

INKBLOT JURISPRUDENCE: *ROMER* v. *EVANS* AS A GREAT DEFEAT FOR THE GAY RIGHTS MOVEMENT

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INTRODUCTION

On November 3, 1992, nearly one million Coloradans voted¹ in favor of amending the State Constitution to read as follows:

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 re-

¹ The precise vote in favor of Amendment 2 was 813,996 to 710,151. See *Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993) [hereinafter *Evans* I].

lationships 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.²

On May 20, 1996, six Supreme Court Justices pronounced that choice irrational.³ Justice Kennedy, writing for the majority, opined that Amendment 2 "lacks a rational relationship to legitimate state interests."⁴

Beyond that, *Romer v. Evans*⁵ is a bit of an enigma, not unlike the amendment at the center of the controversy. Grand in design and far reaching in scope, Amendment 2 sought, in the eyes of some, to " earmark[] a group and say[], you will not be able to appeal to your State legislature to improve your status."⁶ The full extent of the amendment's impact—which existing laws it would or even could affect—was not entirely clear.⁷ Municipal ordinances banning discrimination based on sexual orientation in Boulder,⁸ Aspen⁹ and elsewhere¹⁰ would certainly fall,¹¹ but what about laws of general

² COLO CONST. art. II, § 30(b) [hereinafter Amendment 2].

³ See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

⁴ *Id.* As one prominent author commented, "It is, to say the least, not common practice for the Court to stigmatize more than half the voters of a state as 'irrational.'" Jeremy Rabkin, *The Supreme Court in the culture wars*, THE PUB. INTEREST, Sept. 1, 1996, at 3.

⁵ 116 S. Ct. 1620 (1996).

⁶ Oral Arguments at *8, 1995 WL 605822, *Romer*, 116 S. Ct. 1620 (1996), (No. 94-1039).

⁷ "The parties sharply disagree on the scope of Amendment 2's provisions." *Evans I*, 854 P.2d at 1284 n.25; see *infra* note 12.

⁸ See *Evans I*, 854 P.2d at 1284 (citing BOULDER, COLO., REV. CODE §§ 12-1-2 to 12-1-4 (1987)).

⁹ See *id.* (citing ASPEN, COLO., MUNICIPAL CODE § 13-98 (1977)).

¹⁰ Both the City and County of Denver had also enacted ordinances banning discrimination based on sexual orientation. See *id.* (citing DENVER, COLO., REV. MUNICIPAL CODE art. IV, §§ 28-91 to 28-116 (1991)).

¹¹ Even on this relatively small point there was some disagreement about whether the amendment repealed those anti-discrimination laws completely or only repealed them as they related to *homosexual* orientation. The court in *Evans I* reasoned that "[t]he precise scope of Amendment 2 need not be determined here . . . because neither the parties, nor their amici, have contended that Amendment 2 does not prohibit the enactment of antidiscrimination laws by state or local entities." *Evans I*, 854 P.2d at 1284 n.25. Compare that analysis with the more explicit, and in this author's view, quite accurate reading of the amendment's effects:

Amendment 2 did not repeal Denver's, Aspen's, and Boulder's ordinances in toto, but only insofar as these ordinances protected *homosexuals*, *lesbians*, and *bisexuals* from orientation discrimination. Under the Boulder Code (as modified by Amendment 2), Boulder was not permitted to discriminate against heteros[exuals] on the basis of their orientation, but homos[exuals] and bis[exuals] were shut out of this code's sympathetic protection.

Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 207 (1996).

applicability, federal laws, and common law anti-discrimination protections?¹²

If the potential applications of this grandiose amendment were unclear, the ramifications of its recent downfall are equally blurry. Prior to the decision, many municipalities across the country had adopted referendums similar to Amendment 2, and *Romer* has now forced courts to re-engage the debates about the constitutionality of such laws.¹³ In related areas of law, the lower courts hesitate to cite *Romer* at all, and when they do, they disagree as to what specific proposition, if any, it represents.¹⁴

¹² This debate began in the Colorado courts, continued through the briefs to the United States Supreme Court, throughout oral arguments and even into the Supreme Court's opinion. In its final form, Justice Kennedy contended that Amendment 2 would, at a minimum, (1) repeal existing protections granted to people based on sexual orientation in many municipalities and (2) repeal and forbid all laws at all levels of the Colorado government that would provide protections for homosexuals. See *Romer*, 116 S. Ct. at 1625-27. However, Justice Kennedy went even further in suggesting: "It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Id.* at 1626. Justice Scalia in dissent countered:

