalogue of potential explanations for the Romer decision in an attempt to reconcile its outcome with the Court's jurisprudence. Finally, Part III comments on how Romer reflects America's cultural debate over homosexuality in particular and the role of traditional moral values in political discourse in general.

I. BACKGROUND

On November 3, 1992, Colorado voters approved the statewide referendum known as Amendment 2 which added section 30(b) to Article 2 of the Colorado state constitution. The amendment repealed all existing state and local statutes, regulations, and policies extending preferential status to individuals on the basis of sexual orientation, and prohibited the adoption of similar measures in the future, absent an amendment to the Colorado state constitution. Although supporters of Amendment 2 were outspent by opponents by nearly a 2-1 margin and polls prior to the election consistently showed the proposal to be failing, the referendum nevertheless passed by a margin of 813,966 to 710,151 (53.4% to 46.6%).

The impulse behind Amendment 2, which never did go into effect, stemmed in large measure from the enactment of pro-ho-

6. See Evans v. Romer, 882 P.2d 1335, 1338 (Colo. 1994), aff'd, 116 S.Ct. 1620 (1996). This Comment will designate this case as "Evans I." Amendment 2 provides:

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.

COLO. CONST., art. II, § 30(b).

7. See Evans II, 882 P.2d at 1339 (citing Evans v. Romer, 854 P.2d 1270, 1285 (Colo. 1993)). This Comment will identify the 1993 case as "Evans I."


10. See Evans II, 882 P.2d at 1338.

homosexual ordinances in three Colorado municipalities: Aspen, Boulder, and Denver. These ordinances extended legal protection to individuals on the basis of sexual orientation in the areas of employment, housing, and public accommodations. A majority of Colorado's voters chose to repeal these ordinances and foreclose the enactment of similar laws and policies in the future. Shortly after the election, on November 12, 1992, Richard G. Evans, a homosexual employed by the City of Denver, together with several other homosexual individuals and governmental entities, sued to enjoin Amendment 2 and have it declared unconstitutional on its face. The case eventually reached the United States Supreme Court where the State of Colorado and the challengers of Amendment 2 advanced their arguments.

A. Arguments Made Before The Supreme Court

1. Colorado's Defense of Amendment 2

The State of Colorado argued that state and local laws that establish minority status for homosexuals equate to "special rights" that are unavailable to the public at large. According to Colorado, Amendment 2 was designed to eliminate such special rights. At the same time, however, Colorado argued that Amendment 2 left homosexuals with the same rights that they enjoyed prior to

12. Within the homosexual movement labels are important. This Comment uses the term "homosexual" in favor of the term "gay" as "gay" has become a political term associated with a movement that rejects the moral superiority of heterosexuality and demands that traditional religious understandings about homosexuality be understood as fundamentally in error. See MARGARET CRUIKSHANK, THE GAY AND LESBIAN LIBERATION MOVEMENT 3 (1992) (noting that "homosexual" became "gay" on June 27, 1969, when "gay power" was born).
15. The challengers were comprised of eight homosexuals, one heterosexual, the Boulder Valley School District RE-2, the City and County of Denver, the City Council of Aspen, the City of Boulder, and the City of Aspen. See Grauerholz, supra note 14, at 845 n.31.
19. See id. at 6.
the enactment of such laws and thus did not deprive them of basic civil rights available to other citizens.\textsuperscript{20} The State of Colorado characterized the campaign to pass Amendment 2 as "spirited" and a "classic example of democratic self-government."\textsuperscript{21} It argued that Amendment 2 was not the product of a naked, arbitrary desire to harm homosexuals, as some opponents charged.\textsuperscript{22} Rather, the State articulated at least six independent interests that it maintained were advanced by Amendment 2.

First, the State argued that Amendment 2 preserved the integrity of civil rights laws by setting priorities and conserving the limited resources that the State has at its disposal for combating discrimination.\textsuperscript{23} Colorado argued that amending the State's civil rights statutes to include protections on the basis of sexual orientation would represent a "drastic departure" from the historical posture of such laws.\textsuperscript{24} Moreover, the State argued that, unlike suspect and other needy classes, homosexuals are already a "politically powerful and relatively privileged special interest group,"\textsuperscript{25} and extending such special protections to homosexuals would only tax an already strained state budget.\textsuperscript{26}

Second, Colorado argued that Amendment 2 would achieve uniformity in civil rights laws which would "promote efficient enforcement, [and] ... maximize individual liberty, including the preservation of traditional social norms."\textsuperscript{27} The State added that uniformity fosters greater economic and legal predictability for employers and property owners.\textsuperscript{28}

Third, and relatedly, the State contended that Amendment 2 would promote the stability of Colorado's political system by guarding it from the effects of "unrestrained factionalism" through state-wide uniformity of the laws.\textsuperscript{29} Colorado had argued that the issue of homosexual rights is highly contentious and that municipality-by-municipality conflicts over homosexuality, as reflected by

\textsuperscript{20} See id.
\textsuperscript{21} Id. at 7.
\textsuperscript{22} See Reply Brief at 14-15, Romer v. Evans, 116 S. Ct. 1620 (1996) (No. 94-1039). Challengers and opponents of Amendment 2 had argued that the amendment was driven solely by antipathy toward homosexuals. See also infra note 44 and accompanying text.
\textsuperscript{23} See Petitioner's Brief at 41, Romer (No. 94-1039).
\textsuperscript{24} See id. at 43. In fact, there was some fear that granting special class status might lead to affirmative action for homosexuals. Id. at 43 n.31.
\textsuperscript{25} Id. at 42. As evidence of this political influence, the State noted that homosexuals have been successful at, among other things, repealing sodomy statutes in 27 states and including sexual orientation in the federal hate crimes statute. Id. at 42 n.29.
\textsuperscript{26} See id. at 41.
\textsuperscript{27} Id. at 47.
\textsuperscript{28} See Petitioner's Brief at 47, Romer (No. 94-1039).
\textsuperscript{29} See id. at 47-48 (quoting Storer v. Brown, 415 U.S. 724, 736 (1974)).
the ordinances in Aspen, Boulder, and Denver, have the potential to "seriously fragment Colorado's body politic." Deterring such unrestricted factionalism was thus argued to be a legitimate state interest.

Fourth, Colorado argued that Amendment 2 would enhance religious liberty. Under the amendment, landlords and private employees with profound religious objections to homosexuality would not be under threat of governmental sanction to compromise those beliefs. Similarly, religious organizations, including churches, would not be forced into hiring homosexuals as employees or clergy. Closely related to Colorado's interest in protecting religious liberty was the State's interest in enhancing associational privacy. For example, Colorado argued that Amendment 2 would have repealed the Aspen ordinance that forced churches to open their facilities to homosexual groups if they were open to other community organizations. Similarly, individuals who hold sincere religious beliefs against homosexuality would not be required to share housing with practicing homosexuals under the threat of sexual orientation laws. Thus, the State's fifth argument was that Amendment 2 would protect individuals' personal privacy and intimate association, and that in this regard, it was a very libertarian measure.

Finally, and perhaps most importantly, Colorado argued that Amendment 2 would foster both familial privacy and parents' ability to instill moral values in their children. The State argued that the family is the vehicle by which society passes down cherished moral and cultural values to subsequent generations. "The implicit endorsement of homosexuality fostered by laws granting special protections," Colorado contended, "could undermine the efforts of some parents to teach traditional moral values." Thus, Amendment 2 was a rational response by a majority of Coloradans to preserve their traditional moral values.

30. See supra note 13 and accompanying text.
31. Petitioner's Brief at 47, Romer (No. 94-1039).
33. See Petitioner's Brief at 44, Romer (No. 94-1093).
34. See id.
35. See id. at 44-45.
36. See id. at 44.
37. See ASPEN MUNICIPAL CODE § 13-98.
38. See Petitioner's Brief at 45, Romer (No. 94-1093).
39. See id.
40. See id. at 45-46.
41. See id. at 46.
42. Id.
The implicit, underlying theme of the State's defense of Amendment 2 is that the people of Colorado have a right to translate their traditional views of sexual morality into public policy. Under this view, moral opposition to homosexuality by a majority of citizens can serve as a legitimate basis for State action, just as the Supreme Court declared ten years earlier in *Bowers v. Hardwick*. In a sense, Colorado was merely asking the Supreme Court to respect the process of democratic self-government in Colorado where a majority of citizens had expressed their traditional values through the ballot.

2. The Challenge to Amendment 2

The challengers sharply disputed the justifications proffered by Colorado on behalf of Amendment 2. They charged that Colorado distorted the "real purpose" of Amendment 2 which was "the effectuation of hostility and antipathy toward an unpopular group." They also claimed that Colorado "paint[ed] a distorted picture of the amendment as a benign and libertarian 'shield' barring intrusive regulations of private persons." Instead they likened it to a sword that cuts a wide swath in the protection of homosexuals from arbitrary discrimination. The challengers contended that "Amendment 2's selectivity can be explained only by the illegitimate purpose of targeting gay people based on antipathy and stereotypes." The amendment would not only deny homosexuals special rights, they argued, but would also impose a special disability upon them because it would deprive them of even the protection of laws of general applicability. Thus, the challengers concluded, Amendment 2 would deprive homosexuals, and only homosexuals, of basic rights that are enjoyed by all other Coloradans.

43. 478 U.S. at 186 (1986).
44. Respondent's Brief at 49, Romer v. Evans, 116 S.Ct. 1620 (1996) (No. 94-1039). The challengers specifically pointed to campaign literature from Colorado for Family Values ("CFV"), a non-profit corporation based in Colorado Springs, as evidence of the animus directed toward homosexuals during the Amendment 2 campaign. For example, shortly before the election CFV had distributed brochures to 800,000 homes claiming that the homosexual lifestyle includes sexually molesting children and that homosexuals seek special rights for this very lifestyle. See id. at 48.
45. Id. at 39. See supra note 39 and accompanying text.
46. See id.
47. Id.
48. See Respondent's Brief at 10, Romer (No. 94-1039). The challengers noted that Amendment 2 bars "any . . . claim" requesting relief from arbitrary discrimination based on gay, lesbian, or bisexual orientation. Id. at 10-11. Thus, for example, they argued that while private employers are prohibited under Colorado law from terminating employees for engaging in lawful activity off the employer's premises, COLO. REV. STAT., § 24-34-402.5, homosexuals could not seek relief under this law because of Amendment 2. See id.
49. See id. at 10 n.11. Amendment 2 refers only to "homosexual, lesbian or bisexual orientation." Thus, heterosexuals are unaffected by the amendment. Id.
The challengers of Amendment 2 raised two basic arguments to support their constitutional challenge. First, they claimed that the amendment would deprive homosexuals of the right to participate equally in the political process, a right which the Colorado Supreme Court deemed was fundamental and subject to strict scrutiny under equal protection analysis. Secondly, and in response to the underlying theme of the State's defense, the challengers, as well as other opponents of Amendment 2, claimed that the campaign behind Amendment 2 was driven by antipathy and the desire to harm homosexuals and therefore bears no rational relationship to any legitimate state purpose. The challengers characterized Amendment 2 as being "unprecedented in both the selectivity and severity of discrimination that it imposes on a particular group of persons."

In responding to the six independent interests advanced by Colorado, the challengers argued first that Colorado's interest in conserving fiscal resources in order to protect suspect and other needy classes was merely a pretext because the enforcement of such laws is undertaken on a private scale and thus consumes no governmental resources. More to the point, they argued, was Amendment 2's degree of selectivity. The amendment singled out homosexuals exclusively from the protection of state and local antidiscrimination laws and yet simultaneously continued to protect all other classes of individuals, whether they are veterans, smokers, or

50. See id. at 15-35.
51. Evans II, 882 P.2d 1335, 1349 (Colo. 1994) (quoting Evans I, 854 P.2d 1270, 1282 (Colo. 1993)). The Colorado Supreme Court found that Amendment 2 infringed upon this fundamental right because it "fenced out" homosexuals from equal participation in the political process. Id.
52. See Respondent's Brief at 39, Romer (No. 94-1039) (arguing Amendment 2 illegitimately targets people based on "antipathy and stereotypes"); William E. Adams, Jr., Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy, 55 OHIO ST. L.J. 583, 622 (1994) (discussing the use of "emotional, unsupported stereotypes" by supporters of anti-homosexual initiatives); Seth Hilton, Comment, Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?, 28 U.C. DAVIS L. REV. 445, 472 (1995) (referring to Amendment 2 as one manifestation of "hatred" toward homosexuals); David P. Tedhams, The Reincarnation of "Jim Crow:" A Thirteenth Amendment Analysis of Colorado's Amendment 2, 4 TEMPLE POL. & CIV. RTS. L. REV. 133, 156 (1994) ("It is my contention that the methods used by [certain supporters of Amendment 2] rose to the level of conspiracy, defined under § 1985(3), to deprive homosexuals of their civil rights."); Stephen Zamansky, Note, Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law, 35 B.C. L. REV. 221, 256 (1993) (arguing that "[t]he only objective of Amendment 2 is 'a bare . . . desire to harm a politically unpopular group,' which is not a legitimate governmental purpose") (quoting City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47 (1985)).
53. See Respondent's Brief at 35-49, Romer (No. 94-1039).
54. Id. at 35.
55. See id. at 41-42.
even heterosexuals. The challengers argued that this degree of selectivity left unexplained how Colorado's purported interest in conserving fiscal resources was furthered when all other groups in the State were still entitled to protection.

In a similar fashion, the challengers argued that the State's second purported interest—that of achieving uniform civil rights laws—left unexplained Amendment 2's scope and selectivity because the amendment "tolerate[d] any degree of disuniformity in local anti-discrimination laws so long as the laws provide no relief from discrimination based on gay, lesbian, or bisexual orientation."

Third, the challengers claimed that Colorado's interest in deterring factionalism was spurious because factionalism is the essence of democracy. At any rate, the State's attempt at suppressing factionalism was skewed because it suppressed only one side of the debate. The challengers equally dismissed the State's fourth and fifth interests of promoting religious liberty and associational privacy. They argued that "government must operate on purely secular motives and has no legitimate interest in engaging in religiously motivated discrimination." Furthermore, choosing not to protect homosexuals from governmental discrimination certainly does not facilitate religious freedom, especially since government officials have no constitutional right to association and may not act on their religiously-grounded views about homosexuals. The challengers argued, moreover, that Amendment 2's selectivity belied its purported concern for religious and associational freedom because, while individuals could discriminate against homosexuals, laws prohibiting discrimination based on marital status, for example, were left intact. Thus, they claimed that "Amendment 2's indifference to religious liberty and associational freedom except when pursued at the expense of gay people indicates that

56. See id. at 42.
57. See id. The challengers actually posited that based on the State's logic of conserving governmental resources, State laws could prohibit police departments from providing police protection to homosexuals in their neighborhoods. Id.
58. Respondent's Brief at 44, Romer (No. 94-1039). Once again, opponents claimed that "[b]oth Amendment 2's selectivity and severity . . . indicate that promotion of uniformity is but a pretext, a goal about which the State is utterly indifferent except as a cover for burdening gay people." Id.
59. See id. at 47.
60. See id. The attempt to suppress such factionalism may also raise First Amendment concerns. See id.
61. See id. at 39.
62. Id. at 40.
63. See Respondent's Brief at 40, Romer (No. 94-1039).
64. See id. at 40-41.
protection of such freedoms is a pretext for hostility and bias, not a rationally attributable purpose.”

The challengers also attacked the State’s sixth argument—that Amendment 2 legitimately advanced parents’ ability to instill moral values in their children. Aside from their claim that the State does not “endorse” the homosexual lifestyle when it outlaws discrimination against homosexuals, the challengers also contended that “Amendment 2 is far too broad to be a rational means of preserving traditional sexual morality.” They argued that “even if an interest in preserving traditional sexual morality [could] justify state laws that actually regulate sexual conduct, such an interest [could not] justify Amendment 2’s blanket authorization of all discrimination against a class of people, even discrimination in contexts that are unrelated to sexuality or sexual conduct.”

Finally, the challengers urged that the use of moral arguments to support discrimination against homosexuals is impermissible if driven by nothing more than antipathy toward the group. The implication was that the people of Colorado were driven by hatred and intolerance toward homosexuals which would, in turn, make it impossible for the Court to credit Colorado’s purported rationales for Amendment 2. The Supreme Court apparently agreed with the challengers’ arguments in toto and struck down Amendment 2 on the ground that the amendment was, in fact, born of animosity toward homosexuals.

B. The Supreme Court and Romer v. Evans

Romer v. Evans has been hailed as a major homosexual rights victory for invalidating Amendment 2 as violating the Equal Protection Clause. At the same time, however, some commentators have expressed their concern over the paucity of legal analysis in Justice Kennedy’s majority opinion, especially his failure to distinguish the relevant cases. As one commentator remarked,
Romer "contains precious little case law [and] is remarkable for what it does not cite, rather than for what it does." 75

Justice Kennedy, writing for a 6-3 majority, opened his opinion with Justice Harlan's admonition in *Plessy v. Ferguson* 76 that the Constitution "neither knows nor tolerates classes among citizens." 77 He held that Amendment 2 ran afoul of this principle of legal neutrality and thus violated the Equal Protection Clause. 78 To reach this holding, Justice Kennedy first addressed Colorado's argument that Amendment 2 places homosexuals in the same position as all other citizens in Colorado. 79 He promptly rejected Colorado's characterization of the measure as merely denying homosexuals special rights, arguing instead that the amendment consigned homosexuals to a "solitary class with respect to transactions and relations in both the private and governmental spheres." 80 In the private sphere, Justice Kennedy argued, the effects are "far-reaching." 81 Homosexuals are foreclosed from seeking special legal protections in public accommodations, housing, real estate, insurance, health and welfare services, private education, and employment. 82 In comparable fashion, according to Justice Kennedy, homosexuals are precluded from securing specific legal protection in the governmental sphere. 83

Of course, these policies and laws all deal with specific protections for homosexuals. Thus, Justice Kennedy also argued that "[i]t is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary

---

76. 163 U.S. 537 (1896).
77. *Romer*, 116 S. Ct. at 1623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)). The reference to Justice Harlan's opinion in *Plessy* may be an implicit attempt by Kennedy to equate the demands of a vocal homosexual minority with the struggle against racial segregation that was at issue in *Plessy*.
78. *See id.*
79. *See id.* at 1624.
80. *Id.* at 1625. Justice Kennedy argued that the legal change in homosexuals' legal status is "sweeping" and "comprehensive." *Id.*
81. *Id.*
82. *See Romer*, 116 S. Ct. at 1626 (citing ASPEN MUNICIPAL CODE §§ 13-98(b), (c) (1977); BOULDER REV. CODE §§ 12-1-2, 12-1-3 (1987); DENVER REV. MUNICIPAL CODE, Art. IV §§ 28-93 to 28-95, § 28-97 (1991)).
83. *See id.* at 1626. For example, specific legal protections for homosexuals in state employment, under Colorado Executive Order D0035 (1990), would have been rescinded by Amendment 2. *See id.* (citing *Evans I*, 854 P.2d 1270, 1284-85 (Colo. 1993)).
discrimination in governmental and private settings.\textsuperscript{84} Justice Kennedy claimed that the Colorado Supreme Court had not decided whether Amendment 2 would also affect laws of general application.\textsuperscript{85} However, he argued that even if it did, this was unnecessary to determine given that Amendment 2 not only stripped homosexuals of special rights but also imposed a "special disability" upon them and them alone.\textsuperscript{86} Unlike other citizens, homosexuals under Amendment 2 would have to either persuade fellow citizens to amend the state constitution to obtain specific protection or, depending on how Amendment 2 is construed, to enact laws of general applicability.\textsuperscript{87} Unfortunately, at this point, Justice Kennedy's analysis merely ends and does not articulate why equal protection is violated if a group is required to amend the Constitution (or, in fact, merely resort to a higher level of decision making) in order to secure specific legal protections. As Justice Scalia argues in his dissent, such a consequence is not unknown to the law.\textsuperscript{88}

Justice Kennedy's opinion continues with a reference to the Court's modern equal protection jurisprudence and the tripartite standard of review under which governmental action is analyzed.\textsuperscript{89} If neither a fundamental right nor a suspect class is implicated, a legislative classification will be upheld if it bears a rational relation to some legitimate state interest.\textsuperscript{90}

Justice Kennedy, however, found that Amendment 2 "defies" this conventional inquiry for two reasons:

First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named

\textsuperscript{84} Id. at 1626 (emphasis added). Specifically, Justice Kennedy had in mind such laws of general application as COLO. REV. STAT. § 10-3-1104, which prohibits "unfair discrimination" in insurance. The concern was that Amendment 2 would prohibit a governmental official from making a determination that a decision based upon a person's homosexuality was arbitrary, in effect denying homosexuals even basic protection from arbitrary governmental action. See id.

\textsuperscript{85} See id. Such a consequence would "compound the constitutional difficulties" with Amendment 2. Id.

\textsuperscript{86} See id. at 1626-27.

\textsuperscript{87} See id. at 1627. Justice Kennedy added that "[n]o matter how local or discrete the harm, no matter how public and widespread the injury." Id.

\textsuperscript{88} See infra notes 125-129 and accompanying text.

\textsuperscript{89} See Romer, 116 S. Ct. at 1627. Three different standards of review have evolved over time: "strict scrutiny," "intermediate scrutiny," and "rational basis review." See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16 (2d ed. 1988).

group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests. 91

As far as his first point was concerned, Justice Kennedy explained how the Supreme Court requires a rational relationship between the legislative classification at issue and the interest sought to be advanced. 92 If a law is narrow enough in scope and grounded on a sufficient factual context, the Court will uphold it even if the law seems unwise. 93 Justice Kennedy, however, found that “Amendment 2 confounds this normal process of review;” and that the amendment “is at once too narrow and too broad” because “[i]t identifies persons by a single trait and then denies them protection across the board.” 94 Justice Kennedy thus concluded that Amendment 2 is “unprecedented in our jurisprudence . . . [and] [i]t is not within our constitutional tradition to enact laws of this sort.” 95

The second and more controversial theme that Justice Kennedy explored was the notion that Amendment 2 “raise[s] the inevitable inference that the disadvantage imposed . . . is born of animosity toward the class of persons affected.” 96 The Supreme Court has held that “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” 97 Justice Kennedy argued that Amendment 2 fits this conception of animus when it singles out and denies homosexuals any particular protection under the law. 98 While Justice Kennedy did identify Colorado’s interest in promoting citizens’ freedom of association as well as the State’s interest in conserving fiscal resources in order to combat discrimination against other groups, 99 he argued that

91. Romer, 116 S. Ct. at 1627.
92. See id.
93. See id. Justice Kennedy argued that “[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” Id. at 1627-28 (citing United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) (“If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”)).
94. Id. at 1628.
95. Id. Justice Kennedy argued that the guarantee of equal protection ensures that the government will remain impartial to all citizens. Yet “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.” Id. (quoting Sweatt v. Painter, 339 U.S. 629, 635 (1950)). This may explain why legislative classifications singling out certain classes of citizens for disfavored treatment are so rare. Id.
96. Romer, 116 S. Ct. at 1628.
97. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
98. See Romer, 116 S. Ct. at 1628-29.
99. See id. at 1629.
"[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." He held that it is classification of a group for its own sake and thus does not bear a rational relationship to a legitimate governmental purpose.

Justice Kennedy never addressed the other interests advanced by Colorado, let alone whether the expression of moral opposition to homosexuality can serve as a rational basis for Amendment 2. The most relevant case on homosexual rights, Bowers v. Hardwick, was never even cited. Instead, his opinion closes by merely concluding that Amendment 2 makes homosexuals unequal to all other citizens and is not supported by any rational basis. The State of Colorado, as Justice Kennedy put it, "cannot so deem a class of persons a stranger to its laws."

C. Justice Scalia’s Dissent

While Justice Kennedy’s majority opinion has been criticized as short on legal analysis, Justice Scalia’s dissent, which was joined by Chief Justice Rehnquist and Justice Thomas, has been criticized as long on vitriolic rhetoric. However, while it is easy to dismiss the dissent as a characteristic Scalia tirade, it is more instructive to understand what Justice Scalia believes are the reasons for the majority’s weak analysis. Justice Scalia made the unusual decision to publicly read his dissent, which he began by submitting that the majority “has mistaken a Kulturkampf for a fit of spite.” The Kulturkampf was German Chancellor Otto von Bismarck’s nineteenth century campaign of persecution against the Catholic Church under the banner of secularism and moderni-

100. Id.
101. See id.
102. See id.
103. Romer, 116 S.Ct. at 1629.
104. See Stoddard, supra note 75, at A19.
105. See Taylor, supra note 74, at 27 (describing Scalia’s dissent as “elegantly vitriolic”); Mike McKee, Scalia’s Dissent Dismays Law Schools, THE RECORDER, May 28, 1996, at 5 (noting the “venomous tone” of Scalia’s dissent); LEGAL TIMES, On-Line Exchange: Getting a Read on Romer v. Evans, May 27, 1996, at 8 (quoting William Lockard as stating that “Scalia’s dissent is just vicious”) (hereinafter On-Line Exchange). Justice Scalia’s dissent has even been labeled “homophobic.” Id. One law review Note employs the label “homophobic right” to describe individuals who disagree with the homosexual rights movement. See Note, 106 HARV. L. REV. 1905, 1910 (1993). Fortunately, one commentator recognized that labeling Justice Scalia’s dissent homophobic “a pejorative term coined by homosexuals in a transparent attempt to dismiss contrary views as irrational, etc.” is rather shallow legal analysis and does not contribute to a particularly meaningful discussion of the decision.” On-Line Exchange, supra at 8 (quoting J. Stephen Shi).
106. See Steve Rabey, Court Strikes Down Homosexual Rights Ban; Supreme Court Decision, CHRISTIANITY TODAY, June 17, 1996, at 68.
ty. Justice Scalia’s reference is an attempt to parallel Bismarck’s campaign with the Romer majority’s claim that Amendment 2 fails the rational basis test because it is a product of animus. Justice Scalia characterized Amendment 2 as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.” He found it particularly problematic that the majority placed “the prestige of [the] institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.” That proposition is at the heart of the cultural debate in Colorado—and America.