[W]e need not resolve that dispute [of what laws would be affected], because the Supreme Court of Colorado has resolved it for us. In *Evans v. Romer*, 882 P.2d 1335 (1994), the Colorado court stated: "It is significant to note that Colorado law currently proscribes discrimination against persons who are not suspect classes, including discrimination based on age, . . . marital or family status, . . . veterans' status, . . . and for any legal, off-duty conduct such as smoking tobacco, . . . Of course Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals."

Id. at 1630 (Scalia, J., dissenting) (quoting *Evans v. Romer*, 882 P.2d 1335, 1346 n.9 (Colo. 1994), *aff'd*, 116 S. Ct. 1620 (1996) [hereinafter *Evans II*]) (emphasis in original).

¹³ In 1994 alone, measures similar to Amendment 2 passed in Cincinnati, Ohio; Lewiston, Maine; Oregon City, Oregon; and Keizer, Oregon. See Pamela Coukos, Recent Development, 29 HARV. C.R.-C.L. L. REV. 581, 581 n.6 (1994). The amendment passed in Cincinnati, known as Issue 3, has already experienced quite a legal odyssey. See *infra* notes 60, 149-58, 239-42 and accompanying text.

¹⁴ In the aftermath of the decision, courts have cited *Romer* for a myriad of different propositions. Although this Note will argue that a tentative trend is emerging and beginning to outline the true legacy of *Romer*, for now it suffices to say that *Romer* is the mother of many and varied progeny. See *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996) (dismissing a homosexual's equal protection challenge to the military's "Don't Ask, Don't Tell" policy and citing *Romer* in support of rational basis review for equal protection claims by homosexuals), *cert. denied*, 118 S. Ct. 45 (1997); *Benjamin v. Jacobson*, 935 F. Supp. 332, 354 (S.D.N.Y. 1996) (citing *Romer* for the proposition that laws classifying groups cannot be driven solely by animus), *aff'd in part, rev'd in part*, 124 F.3d 162 (2d Cir. 1997); *Roe II v. Butterworth*, 958 F. Supp. 1569, 1581 (S.D. Fla. 1997) (citing *Romer* as support for the proposition that an anti-prostitution statute would be struck down if "[it] was enacted merely to discriminate against women—to impose male domination, to demean or degrade women, or to discriminatorily 'protect' women in a paternalistic manner . . ."); *Swage v. Inn Phila. and Creative Remodeling, Inc.*, No. Civ.A. 96-2380, 1996 WL 368316, at *3 (E.D. Pa. June 21, 1996) (refusing to rule out the possibility of same-sex sexual harassment claims, in part, because the *Romer* Court stated that "homosexuals cannot be denied protection against discrimination available to all others").

Nowhere is *Romer*'s legacy of confusion greater than on the infamous *Bowers v. Hardwick*¹⁵ and the staggered homosexual rights movement that it had left in its wake.¹⁶ Justice Kennedy, writing for the majority in *Romer*, found *Bowers* entirely unworthy of mention.¹⁷ Justice Scalia in dissent, on the other hand, concluded, "*Bowers* alone suffices to answer all constitutional objections [to Amendment 2]."¹⁸ Some commentators suggest *Romer* merely distinguished *Bowers*;¹⁹ others suggest *Romer* implicitly overturned *Bowers*.²⁰ In short, there is little agreement among scholars or judges as to the present status of *Bowers*.

After *Romer*, we are, at the least, left with something of a paradox. Michael Hardwick, by constitutional fiat, must always remain free and politically unfettered from seeking civil rights laws and protections for his sexual orientation.²¹ Yet, if he acts on that very orientation,²² the state can prosecute and imprison him. This Note attempts to solve, or at least explore and explain, this apparent paradox by engaging the three

¹⁵ 478 U.S. 186 (1986). In *Bowers*, the Supreme Court held that the state of Georgia could, in a manner consistent with the United States Constitution, criminally proscribe the act of sodomy at least as applied to homosexuals. See *id.* at 189.