Justice Scalia’s claims flowed directly from the majority’s failure to adequately explain how it arrived at its decision. For example, Justice Scalia first confronted the majority’s dismissal of Colorado’s argument that Amendment 2 does not deprive homosexuals protection under laws of general applicability. As explained above, Justice Kennedy had argued that “[i]t is a fair, if not necessary, inference” that Amendment 2 does just that. He also argued that this was unnecessary, in any event, to address this issue given that Amendment 2 could be struck down on a narrower ground. Justice Scalia agreed that it was unnecessary to address the issue, but he offered a different reason for its supererogation: the Colorado Supreme Court had already resolved the issue. Justice Scalia cited a passage from the Colorado Supreme Court’s opinion that apparently construed the reach of Amendment 2—a passage that, according to Justice Scalia, the majority “utterly fails to distinguish,” even though it clearly indicates that general laws and policies prohibiting arbitrary discrimination would continue to protect homosexuals.

108. See THE RECORDER, supra note 72, at 10.
109. See id.
110. Romer, 116 S. Ct. at 1629 (Scalia, J., dissenting).
111. Id.
112. See id.
113. See id. at 1629-30.
114. See id. at 1626.
115. See Romer, 116 S. Ct. at 1626 (Scalia, J., dissenting).
116. See id. at 1630.
117. See id. at 1630. Justice Scalia cites the following passage from the Colorado Supreme Court in Evans II:

[It] is significant to note that Colorado law currently proscribes discrimination against persons who are not suspect classes, including discrimination based on age, § 24-34-402(1)(a), 10A C.R.S. (1994 Supp.); marital or family status, § 24-34-502(1)(a), 10A C.R.S. (1994 Supp.); veterans’ status, § 28-3-506, 11B C.R.S. (1989); and for any legal, off-duty conduct such as smoking tobacco, § 24-34-402.5, 10A C.R.S. (1994 Supp.). Of course Amendment 2 is not intended
to have any effect on this legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.


118. See id. at 1630.

119. Despite Justice Scalia's understanding, there has been a real dispute over what constitutes "special rights," especially in the context of Amendment 2. Compare Note, supra note 105, at 191 (arguing that "Amendment 2 is not about preventing 'special rights'; by making all private discrimination against lesbians and gay men 'immune from legislative, executive, or judicial regulation at any level of the state government,' the amendment actually facilitates private discrimination") with Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 NOTRE DAME L. REV. 393, 400 (1994) (arguing that proponents of homosexual rights are wrong when they claim they are seeking nothing more than the same civil rights as everyone else). It is a battle of semantics to be sure. The State of Colorado had argued that after Amendment 2, homosexuals would share an equal status with all other citizens in Colorado—that is, homosexuals would enjoy precisely the same rights they enjoyed prior to the enactment of the ordinances, laws, and policies conferring minority status which were repealed by Amendment 2. Petitioner's Brief at 6, Romer v. Evans, 116 S. Ct. 1620 (1996) (No. 94-1039). The challengers, however, claimed that the State's position was erroneous because prior to Amendment 2, homosexuals had a right to seek protection against discrimination from all levels of government; after Amendment 2, they no longer did. Respondent's Brief at 9-10, Romer v. Evans, 116 S. Ct. 1620 (1996) (No. 94-1039).

Unfortunately, while the challengers are correct that homosexuals are not equal with respect to having to amend the state constitution in order to secure specific rights against discrimination, they evade the main issue of whether such rights are truly equal rights. In reality, homosexuals are already protected against discrimination on the basis of race, gender, religion, marital status, and other protected categories. See Duncan, supra, at 400 (arguing that civil rights laws are merely exceptions to the general rule which is one of free choice); Michael J. Gerhardt and Tracey Maclin, 1995-96 Supreme Court Preview: Mock Arguments in Romer v. Evans, 4 WM. & MARY BILL OF RTS. 639, 646 (1995) (discussing, in a mock argument, how "most citizens occupy a status in which they are not given preferred treatment, in a variety of contexts, against both state action and private action"). Laws such as these which enumerate a class of persons entitled to protection against arbitrary discrimination properly amount to special rights because they extend protections that are unavailable to other, unprotected members of the population, whether it be law professors, hot dog vendors, or left-handed persons. See Gerhardt and Maclin, supra, at 654 (discussing how countless groups of people, like red-headed people, tall people, short people, or overweight people do not enjoy special protections under civil rights laws). In a similar fashion, homosexual conduct is one of those innumerable activities left unprotected by civil rights laws. Duncan, supra, at 400. Thus, Professor Duncan argues that when proponents of homosexual rights legislation argue that they are merely seeking the same civil rights as the public at large, they are very wrong. For example, if a Jewish landlord were to refuse to rent her apartment to a member of the Ku Klux Klan, the Klan member would hardly be protected from discrimination against his political affiliation under typical fair housing laws. Id. In fact, all civil rights grant special privileges in the sense that they involve the transfer of a property right from the title-holder (say, from a landlord) to the member of the protected class (whoever that may be). Petitioner's Brief at 7, Romer (No. 94-1039). Homosexual rights laws, like those Amend-
Justice Kennedy’s failure to address the Colorado Supreme Court’s potential construction of Amendment 2 is peculiar. The general rule is that, except in extreme circumstances, “state courts are the ultimate expositors of state law.” Perhaps Justice Kennedy was unwilling to defer to the Colorado Supreme Court’s narrow construction of Amendment 2 because the language of the amendment allowed such an interpretation. For example, Amendment 2 prohibits the “enact[ment] [or] enforce[ment] [of] any statute, regulation, ordinance or policy whereby [the enumerated categories] constitute . . . the basis of . . . any . . . claim of discrimina-

ment 2 was designed to repeal, offer special rights in the form of “the right to forced association—to compel others to employ you or rent to you on the basis of your sexual habits. Homosexuals are the only ‘sexual minority’ for whom such privileges are claimed.” DON FEDER, WHO’S AFRAID OF THE RELIGIOUS RIGHT? 87 (1996).

Some homosexual rights activists still conflate anti-discrimination laws with equal rights on the ground that protecting individuals on the basis of sexual orientation is as important as protecting individuals on the basis of race or sex; under such a view, equality would mandate treating similarly situated individuals alike. See, e.g., David A.J. Richards, Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives, 55 OHIO ST. L.J. 491, 511 n.81 (arguing that “[t]he rhetoric of ‘special rights’ has been conspicuously used in support of anti-lesbian/gay initiatives and referenda” and that this “blatantly mischaracterize[s] a principle claim of persons to be free of invidious discrimination that is no more a claim to special consideration than any other claim (for example, by African-Americans and women) to be protected from such discrimination”); U.S. LAW WEEK—DAILY EDITION, May 23, 1996 (quoting Denver Mayor Wellington Webb who argued that the true intent of Amendment 2 was “the removal of basic civil rights to a targeted population”). Thus, in the end, it may well be a semantics game whether anti-discrimination laws are really special rights or equal rights. However, the real debate over homosexual rights should be carried on at a higher level than merely the labels which attach to certain laws. Supporters of measures like Amendment 2 will obviously rely on the watchword of “special rights” while opponents will rely on “equal rights.” But the real debate should focus on whether homosexuality is analogous to race or sex for purposes of public policy or whether, instead, it is somehow less deserving of protection for a variety of reasons. Professor Duncan, for example, argues that race is more deserving of legal protection than homosexuality because race, unlike homosexuality, is a morally neutral characteristic which has no bearing on a person’s character. See Duncan, supra, at 402-03. He also argues that one of the reasons for enacting civil rights laws was to rectify the economic deprivation prevalent among blacks but that homosexuals are already economically advantaged in America. See id. at 406-08. Whether or not such claims have merit, these are the types of issues that must be debated.

120. Romer, 116 S.Ct. at 1630 (Scalia, J., dissenting) (emphasis added). Presumably, even the dissent would find Amendment 2 constitutionally infirm if it denied homosexuals the protection of laws of general applicability. Rational basis review represents the floor of equal protection. Eliminating homosexuals from the coverage of generally applicable laws would push them below the rational basis floor and thus lead to an equal protection deprivation. However, the discussion over extreme applications of the amendment seems beside the point given that Romer involved a facial challenge to Amendment 2. A party seeking to facially invalidate Amendment 2 would have to demonstrate that under no set of circumstances could the amendment be constitutional. See United States v. Salerno, 481 U.S. 739, 745 (1987). Thus, the extreme hypotheticals imagined by the challengers of Amendment 2 are irrelevant.

AMERICA'S CULTURE WAR

Moreover, it refers to "branches or departments" of government, suggesting that even courts could not provide remedies for arbitrary discrimination against homosexuals. More likely, however, Justice Kennedy may have simply believed that the Colorado Supreme Court had not given a definitive interpretation of Amendment 2. This would explain his statement that "[t]he state court did not decide whether the amendment had this effect." Nevertheless, Justice Kennedy's failure to so much as acknowledge the passage from the Colorado Supreme Court quoted by Justice Scalia and explain why it is not an authoritative construction is clearly a weakness in his analysis.

Whatever the case, Justice Scalia was more than willing to take on the majority's claim that Amendment 2 was unconstitutional even under a narrow construction of its language. As an initial matter, he argued that "[t]he central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others." Yet to Justice Scalia, if merely describing what Colorado has done does not serve to refute the equal protection challenge, then the Court's jurisprudence has reached "terminal silliness" because the occasional need to petition a higher level of government is the essence of a multilevel democracy. To support his point, Justice Scalia used the example of a state law that prohibits municipalities from awarding contracts to relatives of its public officials. After the state law is enacted, the group comprising the relatives of the officers must persuade the state legislature to change the law. By contrast, all other citizens need only persuade the municipality to award them a contract. Under the majority's reasoning, this could be a denial of equal protection. Justice Scalia suggested, however, that the majority did not advance this argument because it is clear that Amendment 2 is supported by a legitimate rational basis.

122. COLO. CONST., art. II, § 30(b) (emphasis added).
124. Romer, 116 S. Ct. at 1626.
125. Id. at 1630 (Scalia, J., dissenting).
126. See id.
127. See id. at 1631.
128. See id. at 1631.
129. See Romer, 116 S.Ct. at 1631 (Scalia, J., dissenting). The only way it does not satisfy normal rational basis analysis is if there is something "special" in making homosexuals resort to a higher level of governmental decisionmaking, but "[t]hat proposition finds no support in law or logic." Id.
Justice Scalia also argued that the majority eschewed the rational basis inquiry, and for good reason. The most relevant case on point, Bowers v. Hardwick, which held that the Due Process Clause does not prohibit making homosexual sodomy a crime, was not even cited by the majority. The continuing validity of Hardwick was not before the Court since the challengers to Amendment 2 did not seek to overrule it. Nevertheless, Justice Scalia persuasively argued that Romer contradicts Hardwick because if a State can constitutionally criminalize homosexual conduct, then it should be constitutionally permitted to take the lesser step of enacting other laws that merely disfavor homosexual conduct, or merely prohibit all levels of government from conferring preferential treatment on homosexuals. One potential objection to this "greater-includes-the-less" rationale might be that Amendment 2 impermissibly targets the status of individuals with a particular sexual orientation, rather than the acts associated with it—that is, those who do not engage in homosexual acts but only have a homosexual orientation. However, the Supreme Court has upheld legislative classifications even though they could have been drawn more perfectly to encompass only those individuals targeted by the legislation. Similarly, Amendment 2 is not constitutionally invalid merely because it also applies to individuals who do not engage in homosexual "conduct" or "practices." As Justice Scalia put it, "[i]f it is rational to criminalize the conduct, surely it is rational to deny special favor and protections to those with a self-avowed tendency or desire to engage in the conduct."

130. See id.
132. See Romer, 116 S. Ct. at 1631 (Scalia, J., dissenting).
134. See Romer, 116 S. Ct. at 1631-32 (Scalia, J., dissenting).
135. See id. at 1632. In fact, Justice Kennedy referred to Amendment 2 as a "status-based enactment" in the penultimate paragraph of the majority opinion. Id. at 1629.
136. See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (upholding policy against hiring methadone users as transit employees despite the fact that some users pose no threat to safety); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (upholding mandatory retirement scheme of age 50 for police officers despite fact that many officers over 50 still possess capacity to perform job).
137. See Romer, 116 S. Ct. at 1632 (Scalia, J., dissenting).
138. Id. at 1632. Justice Scalia also added that since Romer involved a facial challenge to Amendment 2, it must be established that under no circumstances can the amendment be valid. See id. (citing United States v. Salerno, 481 U.S. 739, 745 (1987)). Such a facial challenge to Amendment 2 necessarily fails because, at a minimum, the amendment can be applied, under Bowers, to those who engage in homosexual conduct. See id. at 1632-33.
Despite the majority's grim depiction of Coloradans as a people driven by animosity to pass Amendment 2, Justice Scalia argued that what a majority of Coloradans had done was "eminently reasonable." Justice Scalia had merely expressed their moral disapproval of homosexual conduct within the same moral heritage that has also produced moral disapproval of murder, polygamy, cruelty to animals, and so on. Justice Scalia chided the majority's portrayal of Coloradans as "a society fallen victim to pointless, hate-filled 'gay-bashing,'" calling it "so false as to be comical."

Justice Scalia also castigated the majority for simply asserting, in effect, that Amendment 2 is unconstitutional for no better reason than that "it has never happened before." Not only is this claim false on the legislative level, as Justice Scalia argued, but it has also proven false at the constitutional level. For example, the Eighteenth Amendment to the federal Constitution prohibited individuals from altering the national policy against prohibition even through state constitutional amendment or federal legislation.

Justice Scalia, however, advanced his most serious objection to the majority's reasoning with his discussion of the anti-polygamy amendments presently in force in five States. The constitutions of Arizona, Idaho, New Mexico, Oklahoma, and Utah each contain a provision declaring that polygamy is "forever prohibited." Here, then, is an instance where "[polygamists, and those who have a polygamous 'orientation,' have been 'singled out' by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions."

139. Id. at 1633.
140. See id.
141. Id. Justice Scalia points out that Colorado is one of the 25 States that have repealed its anti-sodomy laws. At the same time, Scalia acknowledges the problem "which arises when criminal sanction of homosexuality is eliminated but moral and social disapproval of homosexuality is meant to be retained." Id.
142. Romer, 116 S. Ct. at 1634.
143. See supra notes 126-128 and accompanying text.
144. See Romer, 116 S. Ct. at 1634 (Scalia, J., dissenting).
145. See id. at 1634-35.
146. See id. at 1635.
148. Romer, 116 S. Ct. at 1635 (Scalia, J., dissenting). Congress, in fact, required Arizona, New Mexico, Oklahoma, and Utah to include these antipolygamy provisions in their constitutions as a condition of their admission to statehood. Thus, Scalia argues that "this 'singling out' of the sexual practices of a single group for statewide, democratic vote—so utterly alien to our constitution system, the Court would have us believe—has not only happened, but has received the explicit approval of the United States Congress." Id.
Scalia’s view, either these provisions must now be unconstitutional or homosexuals have greater constitutional rights than polygamists. 149

Finally, Justice Scalia relied on *Davis v. Beason,* 159 a case in which the Court approved an Idaho territorial statute that not only denied polygamists the right to vote but also the ability to secure a constitutional amendment, thus exceeding even the breadth of Amendment 2. 151 Justice Kennedy offered only the most perfunctory analysis of *Beason* in the majority opinion and argued that the case “is not evidence that Amendment 2 is within our constitutional tradition” since aspects of it have been overruled. 152 However, as Justice Scalia correctly pointed out, provisions that criminalize polygamy and deny the right to vote to those who engage in polygamy remain good law. 153

The majority’s failure to persuasively distinguish how polygamists were not impermissibly targeted in *Beason* but homosexuals were impermissibly targeted by Amendment 2, led Justice Scalia to suspect that what was really at work in the majority opinion was that the Court was taking sides in America’s culture war, something which is “no business of the courts (as opposed to the political branches).” 154 Justice Scalia impugned the majority’s invention of “a novel and extravagant constitutional doctrine to take the victory away from traditional forces” as well as its disparagement of those who hold traditional moral values. 155 In fact, the notion that Amendment 2 was driven by nothing more than “a bare . . . desire to harm a politically unpopular group” 156 was, to Justice

149. See id.
150. 133 U.S. 333 (1890).
151. See *Romer,* 116 S. Ct. at 1635 (Scalia, J., dissenting).
152. Id. at 1628. For example, a person may no longer be denied the right to vote for merely advocating a certain practice. See *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (per curiam) (holding that criminal punishment of mere advocacy violates the First Amendment).
153. See *Romer,* 116 S. Ct. at 1636 (Scalia, J., dissenting) (citing *Richardson v. Ramirez,* 418 U.S. 24, 53 (1974)). Ironically, Justice Harlan, who is quoted by Justice Kennedy at the opening of the majority opinion, joined the majority in *Beason.* See id. at 1636. Even more strikingly, Justice Kennedy cited *Beason* in 1993, when he argued that “adverse impact will not always lead to a finding of impermissible targeting” because “a social harm may have been a legitimate concern of government for reasons quite apart from discrimination.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 535 (1993).
156. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
Scalia, "nothing short of insulting." Justice Scalia suggested that the majority opinion is infected by the elitist views of America’s lawyer class and the law school view of what is wrong with society, a view that contrasts markedly from the "plebeian attitudes" that prevail in Congress. Thus, Justice Scalia had very little difficulty concluding that the majority’s invalidation of Amendment 2 was an act “not of judicial judgment, but of political will.”

II. ANALYZING ROMER: A CATALOGUE OF POTENTIAL EXPLANATIONS

As Justice Scalia’s dissent effectively demonstrates, the paucity of analysis in the Romer majority opinion is both unfortunate and unacceptable. As Justice Scalia saw it, the majority brazenly disparaged the expression of traditional moral values by a majority of Colorado’s voters and barely attempted to legitimize its holding through reliance on substantive constitutional law. In the process, the Court opened itself up to the charge that it was making law, rather than interpreting it. The following subsections of this Comment therefore catalogue the potential explanations for the Romer decision in an attempt to reconcile its outcome with the Court’s existing jurisprudence.

A. Explaining Romer

1. The Fundamental Right to Equal Participation in the Political Process

One potential explanation for the outcome in Romer was provided by the Colorado Supreme Court in Evans v. Romer (“Evans I”) when it held that there is a “fundamental right to [equal participation] in the political process, and that any legislation or state constitutional amendment which infringes on this right by ‘fencing out’ an independently identifiable class of persons must be subject to strict judicial scrutiny.” To establish such a right, the

158. See id.
159. Id.
161. Id. at 1282. See also Equality Found. v. City of Cincinnati, 860 F. Supp. 417, 430 (S.D. Ohio 1994) (relying on Evans I to permanently enjoin implementation of amendment to city charter of Cincinnati which prohibited state government from granting special class status on basis of sexual orientation, conduct, or relationship); Equality Found. v. City of Cincinnati, 838 F. Supp. 1235, 1238 (S.D. Ohio 1993); Evans II, 882 P.2d 1335, 1341 (Colo. 1994) (affirming holding of Evans I). This Comment will designate the 1993 Equality Found. decision as “Equality I” and the 1994 Equality Found. decision as “Equality II.”
Colorado court relied on several equal protection cases decided by the Supreme Court concerning voting rights, reapportionment, and “candidate eligibility” issues. However, the court relied most heavily on Supreme Court cases involving discriminatory restructuring of normal political processes, commencing with *Hunter v. Erickson.* *Hunter* involved a charter amendment enacted by Akron, Ohio voters that, unlike with all other ordinances, prohibited the passage of any fair housing ordinance unless first approved by the electorate. The Court invalidated the charter amendment arguing, among other things, 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.”

While *Hunter* and its offspring all involved race, a suspect class, the Colorado Supreme Court depended on *Gordon v. Lance* to support its theory that *Hunter* and its progeny gave implicit recognition to a fundamental right to equal participation in the political process. *Gordon* involved a West Virginia supermajority referendum requirement that demanded a three-fifths vote before political subdivisions may incur bonded indebtedness or


163. See *Evans I,* 854 P.2d at 1277-78 (relying on *Reynolds v. Sims,* 377 U.S. 533, 565 (1964) (holding that “each and every citizen has an inalienable right to full and effective participation in the political processes”)).

164. See *id.* at 1278 (relying on *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979) (invalidating Illinois statutes discriminating against minority parties in local elections); *Williams v. Rhodes,* 393 U.S. 23 (1968) (invalidating statute making it “virtually impossible” for new political parties with widespread support to be placed on ballot).


166. See *Hunter,* 393 U.S. at 386.

167. *Id.* at 393 (citing *Reynolds v. Sims,* 377 U.S. 533 (1964)). One commentator has argued that Amendment 2 is even more burdensome because its repeal requires state-wide majority approval unlike the amendment in *Hunter* which only requires city-wide majority approval. See Note, *supra* note 105, at 1917.

168. For example, in *Washington* the Court repeatedly emphasized the racial nature of the classification at issue. *Washington,* 458 U.S. at 471, 474, 485-86. See also *Hunter,* 393 U.S. at 391 (discussing whether the charter amendment “places special burdens on racial minorities”).

169. 403 U.S. 1 (1971).

170. See *Evans I,* 854 P.2d 1270, 1281-84 (Colo. 1993).
increased state tax rates. The Supreme Court upheld the law but, as Evans I argued, Gordon distinguished Hunter on the ground that the West Virginia supermajority requirement did not single out an "independently identifiable group," unlike the charter amendment in Hunter. Thus, the argument runs, Hunter applies to any law affecting an independently identifiable group, regardless of whether it is a suspect class.

The court's reasoning in Evans I is faulty, however, because it too easily dismisses James v. Valtierra. Decided the same year as Gordon, James expressly refused to extend the reasoning in Hunter to indigent persons because they are not a suspect class. In refusing to do so, James viewed Hunter as a suspect class case rather than a fundamental rights case, as the dissent in Evans I argued. James involved the constitutionality of a California vot-

---

171. See Gordon, 403 U.S. at 7.
172. Id. at 5.
173. See Evans I, 854 P.2d at 1281-82. The Evans I court pointed out that unlike in Hunter where "[t]he class singled out . . . was clear—those who would benefit from laws barring racial, religious, or ancestral determinations," the Gordon Court did not perceive any independently identifiable group or category that favors bonded indebtedness over other forms of financing." Id. at 1281-82 (quoting Gordon, 403 U.S. at 5). Thus, the Gordon Court found no part of the population was "fenced out" from the franchise because of the way they will vote. Id. at 1282 (quoting Gordon, 403 U.S. at 5).
174. See Evans I, 854 P.2d at 1282. See also Equality II, 860 F. Supp. 417, 431 (S.D. Ohio 1994); Equality I, 838 F. Supp. 1235, 1240-41 (S.D. Ohio 1993). The Evans I court argued that the language in Hunter speaks in broader terms than just racial discrimination. Evans I, 854 P.2d at 1279. For example, the Evans I court noted that the Hunter Court likened procedural burdens that make it more difficult to enact legislation with dilution of voting power, and yet the Court cited Reynolds v. Sims, 377 U.S. 533 (1964), and Avery v. Midland County, 390 U.S. 474 (1968), "neither of which had anything to do with discrimination against racial, or any other traditionally suspect class of persons." Id. at 1279-80. The Evans I court added that if cases like Hunter and Washington "were decided solely on the basis of the 'suspect' nature of the classes involved, there would have been no need for the Court to consistently express the paramount importance of political participation." Id. at 1283. See also Note, Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law, 35 B.C. L. REV. 221, 256 (1993) ("Even if homosexuals are not a suspect class, strict scrutiny should still be applied as Amendment 2 interferes with the fundamental right of equal political representation.").
176. Id. at 141. The Evans I court attempted to discount James by arguing that "[it] is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on Hunter." Evans I, 854 P.2d at 1282 n.21. However, the court's argument only serves to "underscore the Hunter Court's reliance on the classification being 'suspect' rather than merely identifiable because the poor are certainly an independently identifiable class of persons." Craig Cassin Burke, Note, Fencing Out Politically Unpopular Groups from the Normal Political Processes: The Equal Protection Concerns of Colorado Amendment Two, 69 IND. L.J. 275, 292 (1993).
177. See Evans I, 854 P.2d at 1298 (Erickson, J., dissenting). Several cases and commentators have viewed Hunter's holding as predicated on an unconstitutional racial classifications. See Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975) (stating that the amendment in Hunter was struck down as a racial classification); Lee v. Nyquist, 318 F. Supp. 710, 718 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971) (stating that the principle
er initiative that prohibited low-income housing projects from being developed, constructed, or acquired by a state public body until a majority of voters approved the project in a referendum. The Court held that, "[u]nlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing 'special burdens on racial minorities within the governmental process.'" Additionally, unlike the referendum provision in Hunter, the California amendment does not draw "distinctions based on race." The Court thus concluded that "[t]he present case could be affirmed only by extending Hunter, and this we decline to do." While some courts have relied on Gordon's "independently identifiable group" language to strike down anti-homosexual initiatives on the belief that Hunter represents a broader fundamental right theory, the Kennedy majority in Romer wisely avoided straining the language in that case in order to create a new and potentially expansive fundamental right, especially when creation of new rights is so strongly disfavored.

from Hunter deals with classifications based on race); Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 (4th Dist. 1991) (stating that Hunter involved strict scrutiny based on classifications affecting traditionally suspect characteristics); Robert H. Beinfeld, Note, The Hunter Doctrine: An Equal Protection Theory that Threatens Democracy, 38 Vand. L. Rev. 397, 405 (1985) (stating that Hunter was based on racial classifications); Seth Hilton, Comment, Restraints on Homosexual Rights Legislation: Is There a Fundamental right to Participate in the Political Process?, 28 U.C. Davis L. Rev. 445, 466-67 (1995) (stating that Hunter was a suspect class case).