¹⁶ See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 512-13 (1992) (describing *Bowers* as "a harsh blow to the gay rights movement" that left gay-rights advocates scrambling to find new "legal theories to protect gay men and lesbians from discrimination"); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 70-71 (1996) (calling *Bowers* "one of the few genuinely humiliating decisions in American constitutional law").

¹⁷ One author hypothesized: "[w]e might even say that the Court's silence on *Hardwick* is under ordinary circumstances an unacceptable exercise of judicial power." Sunstein, *supra* note 16, at 65.

¹⁸ *Romer*, 116 S. Ct. at 1633 n.2 (Scalia, J., dissenting).

¹⁹ See Amar, *supra* note 11, at 227. Professor Amar's essay also illustrates the extraordinary level of disagreement on this issue. Amar not only argued that *Romer* did not directly alter or engage *Bowers* but even went so far as to call Justice Scalia's analysis (that *Bowers* directly answered all issues raised by *Romer*) "one of the most troubling passages ever to appear in modern U.S. Reports." *Id.* at 231.

²⁰ See Sunstein, *supra* note 16, at 65-71 (discussing the many possible consequences of *Romer* and hypothesizing that *Romer* seriously weakened *Bowers* and that the Court will soon overturn it).

²¹ At the very least, the state cannot deny Hardwick those rights by a state constitutional amendment with the breadth of Amendment 2.

²² Although there has been, and continues to be up through the writing of this Note, much debate on the issue of whether persons of homosexual orientation necessarily engage in homosexual conduct, one author puts it this way: "[D]eclaring oneself a lesbian, barring a religious oath of celibacy, does seem to imply that one will engage in sexual activity with women; at the very least it implies a desire to engage in such activity. To claim otherwise is intellectually and emotionally dishonest." Teresa M. Bruce, Note, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1172 (1996). Courts have addressed the question somewhat differently, but have come to essentially the same conclusion. See *infra* note 58; see also S. Rep. No. 103-112, at 284 (1993) (maintaining that it would be "irrational . . . to develop military personnel policies on the basis that all gays and lesbians will remain celibate").

different emerging explanations for *Romer* as it is interpreted against the backdrop of *Bowers*: (1) *Romer* implicitly overruled *Bowers* and the homosexual rights movement won a momentous victory with far-reaching effects for civil rights and constitutional notions of privacy; (2) *Romer* properly distinguished *Bowers* because there is no inherent conflict in finding a conduct-based prohibition to be constitutionally sound and a status-based deprivation to be constitutionally *infirm* when the two clauses in question (Due Process and Equal Protection) occupy two entirely different spheres of constitutional law; and (3) *Bowers* has emerged entirely unscathed from *Romer* and the two cases will work together as courts construe *Romer* to stand for little more than rational basis review for homosexual equal protection challenges.

Part I of this Note reviews the underpinnings of *Bowers* and the subsequent state of homosexual rights in the ten years leading up to *Romer*. Part II examines *Romer*'s mechanics and rationale. Part III explores, through the three different interpretations outlined above, the impact that *Romer* has had on *Bowers*, on homosexual rights and on the specific possibility (or impossibility as the case may be) of either an equal protection claim or suspect/quasi-suspect status for homosexuals. In Part IV, this Note concludes that unless and until a new Supreme Court case injects life into *Romer*, the case will be whittled down to the bare legal propositions that (1) homosexuals are not a suspect class and (2) their equal protection challenges deserve only rational basis review—thereby dooming nearly all future challenges by homosexuals.

I. IN THE BEGINNING

A. *BOWERS V. HARDWICK*

Few questions of homosexual rights, conduct, or status have ever reached the Supreme Court.²³ In fact, prior to *Romer*, many regarded *Bowers* as “the gay case.”²⁴ But an inappropriate name it was, as *Bowers* generated far more than its fair share of acrimony and dissent. A quick review of the case explains why.

At issue in *Bowers* was the following Georgia statute:

- (a) A person commits the offense of sodomy when he performs or submits to any sexual activity involving the

²³ Until the Court decided to hear *Romer* in 1995, it had taken no questions concerning homosexual conduct or status with the exception of *Bowers*. See Tracy T. Kenton, *Quasi-Suspect Status for Homosexuals in Equal Protection Analysis*: Equality Foundation of Greater Cincinnati v. City of Cincinnati, 12 GA. ST. U. L. REV. 873, 873-74 (1996). The Courts of Appeals, however, have heard several claims by homosexuals discharged from the military. See *infra* notes 57-58.