178. See James, 402 U.S. at 139.
179. Id. at 140 (quoting Hunter, 393 U.S. at 391).
180. Id.
181. Id. at 141.
182. See Evans I, 854 P.2d 1270, 1280 (Colo. 1993); see also Equality II, 860 F. Supp. 417, 430 (S.D. Ohio 1994); Equality I, 838 F. Supp. 1235, 1240-41 (S.D. Ohio 1993). But see Hilton, supra note 177, at 464 (noting that "courts invalidating procedural burdens on homosexuals rights [like Evans I ignore] language in Hunter indicating that the Supreme Court applied strict scrutiny because it was a suspect class case"). Hilton would nevertheless find a fundamental right to participate in the political process in the Court's right to vote cases. Id. at 469-472.
183. In fact, the "independently identifiable group" language from Gordon must be attributed to Hunter, James, and Washington in a post hoc fashion since none of those cases used that phrase in its opinion. See Evans I, 854 P.2d at 1298 n.15 (Erickson, J., dissenting).
184. See, e.g., id. at 1291. See also Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."), San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."). It is ironic that the point of the fundamental right to equal participation in the political process is to foster the process of self-government, and yet it depends on the intervention of the judiciary to achieve it. The intervention of the judiciary can often be inimical to the process of self-government. As Professor David M. Smolin argues, it is particularly dangerous for the judiciary to create
It cannot seriously be doubted that Amendment 2 requires homosexuals to resort to a higher level of governmental decisionmaking (viz. a state constitutional amendment) in order to secure the enactment of pro-homosexual legislation, and in that sense, it tilts the political process against them. However, as Justice Scalia observed, the occasional need to resort to a higher level of decisionmaking is a hallmark of a multilevel democracy. Amendment 2 neither deprives homosexuals of their right to vote, nor dilutes it; it simply precludes the passage of certain statutes and ordinances that benefit them. Homosexuals remain free to employ the same political process by which Amendment 2 was approved, but they are not free to guarantee the success of their political agenda in that process. However, the novel fundamental right theory fashioned by the Colorado Supreme Court, which no United States Circuit Court has recognized, would essentially skew the political process against the majority in favor of a minority that is not a suspect class—something unprecedented in American constitutional law.

2. Heightened Scrutiny

Even if Hunter is properly understood as a suspect class case, several other potential explanations may account for the outcome in Romer, including the possibility that the decision harbingers heightened scrutiny for classifications based on sexual orientation.

new constitutional rights that have no historical foundation and impose them on a divided society because “[s]elf-government then becomes government by the judiciary.” David M. Smolin, Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry, 76 IOWA L. REV. 1067, 1100 (1991).
185. See Romer, 116 S. Ct. at 1630 (Scalia, J., dissenting).
186. While the Colorado Supreme Court relied on right to vote cases such as Reynolds v. Sims, 377 U.S. 533 (1964), and Kramer v. Union Sch. Dist. No. 15, 395 U.S. 621 (1969), as support for the fundamental right to participate equally in the political process, the majority in Evans I, 854 P.2d at 1276-78, never argued that Amendment 2 infringed on homosexuals’ rights to vote. Id. at 1295 n.12 (Erickson, J., dissenting).
187. The Sixth Circuit made the same observation with Cincinnati’s anti-homosexual city charter amendment, an amendment paralleling Amendment 2 in denying homosexuals preferential treatment of the law, and thus it reversed the trial court’s holding that there is a fundamental right to equal access to the political process. Equality Found. v. City of Cincinnati, 54 F.3d 261, 269 (6th Cir. 1995), vacated 116 S. Ct. 2519 (1996). The Sixth Circuit explained that opponents of the city charter amendment “simply lost one battle of an ongoing political dispute.” Id. The Sixth Circuit’s decision will be designated as “Equality III.”
188. See id. at 268 n.5.
189. See Beinfeld, supra note 177, at 428. (1985).
190. Cf. Romer, 116 S. Ct. at 1633 (Scalia, J., dissenting) (arguing that Colorado’s actions were not prohibited by any principle set forth in the Constitution).
191. See, e.g., LEGAL TIMES, Getting a Read on Romer v. Evans, May 27, 1996, at 8 (quoting David Sobelsohn (“The bottom line is that the Court will now generally give heightened scrutiny for classifications based on sexual orientation.”)).
While the challengers in Romer did not appeal the trial court's holding that homosexuals are not a suspect or quasi-suspect class,\(^\text{192}\) and even though the Court ostensibly decided the case under rational basis review,\(^\text{193}\) Romer could be another Reed v. Reed.\(^\text{194}\) In Reed, the Court purportedly applied rational basis review to strike down a sex-based classification,\(^\text{195}\) but in reality ushered in heightened scrutiny for gender.\(^\text{196}\) Amendment 2, after all, should have survived rational basis review, as Justice Scalia contended.\(^\text{197}\) Courts applying the rational basis standard of review will uphold a classification under equal protection "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."\(^\text{198}\) An imperfect fit between means and ends, moreover, is immaterial as rational basis review does not demand a "perfect fit between means and ends,"\(^\text{199}\) only a "rough accommodation."\(^\text{200}\) In the absence of a suspect class or fundamental right, the classification is presumed valid\(^\text{201}\) because it is not the province of "the judiciary [to] sit as a superlegislature [and] judge the wisdom or desirability of legislative policy determinations."\(^\text{202}\)

---

\(^\text{192}\) See Evans II, 882 P.2d 1335, 1341 n.3 (Colo. 1994). The trial court had concluded that homosexuals do not meet one of the elements of suspectness—to wit, political powerlessness—and the respondents did not appeal the ruling. Id.

\(^\text{193}\) See Romer, 116 S. Ct. at 1627 ("[Amendment 2] lacks a rational relationship to legitimate state interests"). See also id. at 1631 n.1 (Scalia, J., dissenting) ("The Court evidently agrees that ‘rational basis’—the normal test for compliance with the Equal Protection Clause—is the governing standard.").

\(^\text{194}\) 404 U.S. 71 (1971).

\(^\text{195}\) See id. at 76.

\(^\text{196}\) See generally, Tribe supra note 89, at § 16.

\(^\text{197}\) See Romer, 116 S. Ct. at 1631 (Scalia, J., dissenting) (stating that the answer to the question whether there is a legitimate rational basis for Amendment 2 is "obviously yes").

\(^\text{198}\) FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993) (emphasis added). In other words, the use of the term "conceivable" means that the purpose or rationale behind the governmental classification need not even be articulated. See Heller v. Doe, 113 S. Ct. 2637, 2642 (1993). It will be upheld so long as it is possible to derive a hypothetical reason. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980); McDonald v. Bd. of Election Comm'n, 394 U.S. 802, 809 (1969). The State "has no obligation to produce evidence to sustain the rationality of a statutory classification." Heller, 113 S. Ct. at 2643. Instead, the party challenging the classification must "negate every conceivable basis which might support it." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973). But see City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 447-48 (1985) (striking down under rational basis review a zoning law affecting the mentally retarded because the law was based on "a bare . . . desire to harm a politically unpopular group") (citations omitted).

\(^\text{199}\) Heller, 113 S. Ct. at 2643.


\(^\text{201}\) See Beach Communications, 113 S. Ct. at 2101.

\(^\text{202}\) New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam). See also Beach Communications, 113 S. Ct. at 2101 (holding that rational basis is not a "license for courts to judge the wisdom, fairness, or logic of legislative choices"). Thus, under rational
faith in the political process to eventually rectify its own improvident results.\(^\text{203}\)

Accordingly, it is not seriously contestable that Amendment 2 at least \textit{conceivably} advances religious liberty and associational privacy, for example, by prohibiting the enactment of statutes or ordinances prohibiting individuals and organizations from refusing to rent to, or live with, homosexuals.\(^\text{204}\) Whether the means-end connection between Amendment 2 and the interests sought to be advanced is “made with mathematical nicety” is immaterial,\(^\text{205}\) as only a “rough accommodation” is necessary.\(^\text{206}\) \textit{Romer} could thus be understood as a heightened scrutiny case, which would explain the Court’s attempt to distinguish the anti-polygamy territorial statute in \textit{Beason}, a provision which Justice Scalia persuasively argues is even harsher than Amendment 2.\(^\text{207}\)

Is such a shift justified in light of \textit{Bowers v. Hardwick}, assuming that \textit{Hardwick} is still good law?\(^\text{208}\) A number of commentators and some judges have argued that \textit{Hardwick} is not dispositive of the equal protection issue.\(^\text{209}\) For example, Judge Wil-

\(^{203}\) See, \textit{e.g.}, \textit{Cleburne}, 473 U.S. at 440 (stating that “[t]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process”); \textit{Vance v. Bradley}, 440 U.S. 93, 97 (1979) (concluding that “[a]bsent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process”).

\(^{204}\) See supra notes 34-39 and accompanying text. In fact, the Sixth Circuit in \textit{Equality III}, 54 F.3d 261 (6th Cir. 1995), arrived at exactly this conclusion with a voter-enacted city charter that is strikingly similar to Amendment 2 in prohibiting protected status, quota preferences, and other preferential treatment for homosexuals. The Sixth Circuit argued that this interest, among others, “[i]s at least arguably advanced by the Amendment,” and it refused to impose its own view as to whether the Amendment was desirable policy. \textit{Id.} at 270. The Circuit Court further concluded that the Amendment could arguably save taxpayer money by withdrawing governmental supervision of private conduct. \textit{Id.} at 270. Most important, it agreed that the expression of morality by the electorate is a legitimate governmental interest. \textit{Id.} at 271 n.10 (citing \textit{Bowers v. Hardwick}, 478 U.S. 186, 196 (1986)).


\(^{207}\) See \textit{Romer v. Evans}, 116 S. Ct. 1620, 1636 (1996) (Scalia, J., dissenting) (arguing that Amendment 2 is “much more mild” than the anti-polygamy territorial statute).

\(^{208}\) See supra note 133-138 and accompanying text.

liam A. Norris, concurring in Watkins v. United States Army, has argued that, first, Hardwick dealt with homosexual conduct as opposed to homosexual orientation or status. Second, Hardwick was a due process, not an equal protection, case and the two inquiries implicate antithetical concerns. The Due Process Clause protects customs that are “deeply rooted in this Nation’s history and tradition,” whereas the Equal Protection Clause “protects minorities from discriminatory treatment at the hands of the majority.” Thus, Judge Norris claimed it was “perfectly consistent” with Hardwick to hold that homosexuals are a suspect or quasi-suspect class. However, every Circuit Court after Hardwick addressing this issue has argued that entitling homosexuals to special constitutional consideration under heightened scrutiny is incongruous with Hardwick.

For example, the D.C. Circuit in Padula v. Web-
ster\textsuperscript{216} held that the Hardwick Court's rejection of a privacy right to engage in homosexual conduct foreclosed the possibility of heightened scrutiny for homosexuals, even though the Court in Hardwick never addressed the equal protection issue.\textsuperscript{217} The D.C. Circuit argued that it would be "quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."\textsuperscript{218}

Even apart from this anomaly, serious questions remain with respect to whether homosexuals satisfy all the criteria for suspect class status.\textsuperscript{219} For example, some courts have questioned whether homosexuality is immutable.\textsuperscript{220} Further, there are also serious questions as to whether homosexuals are politically powerless.\textsuperscript{221}

Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (noting that Hardwick's countenance of the criminalization of homosexual conduct precludes suspect status for homosexuals); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (finding that it cannot be asserted that discrimination against homosexuals is constitutionally infirm after Hardwick); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (contending that Hardwick's permitted criminalization of homosexual conduct is inconsistent with strict scrutiny for homosexuals as a class).

216. See id. at 103.
217. See id. at 103.
218. Id. The D.C. Circuit added:

[I]n all those cases in which the Supreme Court has accorded suspect or quasi-suspect status to a class, the Court's holding was predicated on an unarticulated, but necessarily implicit, notion that it is plainly unjustifiable . . . to discriminate invidiously against the particular class . . . . If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Id. (citations omitted).


220. See, e.g., High Tech Gays, 895 F.2d at 573 ("[Homosexuality] is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes"); Woodward, 871 F.2d at 1076 ("[H]omosexuality is primarily behavioral in nature [and] conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups").

221. See, e.g., Romer v. Evans, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting) (noting "disproportionate political power of homosexuals"); High Tech Gays, 895 F.2d at 574 (finding that homosexuals have the ability to attract attention of legislatures as evidenced by States and municipalities enacting anti-discrimination laws protecting homosexuals); Ben-Shalom v. Marsh, 881 F.2d 454, 466 n.9 (7th Cir. 1989) ("Homosexuals are not without political power"); Steffen v. Cheney, 780 F. Supp. 1, 7 (D.C. 1991), rev'd sub
If there is one certainty, however, it is that in the end it would be extremely ironic if *Romer* represents the watershed case on special status for homosexuals, since this is exactly what Colorado voters were trying to avoid with Amendment 2.\textsuperscript{222}

3. Status v. Conduct

In the penultimate paragraph of the majority opinion, Justice Kennedy referred to Amendment 2 as a “status-based enactment.”\textsuperscript{223} Thus, there is speculation whether the Court invalidated Amendment 2 because it irrationally targeted the “status” of homosexuality as opposed to homosexual “conduct” or “practices.”\textsuperscript{224} The status-conduct distinction draws support from the seminal case of *Robinson v. California*,\textsuperscript{225} in which the Court held that California could not criminalize the mere status of drug addiction as opposed to the conduct of drug use, which is legally sanctionable.\textsuperscript{226} The Court said the statute violated the Eighth Amendment prohibition against cruel and unusual punishment.\textsuperscript{227}

However, it is unclear how much explanatory force the status-conduct distinction provides for *Romer*. First, as Justice Scalia pointed out, several Circuit Courts have rejected the status-conduct distinction as one “without a difference.”\textsuperscript{228} Even the Colorado Supreme Court argued that the four characteristics identifying individuals under Amendment 2—sexual orientation, conduct, practices, and relationships—“are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons.”\textsuperscript{229} Second, Amendment 2 is dis-

\textsuperscript{nom}, Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), vacated for reh’g en banc, 8 F.3d at 70 (D.C. Cir. Jan 7, 1994), aff’d en banc sub nom, Steffan v. Perry, 41 F.3d 677 (1994) (“[H]omosexuals as a class enjoy a good deal of political power in our society”). In fact, the trial court in *Evans v. Romer* failed to declare homosexuals a suspect class precisely because they fail the element of political powerlessness. *Evans v. Romer*, No. 92-CV7223, 1993 WL 518586, at *12 (Colo. Dist. Ct. Dec. 14, 1993), aff’d, 882 P.2d 1335 (1994), aff’d, 116 S.Ct. 1620 (1996) (“No adequate showing has been made of the political vulnerability or powerlessness of gays.”). The fact that 46.6% of Colorado voters cast a vote against Amendment 2 seems to clearly display the potency of the homosexual movement. *See supra* note 10 and accompanying text.