²⁴ Scott N. Ihrig, Note, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 LAW & INEQ. J. 555, 555 (1996) (emphasis added).

sex organs of one person and the mouth or anus of another.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .²⁵

The respondent in the case, Michael Hardwick, had been ticketed for public drinking but failed to appear in court for a hearing.²⁶ Although Hardwick paid the fine after learning that he had missed his court date, the police obtained a warrant for his arrest and went to his house.²⁷ Entering through an open door, Officer Torick found Hardwick in the bedroom engaging in "mutual oral sex" with another man.²⁸ The officer arrested both men for violating Georgia's criminal sodomy statute.²⁹ The other man eventually pled guilty to a lesser charge, and "the District Attorney decided not to present the [Hardwick sodomy] matter to [a] grand jury unless further evidence developed."³⁰ Michael Hardwick, however, brought a declaratory judgment action in federal district court challenging the constitutionality of the statute at least as applied to consensual sodomy.³¹ The district court dismissed the action for failure to state a claim, but the court of appeals reversed.³² The Supreme Court then reversed the court of appeals, upholding the criminal sodomy statute.³³

Its strange procedural nature aside, *Bowers* is relatively clear and concise in its legal reasoning.³⁴ Justice White, writing the plurality opin-

²⁵ GA. CODE ANN. § 16-6-2 (1984).

²⁶ There is evidence that Hardwick's public drinking offense was a fabricated charge—a form of police harassment. For the intriguing and, generally upsetting, background details of the case, see PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 395-96 (1988); Peter Irons, *Interview with Michael Hardwick*, in *LESBIANS, GAY MEN, AND THE LAW* 125-31 (William B. Rubenstein, ed., 1993); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1643, 1652-53 (1993) (describing the background details of the case).

²⁷ See IRONS, *COURAGE OF THEIR CONVICTIONS*, *supra* note 26, at 394-95.

²⁸ *Id.* at 395.

²⁹ See *id.* at 396.

³⁰ *Bowers*, 478 U.S. at 188.

³¹ See *id.*

³² See *id.* at 188-89.

³³ See *id.*

³⁴ Many, including the dissenting Justices, questioned the validity of the legal reasoning for among other reasons its failure to account for the twin facts that (1) the statute on its face only applied to sodomy (not just homosexual sodomy) and (2) the act took place in the privacy of the home where *Stanley v. Georgia*, 394 U.S. 557 (1969), and its progeny provide special protection. See *Bowers*, 478 U.S. at 199-200 (Blackmun, J., dissenting). Those challenges, however, are in essence challenges to the premise of the *Bowers* majority—that the Court would decide the case at the lowest possible level of controversy (the act in question) and not in terms of the statute as broadly written, nor by notions of privacy broadly construed like private, consensual sex between adults.

ion,³⁵ began his line of reasoning with the traditional premise that constitutional rights not explicit in the text of the Constitution must be in some sense “implicit in the concept of ordered liberty”³⁶ or “deeply rooted in this nation’s history and tradition.”³⁷ While it was, and still is, far from clear what rights qualify under these tests, at the very least the right in question must not have been proscribed by a majority of the states for most of this country’s history.³⁸ Sodomy, however, was a criminal offense in all of the original thirteen states,³⁹ in thirty-two of the thirty-seven states at the time the Union enacted the Fourteenth Amendment,⁴⁰ in all fifty states until 1961 and in twenty-four states in 1986 at the time of Hardwick’s litigation.⁴¹ Therefore, Justice White asserted, “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”⁴²

But *Bowers* is remembered for more than its narrow holding. At the conclusion of the opinion, Justice White, in one of the more famous passages of recent constitutional law, left no doubt that the criminal sodomy statute satisfied rational basis review:

[R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate of Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to

³⁵ Chief Justice Burger and Justice Powell each wrote concurring opinions. Powell’s opinion is the more noteworthy for two reasons: (1) He insisted that any evidence that people were actually being charged, convicted and imprisoned under this statute “would create a serious Eighth Amendment issue,” *Bowers*, 478 U.S. at 197 (Powell, J., concurring), and (2) He originally cast his vote with what became the dissent and then changed his mind at the last moment. See Chris Bull, *A Hard Look at Hardwick: The Supreme Court Came Close to Voiding Sodomy Laws in 1986, According to Newly Revealed Documents*, *ADVOC.*, June 29, 1993, at 31, 38.

³⁶ *Bowers*, 478 U.S. at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

³⁷ *Bowers*, 478 U.S. at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

³⁸ For a subtle variation of this analysis, see *Michael H. v. Gerald D.*, 491 U.S. 110, 122 n.2 (1988) (accepting the potential existence of “an interest society has traditionally thought important without protecting it” but holding “[such an interest] must at least exclude . . . a societal tradition of enacting laws denying the interest”).

³⁹ See *Bowers*, 478 U.S. at 192.

⁴⁰ See *id.* at 193.

⁴¹ See *id.* at 193-94. Some commentators, however, have raised concerns (cleverly turning the majority’s own line of reasoning against it) about the ambiguous meaning of the word sodomy at the time the states enacted those statutes—particularly on the difficult question of whether oral sex (the offense in question in *Bowers*) was included in the definition of sodomy. See Bruce, *supra* note 22, at 1142-43.

⁴² *Bowers*, 478 U.S. at 194.

support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.⁴³

Withering dissents, led principally by Justice Blackmun, took umbrage at the majority's reliance on traditional mores as the sole justification for the law in question. Justice Blackmun likened this reliance to naming "racial animus" as the justification for a race-based classification.⁴⁴ He thundered:

Like Justice Holmes, I believe that [it] is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁴⁵

The arguments of the dissenters, however, only cemented the meaning of the dispute and the proposition that would become tied to *Bowers*: traditional morality, and traditional morality alone, sufficed as a rational constitutional justification for a criminal law.⁴⁶

B. THE EFFECTS OF *BOWERS* ON THE GAY RIGHTS MOVEMENT

The move to condemn *Bowers* was swift and sharp,⁴⁷ but for nearly ten years it remained good law.⁴⁸ *Bowers* not only dealt a severe blow to

⁴³ *Id.* at 196.

⁴⁴ *See id.* at 212 (Blackmun, J., dissenting).

⁴⁵ *Id.* at 199 (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

⁴⁶ Blackmun attacked this point in vain: "But the fact that moral judgments expressed by statutes like § 16-6-2 [Georgia criminal sodomy statute] may be 'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Bowers*, 478 U.S. at 199 (quoting *Roe v. Wade*, 410 U.S. 113, 117 (1973) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting))).

⁴⁷ For a survey of the severe academic criticism the case received, see John Charles Hayes, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after Bowers v. Hardwick*, 31 B.C. L. REV. 375 (1990); Nan D. Hunter, *Life after Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Jeb Rubenfield, *The Right of Privacy*, 102 HARV. L. REV. 737, 770, 799-801 (1989); Thomas B. Stoddard, *Bowers v. Hardwick, Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987). Furthermore, although this author doubts the public's ability to interpret the Constitution, polls confirmed that 57% of the people questioned disagreed with the decision. *See Irons, Interview with Michael Hardwick*, *supra* note 26, at 131 (citing a 1986 *Newsweek* poll after *Bowers*).

⁴⁸ At least in the sense that it was never overruled or seriously weakened by subsequent decisions. It has, however, been distinguished or explained on numerous occasions. *See, e.g.,* *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 82 n.2 (1990) (Stevens, J., concurring) (arguing

the gay rights movement, it also “changed the course of gay rights litigation.”⁴⁹ After *Bowers*, homosexual conduct was clearly proscribable, but homosexual status was still a *tabula rasa*. The status/conduct distinction, therefore, became the “driving force in shaping new constitutional challenges to discrimination against gays and lesbians.”⁵⁰ As one author recently explained:

Bowers v. Hardwick force[d] pro-gay litigators to evade any focus in the courtroom on their lesbian, gay, and bisexual clients’ sexual activity. It foreclose[d] the application of strict scrutiny in the substantive due process arena, force[d] gay-rights advocates to avoid privacy claims in their challenges to laws that discriminate against homosexuals, and all but necessitate[d] the use of the status/conduct distinction in equal protection cases.⁵¹