\textsuperscript{222.} See *Evans II*, 882 P.2d at 1356 (Erickson, J., dissenting).

\textsuperscript{223.} *Romer*, 116 S. Ct. at 1629.

\textsuperscript{224.} See *On-Line Exchange*, supra note 105, at 12 (quoting Stephen Gillers).

\textsuperscript{225.} 370 U.S. 660 (1962).

\textsuperscript{226.} See *id.* at 667.

\textsuperscript{227.} See *id.* (finding that narcotic addiction is a mere illness).


\textsuperscript{229.} *Evans II*, 882 P.2d 1335, 1349-50 (Colo. 1994).
tistinguishable from the statute in Robinson because Robinson dealt with criminal sanctions whereas Amendment 2 deals with the removal of preferential treatment. Under rational basis review, as Scalia argued, "[i]f it is rational to criminalize [homosexual] conduct [under Hardwick], surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct." Thus, without the benefit of heightened scrutiny for homosexuals and the fact that the Romer majority never even cited Robinson, it is unlikely that the status-conduct rationale provides much satisfaction.

4. "Active" Rational Basis Review and the Animus Principle

Yet another explanation for Romer draws support from the Court's 1985 decision in City of Cleburne v. Cleburne Living Center, Inc. In that case the Court held that mental retardation was not a suspect or quasi-suspect classification. Nevertheless, the Court inquired into the legislative record to determine whether the classification was related to a legitimate governmental interest or merely "a bare . . . desire to harm a politically unpopular group." By probing the record for a legitimate state interest, the Court in Cleburne went beyond conventional rational basis review, under which a law will be upheld if any conceivable state of facts provides a rational basis for the classification. Instead, the Court invoked what has been termed "active" rational basis review, which some courts have employed even when refusing to subject homosexual classifications to heightened scrutiny. For example, the...
Ninth Circuit in *Pruitt v. Cheney* relied on *Cleburne* when it reversed and remanded a district court’s dismissal of an equal protection claim brought by an Army Reserve Officer, an admitted homosexual, by arguing that courts must probe the “record” to determine whether the government has a rational basis for a challenged classification. Unfortunately, “active” rational basis review does not really explain *Romer* given that Amendment 2 was a popular referendum rather than a legislative enactment and thus there was no record for the *Romer* Court to probe.

On the other hand, *Cleburne* also established that bare animus toward a group is not a legitimate governmental interest. Justice Kennedy appears to have relied solely on the animus principle from *Cleburne* in concluding that Amendment 2 was born of animus and “a bare... desire to harm a politically unpopular group.” In other words, he treated *Romer* as an illegitimate purpose case, meaning that none of the grounds advanced to justify Amendment 2 were rational.

The illegitimate purpose rationale may well explain the outcome in *Romer*, but it is not without its difficulties. The principal difficulty is that Amendment 2 was a voter referendum. The judicial difficulties associated with delving into legislative motivations are already legion, but they are compounded when probing voter referendums like Amendment 2, which have little or no legislative history regarding their purpose or rationale. In fact, it is difficult enough for social scientists to scrutinize voter motivations, let alone a Supreme Court that lacks the institutional competence and infrastructure to make such evaluations. That is not to say that

---

238. 963 F.2d 1160 (9th Cir. 1991).
240. See *Evans II*, 882 P.2d 1335, 1362 (Colo 1994) (Erickson, J., dissenting).
241. The *Cleburne* Court did not pioneer the animus principle. The Court in United States Dep’t of Agric. v. *Moreno* also argued “that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Moreno*, 413 U.S. at 534.
243. See, e.g., *Cleburne*, 473 U.S. at 446-47 (noting that some objectives are not legitimate state interests); Metropolitan Life Insurance Co. v. *Ward*, 470 U.S. 869, 882 (1985) (“Promotion of domestic business by discriminating against competitors is not a legitimate interest”); *Zobel v. Williams*, 457 U.S. 55, 63 (1982) (rewarding citizens for past contributions to governmental treasury is not a legitimate state purpose); *Moreno*, 413 U.S. at 534 (excluding “hippies” from federal food stamp program is not a legitimate governmental purpose).
244. See *Evans II*, 882 P.2d 1335, 1362 (Colo. 1994) (Erickson, J., dissenting).
245. In some ways, the animus principle from cases like *Cleburne* is really an easy escape valve that enables the Court to invalidate a particular enactment it knows satisfies rational basis review: it can simply infer animus when no legal basis exists to invalidate
the Court never probes motivation—it often does—but in all the cases in which the animus principle was invoked to strike down an enactment, such as Cleburne or United States Department of Agriculture v. Moreno, a legislative enactment was involved. While the Court in Cleburne also explicitly stated that “the electorate as a whole, whether by referendum or otherwise,” may not violate the Equal Protection Clause, greater judicial caution is warranted for a voter referendum which should be analyzed on the constitutionality of its terms and conditions rather than by the statements of some of the supporters behind it.

The Romer majority was no doubt aware of the statements made by some of the supporters of Amendment 2, including the campaign literature of Colorado for Family Values which claimed that homosexuals are “sex-crazed, disease-ridden perverts out to destroy the traditional family.” Yet even Justice Stevens, one of the justices joining the Romer majority, has argued that “a political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decision-making process were motivated by a purpose to disadvantage a minority group.” In fact, the Sixth Circuit recently held that “in the referendum context, it is impermissible for the reviewing court to inquire into the possible actual motivations of the electorate.” Rather, “the court must consider all hypothetical justifications which potentially support the enactment.”

---

246. 413 U.S. 528 (1973).
247. See Cleburne, 473 U.S. at 436 (involving local zoning regulation); Moreno, 413 U.S. at 529 (involving federal food stamp act).
249. Indeed, as Chief Justice Marshall recognized long ago, a valid legislative enactment cannot be nullified merely because of its supporters’ impure motives. See Fletcher v. Peck, 10 U.S. 87, 131 (1810).
250. All Things Considered: Gay Rights Battle Heats Up in Colorado (National Public Radio broadcast, Feb. 12, 1993). Of course, it should be noted that poisonous rhetoric is common in election campaigns.
252. Equality III, 54 F.3d 261, 270 n.9 (6th Cir. 1995). See also Clarke v. City of Cincinnati, 40 F.3d 807, 815 (6th Cir. 1994), cert. denied, 115 S. Ct. 1960 (1995); Arthur v. City of Toledo, 782 F.2d 565, 574 (6th Cir. 1986). The Circuit Court in Arthur, for example, suggested that if the judiciary will probe voter motivation, it should save its institutional capital for suspect classes—more specifically, race. Arthur, 782 F.2d at 573-74.
253. Equality III, 54 F.3d at 270 n.9 (citing Beach Communications, 113 S. Ct. at 2101). But see generally, Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503 (1990) (arguing that less judicial restraint is appropriate when plebiscites are challenged).
Ironically, the Court in Romer cited to Heller v. Doe,254 a case in which the Court reiterated the rule that a classification will be upheld if there is any conceivable set of facts to support it.255 Yet the Romer majority eschewed this test. Instead, it engaged in the precarious judicial enterprise of delving into the motivations of Colorado voters rather than reviewing whether any potential justifications could hypothetically support Amendment 2. For the Court to have suggested that the Coloradans who voted for Amendment 2 were engaging in “gay-bashing” is quite bold indeed,256 especially given that Coloradans have been fairly tolerant of homosexuality and, as Justice Scalia observed, Colorado was one of the first 25 States to repeal its anti-sodomy laws.257

The most likely explanation for Romer may be, as Justice Scalia suggested, not that Coloradans were actually motivated by animus when voting for Amendment 2—there is no real way for the Court or anyone else to know this for sure—but that the majority believed that such stern moral disapproval of homosexuality could be nothing but animus—a view that accords perfectly with the views of the lawyer class and law school elite (and, in fact, of academic and intellectual elites in general).258

B. The Final Evaluation

While several less persuasive theories abound for challenging Amendment 2,259 even the most persuasive theories explored above fail to justify Romer. In the final evaluation, one finds a litany of explanations but an absence of justifications. Thus Justice Scalia’s charge that the majority was merely reflecting the politically correct views of the lawyer class and law school elite, and

255. See id. at 2642 (citing Beach Communications, 113 S. Ct. at 2101).
256. It really is a short step to conclude that very few Coloradans were driven by animosity toward homosexuals. See Taylor, supra note 74, at 27 (explaining how Colorado voters were probably motivated by various concerns, ranging from association issues to desires in avoiding cultural trends promoting homosexuality to their children).
257. See Romer, 116 S. Ct. at 1633 (Scalia, J., dissenting).
258. This Comment uses the terms “modern liberal,” “liberal neutralist” and “academic and law school elites” interchangeably.
259. See, e.g., Evans II, 882 P.2d 1335, 1351-56 (Colo. 1994) (Scott, J., concurring) (arguing that Amendment 2 violates the right to peaceably assemble and petition the government for redress of grievances which is found in the Privileges and Immunities Clause); Note, supra note 105, at 1919-22 (discussing potential First Amendment free expression objections to anti-homosexual initiatives); Hans A. Linde, When Initiative Law-making Is Not “Republican Government”: The Campaign Against Homosexuality, 72 OR L. REV. 19 (1993) (arguing that anti-homosexual ballot measures violate principles of republicanism found in the Guarantee Clause); Richards, supra note 119, at 493 (arguing that anti-homosexual initiatives use public law to express “constitutionally forbidden sectarian intolerance against [homosexuals’] fundamental rights of conscience, speech, and association”).
thereby choosing sides in the culture war, is validated.\textsuperscript{260} It is not as if the Court had no alternative but to choose a side in the culture war, of course.\textsuperscript{261} If that were the case, anytime the Court decided a case it would be \textit{ipso facto} taking sides, and clearly that is unpersuasive. Justice Scalia does not contend that the Court took the wrong side in the culture war.\textsuperscript{262} Rather, his dissension flows from the fact that the Court failed to serve as a neutral tribunal that decides cases on the basis of substantive law rather than on the basis of "the law-school view of what 'prejudices' must be stamped out."\textsuperscript{263} The majority viewed Amendment 2 as bad law—not because it failed the rational basis test or because it deprived homosexuals of protection under laws of general applicability (since it did not grapple with the Colorado Supreme Court's apparent interpretation that it does not), but because it clashed with the prevailing sentiment in elitist academic and intellectual circles where moral opposition to homosexuality is seen as anathema to the prevailing liberal Zeitgeist. Justice Scalia would leave the dispute over the desirability of Amendment 2 as public policy to the political process. In his view, the Court's proper role is to be a neutral institution that invalidates \textit{unconstitutional} laws rather than a roving commission that patrols the political landscape to strike down laws it dislikes.\textsuperscript{264}

As it now stands, legal commentators can only guess what \textit{Romer} may portend for other controversial public policy issues such as prohibitions on homosexuals in the military or refusals to recognize same-sex marriages—issues that the Court can simply brand as motivated by bare animus in order to defeat traditional views.\textsuperscript{265} Elsewhere, Court observers are left to speculate on whether \textit{Hardwick} has been overruled \textit{sub silentio}\textsuperscript{266} or at least

\begin{footnotes}
\textsuperscript{260} See \textit{Romer}, 116 S. Ct. at 1637 (Scalia, J., dissenting).
\textsuperscript{261} A separate issue, which is beyond the scope of this Note, involves whether the use of religious moral arguments to support Amendment 2 violates the Establishment Clause under \textit{Lemon} v. \textit{Kurtzman}, 403 U.S. 602 (1971). Under the first prong of the three prong \textit{Lemon} test, a statute or policy must have a secular legislative purpose. See \textit{id.} at 612. Whether \textit{Lemon} is still good law is itself debatable. For a persuasive argument that it is not, see generally Michael Stokes Paulsen, \textit{Religion and the Public Schools After Lee v. Welsman: Lemon is Dead}, 43 CASE W. RES. L. REV. 795 (1993).
\textsuperscript{262} Justice Scalia argued that it is not the role of the Court to take sides in the culture war. \textit{Romer}, 116 S. Ct. at 1637 (Scalia, J., dissenting).
\textsuperscript{263} \textit{id.}
\textsuperscript{264} See \textit{id.} at 1629 (arguing that the question about whether "opposition to homosexuality is as reprehensible as racial or religious bias . . . is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions").
\textsuperscript{265} See \textit{THE RECORDER}, supra note 72, at 10 (quoting David Sobelsohn) (discussing how \textit{Romer} will help the same-sex marriage issue).
\textsuperscript{266} See, e.g., \textit{Gay Rights Watershed? Scholars Debate Whether Past and Future Cases Will Be Affected by Supreme Court's Romer Decision}, 82 JULY ABA J. 30, July 1996 (quoting Doug Kmiec who suggested that \textit{Bowers} has been overruled \textit{sub silentio}).
\end{footnotes}
The most ominous overture of the Romer opinion, though, is the suggestion that the conventional sexual morality of a majority of voting Americans cannot support public policy decisions. In that sense, Romer is clearly inconsistent with Hardwick, where the Court explicitly stated that traditional moral views are a legitimate basis for state action.\textsuperscript{268}

In broader terms, Romer raises the concern that the Supreme Court has become a confederate of the Cultural Left, mirroring the views and values of America's lawyer class and law school elite who detest the expression of traditional moral values in public life and are actively seeking to root them out from political discourse. The last section of this Comment explores this final, and most alarming, aspect of the Romer decision with the intention of exposing its shortcomings.