These new tactics generally enjoyed little success. With few exceptions, the lower courts interpreted *Bowers* as posing an “insurmountable barrier to the claim that homosexuals constitute a suspect or quasi-suspect class.”⁵² Even worse, after *Bowers*, sodomy became “the behavior that defines the class.”⁵³ On the whole, lower federal courts, with only *Bowers* to use as guidance on questions of homosexual rights, imported the avowedly conduct-based case⁵⁴ and its rationale into the equal protection realm, thus eradicating an important distinction many thought should and did exist.⁵⁵ Almost inevitably then, homosexuals’ status-based equal protection claims, after being relegated to the lowest level of scrutiny

Bowers was a refusal to extend substantive due process rights not an invitation to “immunize from constitutional review state conduct that would otherwise violate the [Constitution]”); *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 575 (1991) (maintaining that where the Constitution is otherwise silent, traditional morality suffices as a rational basis for regulating private consensual conduct).

⁴⁹ Cain, *supra* note 26, at 1617.

⁵⁰ *Id.*

⁵¹ Bruce, *supra* note 22, at 1144.

⁵² *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). This finding is an important one because in the absence of a fundamental right or a suspect classification, courts will uphold a law if it is rationally related to a legitimate governmental objective. This level of review, known as rational basis, is the lowest form of scrutiny available and rarely results in the invalidation of a law. See *infra* note 56 and accompanying text.

⁵³ *Padula*, 822 F.2d, at 103.

⁵⁴ The Court refused even to consider the Equal Protection Clause as a potential source of protection for homosexual sodomy because “Respondent does not defend the judgment below on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.” *Bowers*, 478 U.S. at 196 n.8.

⁵⁵ See generally Amar, *supra* note 11.

available,⁵⁶ routinely failed⁵⁷—particularly in the military context.⁵⁸ Thus, not only did *Bowers* eliminate the possibility of conduct-based challenges, but in practice it effectively closed the door on status-based equal protection challenges as well.⁵⁹ Individually, homosexuals had no right to engage in sodomy (conduct) and collectively they had no claim

⁵⁶ In equal protection jurisprudence, the Court generally employs three levels of review: rational basis, heightened scrutiny and strict scrutiny. Rational basis review requires only that a law be drawn to rationally achieve “a legitimate public purpose or set of purposes based on some conception of the general good.” LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, 1440 (2d ed. 1988). Heightened scrutiny, “a more penetrating” level of review than rational basis, was “a judicial response to statutes creating distinctions among classes of residents based on factors the Court evidently regard[ed] as in some sense ‘suspect’ but appear[ed] unwilling to label as such.” *Id.* at § 16-3, 1445. Strict scrutiny, generally reserved for classifications implicating a suspect class or abridging a fundamental right, is “‘strict’ in theory and usually ‘fatal’ in fact.” *Id.* at § 16-6, 1451.

⁵⁷ In the wake of *Bowers*, courts often took different tacks on the issue but came up with essentially the same result: the Constitution provided no protected status for homosexuals. See *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (refusing to accept homosexuality as an immutable characteristic and concluding that “after *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm”); *High-Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 461 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) (while holding that the military’s policy actually policed conduct not status, the court concluded that the Army could “properly infer that plaintiff’s lesbian acknowledgment, if not an admission of (lesbian) practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct”); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1324 (E.D. Cal. 1993) (finding that homosexuals did not have the necessary characteristics of a suspect class). For a case factually similar to *Romer* (but at the municipal rather than state level), see *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995) (concluding that homosexuals are not identifiable on sight unless made so by their own conduct), *vacated and remanded* 116 S. Ct. 2519 (1996) [hereinafter *Equality II*]. But see *Watkins v. United States Army* 847 F.2d 1329, 1340 (9th Cir. 1988), *vacated and aff’d on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc) (holding contrary to virtually all the other circuit courts that “nothing in *Hardwick* suggests that the states may penalize homosexuals for their sexual orientation”).

⁵⁸ The history of failed challenges to the military’s anti-gay policies, the current version of which is DADT (Don’t Ask, Don’t Tell), has been well documented. See *supra* note 57; Bruce, *supra* note 22, at 124-33. Many have suggested that the failure to achieve any success on this front is not surprising given that *Bowers* set the framework for the debate. See Nan D. Hunter, *Identity, Speech and Equality*, 79 VA. L. REV. 1695, 1717 (1993); see also Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 543 (1992) (arguing that “[t]he decision in *Hardwick* now bedevils virtually all litigation concerning lesbian and gay rights claims”).

⁵⁹ See *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Equality II*, 54 F.3d at 266; *Ben-Shalom*, 881 F.2d. at 464. All these cases in one respect or another imported the *Bowers* rationale into the equal protection realm to shut off homosexual rights challenges. See also Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick*, 32 HARV. C.R.-C.L. L. REV. 225, 225 (1997) (“Despite *Hardwick*’s narrow holding that there is no fundamental right to homosexual sodomy under the Due Process Clause, lower courts have understood *Hardwick* to stand for the proposition that state-endorsed discrimination against homosexuals is not constitutionally infirm.”).

to suspect or quasi-suspect status.⁶⁰ Absent either an overruling of *Bowers* or a Supreme Court case explicitly addressing the question of equal protection review for homosexuals as a class, the gay rights movement was at a standstill.

II. *ROMER v. EVANS*

The entire history and development of constitutional challenges by homosexuals may, or may not, have changed⁶¹ on May 20, 1996 when the United States Supreme Court declared:

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A state cannot so deem a class of persons a stranger to its laws. *Amendment 2 violates the Equal Protection Clause*, and the judgment of the Supreme Court of Colorado is affirmed.⁶²

A. BACKGROUND OF THE CASE

The Supreme Court ruling in *Romer* marked the end of at least one era⁶³ in a long struggle that began when cities and municipalities in the

⁶⁰ While generally true, this claim is not universally so. Commentators have been urging some kind of suspect classification for homosexuals for years. See Kenton, *supra* note 23 at 896-97. The case described therein, *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, involved an amendment to the Cincinnati City Charter (known as Issue 3) that passed by voter referendum 62% to 38% and read much like Amendment 2 in *Romer*. *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 421-22 (S.D. Ohio 1994) [hereinafter *Equality I*]. The district court, after evaluating the traditional criteria of suspect classes, concluded that "gays, lesbians, and bisexuals meet the requisite criteria for quasi-suspect status." *Id.* at 440. While the court found that the amendment also implicated a fundamental right, and thus subjected it to strict scrutiny, the court further insisted that "Issue 3 is not rationally related to any legitimate governmental purpose." *Id.* at 441. The Sixth Circuit, however, reversed. See *Equality II*, 54 F.3d 261 (6th Cir. 1995). The Supreme Court then vacated and remanded in light of *Romer*. See *Equality Found. v. City of Cincinnati*, 116 S. Ct. 2519 (1996) [hereinafter *Equality III*]. On remand, the Sixth Circuit again reversed the district court by holding that Issue 3 was rationally related to a valid governmental interest. See *Equality Found. v. City of Cincinnati*, Nos. 94-3855, 94-3973, 94-4280, 1997 WL 656228, at *10-11 (6th Cir. Oct. 23, 1997) [hereinafter *Equality IV*]. For more detailed discussion of the *Equality Foundation* litigation see *infra* notes 149-57, 239-42 and accompanying text.

⁶¹ Precisely how much or how little has changed is the inkblot that is *Romer* and will be the subject of later analysis. The inkblot reference stems from the similarities between the psychological Rorschach Test and *Romer v. Evans*. In both cases, someone throws ink down on a page and asks others what they see. The responses, inevitably, are extremely varied and usually reveal more about the interpreters than the inkblot. So it may be for *Romer* which provided little or no guidance and is now being interpreted in various peculiar ways—the inevitable consequence of the Court's inkblot jurisprudence.

⁶² *Romer*, 116 S. Ct. at 1629 (emphasis added).

⁶³ Note, however, that as many have suggested, *Romer* is also the beginning of another major battle. See Tobias Barrington Wolff, Case Note, *Principled Silence*, *Romer v. Evans*,

state of Colorado first passed legislation banning discrimination based on sexual orientation⁶⁴ "in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services."⁶⁵ In May 1992, voters⁶⁶ filed a petition with the Secretary of State to amend the state's constitution to repeal these municipal ordinances and prevent all future legislative, executive, or judicial action at any level of state or local government aimed at protecting the named class.⁶⁷ On November 3, 1992, that amendment, known simply as Amendment 2, received 53.4% of the popular vote and passed into law.⁶⁸ Soon thereafter, the litigation began.