\section*{III. CHOOSING SIDES IN THE CULTURE WAR: THE COURT, RELIGION, AND THE PUBLIC SQUARE}

In many ways, Romer v. Evans reflects the cultural divide in America today between modernist liberals, as represented by the Romer majority opinion, and traditionalists.\textsuperscript{269} A key battle in this cultural war is being fought over the role of religion in public life and the question of whether religious moral beliefs may properly be brought to bear upon the formulation of public policy in a liberal democracy. In one camp of this highly contentious philosophical debate are modern liberals (or more precisely, liberal neutralists) who believe that citizens should abstain from appealing to their religious beliefs and convictions when engaging in public discourse; in the other camp are traditionalists who believe that the "public square" benefits from the presence of religious dialogue.\textsuperscript{270}

One might understandably ask just exactly how Romer reflects the philosophical debate over religion in the public square. After all, Coloradans may no doubt have debated the merits of Amendment 2 on secular terms, such as whether the measure would effectively advance associational privacy interests. At the same time, however, it is also fair to say that many Coloradans supported

\begin{flushleft}
\textsuperscript{267} See id. (noting that scholars have debated whether Hardwick has been weakened).
\textsuperscript{269} Indeed, James D. Hunter describes America as involved in a cultural struggle to define itself. See James Davison Hunter, Culture Wars: The Struggle to Define America (1991).
\textsuperscript{270} The "public square" is Richard J. Neuhaus' term for the arena in which public policy is fashioned. See Richard J. Neuhaus, The Naked Public Square 26 (1984). Neuhaus characterizes the public square today as being naked because of the exclusion of religion and religiously grounded values from questions of public policy. Id. at ix.
\end{flushleft}
Amendment 2 based on their adherence to traditional moral beliefs\(^{271}\)—moral beliefs that, in many if not most cases, are informed by religious principles.\(^{272}\)

_Romer_ raises the concern that traditional moral values will not be respected by the Court. The real concern, then, is for the future. While Amendment 2 could be supported on secular grounds, other divisive policy issues—most notably, the ban on same-sex marriages—are grounded primarily on traditional religious morality.\(^{273}\) If Justice Scalia's criticism is valid, then the _Romer_ majority not only portrayed the people of Colorado as troglodytes for expressing their traditional religious moral beliefs and attitudes toward homosexuality,\(^{274}\) but it also equated opposition to the homosexual rights agenda with intolerance and bigotry.\(^{275}\) However, that is precisely the unresolved debate being contested in America's culture war.\(^{276}\) The _Romer_ majority, in effect, assumed the answer to the cultural debate and concluded that Amendment 2 was unconstitutional because it was a product of animus.\(^{277}\) In truth, though, the real source of animus today emanates from academic and law school elites who not only scorn religion in general\(^{278}\) but also seek to banish it from the public square in order to advance their own moral agenda.\(^{279}\)

\(^{271}\) See _Kulturkampf_, N. J. L. J., June 17, 1996, at 24 (discussing how Coloradans expressed their belief that homosexuality is immoral when they passed Amendment 2). In fact, one of the most visible supporters of Amendment 2 was Colorado for Family Values which distributed campaign brochures arguing that Amendment 2 was designed to protect "traditional family values and structures" as well as to protect "individuals' rights to view homosexuality as immoral." Plaintiffs-Appellees' Answer Brief at 10-11, Evans v. Romer, 854 P.2d 1270 (Colo.) (No. 93SA17), cert. denied, 114 S. Ct. 419 (1993).

\(^{272}\) For example, the moral opposition to homosexuality is, for many Americans, rooted in Leviticus, _supra_ note 1.

\(^{273}\) Take, for example, the argument advanced by West Virginia Senator Robert C. Byrd in support of the Defense of Marriage Act, a federal law denying recognition of same sex marriages: "Let us defend the oldest institution, the institution of marriage between male and female as set forth in the Bible." Eric Schmitt, _Senators Reject Both Job-Bias Ban and Gay Marriage_, N.Y. TIMES, Sept. 11, 1996, at A1.


\(^{275}\) See _id._

\(^{276}\) See _id._ at 1629.

\(^{277}\) See _id._ at 1628 (Amendment 2 "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").


\(^{279}\) See NEUHAUS, _supra_ note 266, at 126-28. Richard J. Neuhaus further argues that the conflict in America's cultural struggle is not between morality and secularism but rather between two different moralities. Secularism is its own moral system which simply calls itself "secular." _Id._
Some commentators strongly dispute the claims of traditionalists that American culture is hostile to religion. They point to the admixture of religion and politics in the last three decades as well as the recent increase in religious affiliation as refuting the perceived trend toward secularization. However, such commentators misconstrue the battle lines. Today, the real culture war is being waged not between a small segment of highly devoted religious and a larger, predominantly secular, society at large but rather between the American people generally (that is, the people of middle America where religion is vibrant and flourishing) and a small coterie of intellectual elites who hold a deep distrust, and often a disdain, of religion in public life.

The strident anti-religious bias among intellectual elites in America toward religious expression in public life is well-documented. In animating this anti-religious bias, many in academia and the legal community have endorsed some variation of the


283. See, e.g., Smolin, supra note 278, at 388 (describing the cultural gap between the people and the academic elite, including law school academic elites); James Boyd White, Response to Roger Cramton's Article, 37 J. LEGAL EDUC. 533 (1987) (noting the "peculiar" division between secular academics and people outside the academy who are very religious). Such academic and cultural elites particularly despise conservative traditionalists who combine two things these elites most dislike: modern conservatism and religion. See generally FEDER, supra note 119.

liberal neutrality ideal, a theory of political choice advanced most prominently in the works of John Rawls285 and Bruce Ackerman,286 which proposes a radical dichotomy between religious argument and public discourse.287 Liberal neutrality posits that the moral and religious pluralism which characterizes American society is a permanent condition288 and that it is impossible to achieve consensus among competing conceptions of the good life.289 Therefore, in order to regulate conflict among these competing conceptions and to preserve temporal peace, citizens should engage in "the method of avoidance" whereby controversial religious and moral views are disqualified from the political process.290 Liberal neutrality presupposes that religious arguments are based on faith rather than reason and as a result "public reference to the good should be drawn from as widely-accepted and publicly-accessible an epistemic base as possible."291 What follows is an "epistemic abstinence," as Joseph Raz denotes it,292 in which religion is privatized, and hence marginalized, because it is controverted and hypothetically cannot serve as a publicly accessible basis for political discourse.293


289. See David Hollenbach, Contexts of the Political Role of Religion: Civil Society and Culture, 30 SAN DIEGO L. REV. 877, 879-81 (1993) (discussing liberal neutrality through the philosophy of Rawls). See also Rainey, supra note 283, at 164 (explaining that "[t]he liberal practice of privatizing moral controversy is premised upon the classical liberal doctrine that government must be neutral toward competing conceptions of the good because there is no principled basis upon which we can resolve moral or religious-ethical conflicts") (citations omitted).


291. Sanford Levinson, Religious Language and the Public Square, 105 HARV. L. REV. 2061, 2064 (1991) (reviewing MICHAEL PERRY, THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991)). When participating in the public square, a citizen must only tender reasons that others could accept. Yet "a person's reasonable belief that her views of the world are true is not enough to justify 'public' speech directed to her fellow citizens." Id. at 2065.


293. See Levinson, supra note 291, at 2064. As Levinson puts it, the public accessibility requirement "would certainly exclude any appeals to justifications that rest on a privileged episteme of revelation from a sovereign God and appointed messengers." Id. See
Champions of liberal neutrality, however, fail to satisfy their very own premises. First, the antinomy between faith and reason is not self-evident. Religious arguments can be based on reason just as non-religious, or secular, arguments can be based on faith.\(^2\) If religious belief and argument were truly as irrational and publicly inaccessible as liberal neutralists contend,\(^2\) then such liberals should have no difficulty subjecting religious dialogue to the marketplace of ideas where, presumably, “public scrutiny will make its rational deficiencies abundantly clear.”\(^2\) If anything, religion should be privileged in public dialogue given its constitutional status in the Free Exercise Clause.\(^2\) Second, liberal neutrality’s “neutrality” is belied by the fact that it privileges a particular conception of rationality which is itself unverifiable. Reason, like faith, is vulnerable to the same kind of epistemological attack.\(^2\) Third, liberal neutrality fails to establish that the product of publicly accessible discourse is in any way superior to the product derived from other forms of discourse.\(^2\) It surely overlooks the richness

\(^2\) See supra note 289, at 896 (discussing liberal neutrality’s division between publicly accessible reasons and religious reasons). The degree of religious exclusion, ironically, is itself controverted among liberal neutralists. Bruce Ackerman, for example, advocates that “[w]e should put the moral ideals that divide us off the conversationalist agenda of the liberal state.” ACKERMAN, LIBERAL STATE, supra note 286, at 16. Kent Greenawalt, in a more moderate tone, recognizes that there are moments “when religious convictions appropriately come into play and when they do not.” GREENAWALT, supra note 284, at 76.

294. See William P. Marshall, The Other Side of Religion, 44 HASTINGS L.J. 843, 846 (1993). In fact, several theological traditions, such as Catholicism, hold that religious faith can be rational. In such traditions, “[f]aith and understanding go hand in hand.” Hollenbach, supra note 289, at 894. See also Rainey, supra note 284, at 161-62 (criticizing liberal neutrality for assuming the validity of its major premise that faith and reason are irreconcilable).

295. See supra note 288 and accompanying text.

296. Rainey, supra note 284, at 163.

297. See U.S. CONST. amend. I. A potential objection to the Free Exercise argument is that the Establishment Clause stands in conflict with the Free Exercise Clause by restraining the influence of the latter. However, it is also possible to view that Establishment Clause as facilitating the Free Exercise Clause—that is, protecting and promoting the free exercise of religion rather than stifling it. See Neuhaus, supra note 284, at 628 (arguing that the Establishment Clause “is a means and instrument in support of free exercise”); Rainey, supra note 284, at 167 (discussing the privileged constitutional status of religious liberty which justifies religious influence in political discourse); John H. Garvey, The Pope’s Submarine, SAN DIEO L. REV. 849, 872 (1993) (discussing the same issue).

298. See Marshall, supra note 294, at 846. (“The belief that reason inspires moral or political truths is just that—a belief.”)

299. See id. at 847. Notwithstanding the various deficiencies in liberal neutrality revealed above, another objection to the presence of religion in the public square proceeds from an evaluation of religion’s very nature. Professor William P. Marshall, for example, argues that while religion is a highly positive social force, it also embodies a “dark side” which sometimes justifies its truncation from the political process. Id. at 854. Religion is a response to the existential anxiety that inescapably plagues humanity. Id. at 855-56. When religious believers, who cling passionately to their beliefs in the face of this exis-
and diversity that religion offers to bring to the public square.°°° Fourth and finally, it is doubtful that, in terms of public accessibility, religious principles and tenets are any “less understandable to the public than . . . the often obscure and pedantic language of modern secular moral philosophy.”°°° In other words, liberal neutrality begs the question of whether religious arguments can ever

tential fear, are confronted with opposing belief structures that threaten to fundamentally destabilize their own, they may perceive “these forces as threatening evils that must be eliminated.” Id. at 858. According to Professor Marshall, it is this dark side of religion that has the capacity to transform the political process from a forum of constructive debate to a battleground of a holy war and thus presents the strongest argument for excluding religion from public discourse Id. at 859. Professor Marshall argues that “religion’s participation in the political process can produce dangerous results: Fervent beliefs fueled by suppressed fears are easily transformed into movements of intolerance, repression, hate, and persecution.” Id.

Unfortunately, such an argument proves too much as it fails to distinguish religion from other secular social forces. Professor Marshall acknowledges as much in a footnote when he concedes that the secular ideologies of communism and fascism also have a tendency to be destructive to the political process. Consequently, Marshall argues that similar constraints might apply to such secular movements as well. Id. Regrettably, this seems to be an unsatisfactory solution if it means excising all social movements that may have a deleterious effects on political discourse. On that account, political campaigns should be eliminated from the public square because the practice of politics in America today is often highly divisive and potentially destructive with its frequent appeals to emotion over reason. See Frederick Gedicks, Public Life and Hostility to Religion, 78 VA. L. REV. 671, 695 (1992). In any event, it would be better to develop a theory of religion and the public square “in terms that fit the discourse to which we aspire, rather than the distortions that we fear.” Robin W. Lovin, Perry, Naturalism, and Religion in Public, 63 TUL. L. REV. 1517, 1539 (1989). Clearly religion has its dark side, as history attests, but it is not apparent that the risks justify closing off the public square to religion, especially when one considers the contributions that religious insights offer into the human condition and public good. See id. at 696 n.122 (agreeing with Marshall that religion in public life poses risks but arguing that the exclusion of religion is not justified by those risks). In fact, the lessons of religion and history may have little applicability to the American experiment of republican government which, as Professor Levinson argues, is marked by intense pluralism and “where it is simply unthinkable that the members of a particularistic religion could ever capture national political institutions.” Levinson, supra note 291, at 2077 (adding that excluding religion from the public square “seems gratuitously censorial”).


°°° Smolin, supra note 184, at 1085. Professor Smolin adds:

I doubt that the people of America understand the language of Kant better than the language of the Bible . . . . The very nature of scriptural religions like Christianity, Judaism, and Islam is that they posit an extremely public and accessible revelation of God. The language of the Bible and the claim that it is divinely inspired are generally publicly intelligible, in the sense that they are widely available to the public and in the sense that their most important truth claims are understandable.

Id. at 1085-86.
advance public discourse. However, even if it could somehow be established that religious arguments are never publicly accessible, the same claim of nonaccessibility would seem to apply to all other conceptions of the good life which are also marked by intense pluralism and are frequently incompatible. In fact, Professor Steven Smith notes the "delicious irony" that plagues liberal neutrality: it is one that insists on excluding religious beliefs and values on the ground that they are not publicly accessible but then invokes political theories that are accessible only to the academic elites. Thus, in the end, it becomes very clear that liberal neutrality is plagued by several theoretical shortcomings which undercut its very viability.

However, in addition to these philosophical objections there are also several practical objections. First, liberal neutrality is unrealistic in its approach to religious beliefs because it fails to account for the central role that such beliefs play in peoples' lives. Liberal neutralists cannot expect religious believers to bracket their religious moral beliefs when engaging in political dialogue or when voting in referendums, such as Amendment 2, because religion is an integral part of a religious believer's existence. Religion cannot be treated like a piece of hearsay evidence that courts can ask juries to disregard. A believer cannot simply disregard his or her most fundamental beliefs.

Second, and ironically, liberals deny their own successes when they advocate the estrangement of religion and politics. Religious principles, rhetoric, and imagery, after all, galvanized and sustained the civil rights movement of the 1960's, one of the most successful political movements of this century. As Professor Stephen Carter observes, civil rights leaders were unabashedly religious in their expressions and they "made no effort to disguise their true inten-

302. See Rainey, supra note 284, at 169.
303. See id. at 166-67. If anything, it may be more accurate to say that America is not plagued by intense religious pluralism as over ninety percent of Americans subscribe to some form of the Judeo-Christian tradition. See NEUHAUS, supra note 270, at 145.
305. See Lovin, supra note 299, at 1518-19 (arguing that liberal theories isolating religious beliefs from the public square are "curiously abstract" because they are unrelated to the role religion plays in people's lives); Hollenbach, supra note 289, at 889 (agreeing with Lovin that theories that insulate religion from the public square are impractical).
306. Liberal neutrality is not confined solely to political dialogue which citizens and public officials engage in but also to votes that citizens cast. Lawrence B. Solum, Constructing an Ideal of Public Reason, 30 San Diego L. Rev. 729, 732 (1994).
307. See Garvey, supra note 297, at 872.
308. See id.
309. As Garvey has suggested, asking religious believers to put aside their religious beliefs is like asking them to put aside the concept of color or shape. See id.
310. See Smolin, supra note 278, at 385.
tion: to impose their religious morality on others." Morality is inevitably a part of political discourse and to advocate screening religious moral beliefs from such discourse overlooks both American history as well as contemporary America. In both, one finds that religious individuals have played an active role in the War for Independence, the abolition movement, women's suffrage, labor reform, civil rights, minimum wage legislation, nuclear disarmament, restrictions on pornography, and welfare reform. For liberal neutralists, then, to claim that the institutional separation of church and state also mandates the separation of politics and religion is hopelessly misguided. It also ignores the fact that, as Justice Scalia has observed elsewhere, "political activism by the religiously motivated is part of our heritage." At one level, a theory that advocates limiting the role of religion in the public square could be driven by the fear that controversial religious moral beliefs may be corrosive to civilized public debate—a valid concern, to be sure. However, the myriad shortcomings in liberal neutrality lead one to suspect that it is not a theory devoted to elevating the quality of political discourse in America but rather a scheme designed to minimize the public influence of religious moral beliefs, especially conservative religious moral beliefs, in

311. CARTER, supra note 284, at 229. Professor Carter argues:

[L]iberal philosophy's distaste for explicit religious argument in the public square cannot accommodate the openly and unashamedly religious rhetoric of the nonviolent civil rights movement of the 1950s and 1960s. To be sure, liberalism has had no trouble subsuming the goals of the movement under the umbrella of secular argument. But justifying the results, after the fact, as a matter of liberal dialogue does not alter the plain historical truth that the movement itself represented a massive infusion of religious rhetoric into the public square.

Id. at 227.


313. See Smolin, supra note 278, at 1091; see also Neuhaus, supra note 284, at 623; M.G. "Pat" Robertson, 4 WM. & MARY BILL OF RTS. J. 223, 224 (1995). As David Hollenbach has argued:

Even those who profess to support public neutrality on the meaning of the good life find it difficult to live up to their ideal in practice. The interconnection of our lives and the common institutions we share make the demand that we be silent on the deeper issues of how we should live together itself seems like a form of repression. Is it really possible to maintain that fundamental convictions about the meaning of the good life can be regarded as private preferences rather than matters of high public importance in a society like ours?

Hollenbach, supra note 288, at 889.

314. Edwards v. Aguillard, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting). Scalia has also noted that "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, 'contra bonos mores,' i.e., immoral." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991).
order to assure a hegemonic mode of liberal discourse in law and politics. One can always win the debate if one controls its terms and liberals have been dominating.

Professor David M. Smolin encapsulates the entire subject best when he argues that "[t]he flaw of most contemporary theories of religion and law is that they try to guarantee that the nation will, regardless of the people, not reflect the views of one’s cultural enemies." Such a goal is inimical to the principle of self-government under which the government should reflect the will of the people. Through Amendment 2, the people of Colorado were expressing their morality in an attempt to preserve traditional sexual mores. Yet there is little difference between these attempts and the efforts of modern liberals to enact anti-discrimination laws declaring homosexuality to be an acceptable lifestyle, because liberalism is its own moral agenda. As Professor Richard F. Duncan argues, homosexual rights laws like the ones Amendment 2 was designed to repeal, "legislate one view of sexual morality—that of sexual relativism—and then enforce this code of morality in society to stigmatize orthodox religious believers as homophobes whose religious exercise is nothing more than irrational bigotry (and thus self-governing government assumes . . . that the government, although limited in power, will in its proper sphere reflect the will and views of the people. Self-government, in short, links the quality of the people. Self-government means that a Christian people will have, in some sense, a Christian government, and that a pagan people will have, in some sense, a pagan government." Id.

315. See Smolin, supra note 184, at 1087. Take, for example, the argument by Professor Smolin that theories of liberal neutrality are essentially devices to control Christianity, especially theologically conservative Christianity, by relegating such beliefs "to a safe, 'private' realm where their impact on American public life, including law, politics, and even public culture, can be minimized." Id. at 1072-73.

316. See Durham and Dushku, supra note 300, at 443 (arguing that the "systematic privileging of secularism over religious traditionalism in politics . . . obscures the true nature, appeal and strength of religious conceptions . . . [and] robs . . . [them] of their persuasive force, enfeebling them in the struggle against the secularist hegemony in the public square.").

317. Smolin, supra note 184, at 1099.

318. See id. Smolin argues that "[s]elf-government . . . assumes . . . that the government, although limited in power, will in its proper sphere reflect the will and views of the people. Self-government, in short, links the quality of the people. Self-government means that a Christian people will have, in some sense, a Christian government, and that a pagan people will have, in some sense, a pagan government." Id.

319. See Romer, 116 S. Ct. at 1629 (Scalia, J., dissenting).

320. See Stanley Fish, Liberalism Doesn't Exist, 1987 DUKE L.J. 997, 1000 (arguing that liberalism "is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that has held it for centuries"). The homosexual movement itself has a moral agenda. Specifically, it seeks to discredit traditional moral authorities, such as Judaism, Christianity, and Islam, which all profess that homosexuality is immoral. See the Jewish TORAH (Leviticus 18:22, 20:13), the NEW TESTAMENT (Romans 1:26-28, I Timothy 1:9-10, I Corinthians 6:9-10), and the KORAN (The Heights 7:80). The main thrust of the homosexual movement is not mere toleration but absolute acceptance of the homosexual lifestyle as a legitimate and equally valid alternative to heterosexuality. See Randy Shilts, The Queering of America, THE ADVOCATE, Jan. 2, 1991, at 33 ("[C]ultural acceptability is why a gay movement exists").
deserving of discouragement)." Ammendment 2, in turn, represented a political victory, as Justice Scalia put it, for "traditional forces" who sought "to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans." While Amendment 2 may have been a major blow to the homosexual movement, the presence of winners and losers in the political sphere is not problematic under our theory of self-government. In fact, it is a necessary concomitant of the theory. This is especially true in America’s culture war where two radically incompatible conceptions of morality are competing for social legitimacy. The problem arises when the Supreme Court decides to choose sides in the cultural battle by ignoring relevant precedent and reflecting the views and values of academic and law school elites, in effect declaring one set of views the winner by judicial fiat.

Justice Scalia flatly stated that the Romer majority’s claim about Coloradans expressing animus toward homosexuals was "nothing short of insulting." However, not all will find the majority opinion insulting. It is only insulting to those who believe that Supreme Court justices should not parrot the views of politically correct law school elites on the issue of homosexuality. It is only insulting to those who believe that traditional moral beliefs that are inescapably informed by religious principles deserve to influence public policy which should reflect the cultural consensus among most Americans. It is only insulting to those who believe that religious beliefs should not be exiled into some private sphere where they become little more than a hobby. In other words, it is insulting to most Americans.

321. Duncan, supra note 119, at 444. But see Evans II, 882 P.2d 1335, 1347 (Colo. 1994) (arguing that anti-discrimination laws “make no assumptions about the morality of protected classes—they simply recognize that certain characteristics, be they moral or immoral—have no relevance in enumerated commercial contexts”).
322. Romer, 116 S. Ct. at 1637 (Scalia, J., dissenting).
323. Self-government and civil liberty do not mean that there are no winners or losers. See Smolin, supra note 184, at 1099.
324. See Romer, 116 S. Ct. at 1637 (Scalia, J., dissenting) (criticizing the majority for choosing sides in the culture war).
325. Id.
326. See id. (criticizing the majority for reflecting the “law-school view of what ‘prejudices’ must be stamped out”).
327. See Hollenbach, supra note 289, at 900 (“In general, public policy should reflect the cultural consensus about the social good that is present among people.”).
CONCLUSION

The homosexual movement will no doubt view Romer as a cause celebre, but the decision may be too hollow a victory to offer any hope for the future. As Justice Scalia expressed in dissent, Justice Kennedy’s majority opinion is long on principles of righteousness but short on judicial precedent, and unfortunately, majestic platitudes do not make constitutional law—concrete legal analysis does. The Romer majority’s commitment to self-government and adherence to the rule of law is seriously questioned when, acting as a superlegislature, it invents, rather than interprets, constitutional law, fails to distinguish highly relevant cases, impugns the motives of the Colorado electorate, chooses sides in America’s culture war by reflecting the politically correct views of intelligentsia, equates opposition to homosexuality with racial bias, and offers only explanations but no justification for its holding. Romer, perhaps better than any other case to date, reveals the intellectual bankruptcy of the Cultural Left and how the Court is quickly becoming its most powerful instrument for imposing its elitist values on unwilling majorities. The most disturbing aspect of Romer is the Court’s suggestion that the expression of traditional religious morality—a morality, it should be noted, which founded and has sustained this Nation for 200 years—is somehow a manifestation of intolerance or, worse yet, hatred, if used to support public policy decisions such as Amendment 2. Justice Scalia once observed, not surprisingly, that “those who adopted our Constitution . . . believed that the public virtues inculcated by religion are a public good.” It is only too unfortunate that the wisdom of the Framers has been lost on today’s Court.

STEVEN A. DELCHIN

329. According to Robert Bork:

It will be extremely difficult to defend traditional values against intellectual class onslaught. Not only do the intellectuals occupy commandeering heights of the culture and the means by which values and ideas are created and transmitted, they control the most authoritarian institution of the American government, the federal and state judiciaries, headed by the Supreme Court of the United States. The courts have increasingly usurped the power to make our cultural decisions for us . . . .