On November 12, 1992, Richard Evans, eight other homosexuals (including tennis star Martina Navratilova), one heterosexual woman with AIDS, and various implicated municipalities filed suit in Denver District Court to enjoin enforcement of Amendment 2 claiming that it was unconstitutional.⁶⁹ The trial court conducted an evidentiary hearing and granted the preliminary injunction pending the outcome of a trial on the merits.⁷⁰ The defendants⁷¹ appealed and the Colorado Supreme Court affirmed, concluding that the trial court did not err in granting the injunction.⁷² The Colorado Supreme Court found that Amendment 2 infringed upon a fundamental right⁷³ and, therefore, remanded the case

116 S. Ct. 1620 (1996), 106 YALE L.J. 247, 248 (1996) ("[*Romer*] . . . is the beginning of a story, not the end."); Sunstein, *supra* note 16, at 71 (arguing that the Court's "minimalist approach" left many questions unanswered and has allowed for a massive struggle over the meaning of the decision).

⁶⁴ The municipalities defined discrimination based upon sexual orientation somewhat differently. For example, the Boulder ordinance defined sexual orientation as "the choice of sexual partners, i.e., bisexual, homosexual, or heterosexual." *Romer*, 116 S. Ct. at 1623 (citing BOULDER, COLO., REV. CODE § 12-1-1 (1987)). Denver's ordinance defined it as "the status of an individual as to his or her heterosexuality, homosexuality, or bisexuality." *Id.* (citing DENVER, COLO., REV. MUNICIPAL CODE, art. IV, § 28-92 (1991)).

⁶⁵ *Romer*, 116 S. Ct. at 1623 (citing DENVER, COLO., REV. MUNICIPAL CODE, art. IV §§ 28-91 to 28-116 (1991); ASPEN, COLO., MUNICIPAL CODE, § 13-98 (1977); BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-11 (1987)).

⁶⁶ Amendment 2 was actually the brainchild of a group called "Coloradans for Family Values" and its founder and chairman, Will Perkins. The group was the fundamental supporter and promoter of the Amendment and waged a brutal and bruising campaign against opponents who, by some accounts, outspent Coloradans for Family Values 2-1. See Daniel A. Batterman, Comment, *Evans v. Romer: The Political Process, Levels of Generality, and Perceived Identifiability in Anti-Gay Rights Initiatives*, 29 NEW ENG. L. REV. 915, 933 (1995).

⁶⁷ See *Evans I*, 854 P.2d at 1272. For specific language of Amendment 2, see *supra* note 2 and accompanying text.

⁶⁸ See *Evans I*, 854 P.2d at 1272. The amendment was self-executing.

⁶⁹ See *id.* at 1273.

⁷⁰ See *id.*

⁷¹ The defendants were Colorado Governor Roy Romer, the Colorado Attorney General, and the state of Colorado. See *Romer*, 116 S. Ct. at 1624.

⁷² See *Evans I*, 854 P.2d at 1286.

⁷³ The right in question, one derived from the voting rights line of cases, was a fundamental right to participate equally in the political process. See *Evans I*, 854 P.2d 1270, 1273

with instructions for the trial court to determine whether Amendment 2 was (1) supported by a compelling state interest and (2) narrowly tailored to meet that interest.⁷⁴ The trial court, after considering the state's six purported justifications for Amendment 2,⁷⁵ concluded that it was not supported by any compelling state interest and permanently enjoined its enforcement.⁷⁶ The defendants appealed again and the Colorado Supreme Court re-affirmed.⁷⁷ Finally, the defendants appealed to the United States Supreme Court which granted certiorari, heard oral arguments and announced its decision on May 20, 1996.⁷⁸

B. THE SUPREME COURT CASE

Justice Kennedy's opinion, although a mere six and one-half pages,⁷⁹ covered quite a bit of legal ground. He opened by quoting Justice Harlan's legendary dissent in *Plessy v. Ferguson*⁸⁰ that the Constitution "neither knows nor tolerates classes among citizens."⁸¹ Next, Kennedy delved into the specifics of Amendment 2 and the Colorado

(1993); see also Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of A Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 888 (1995); 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, 463-73 (1995).

⁷⁴ See *Evans I*, 854 P.2d at 1286; *Romer*, 116 S. Ct. at 1624.

⁷⁵ The reasons given were:

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

Evans II, 882 P.2d 1335, 1339-40 (1994).

⁷⁶ See *Evans II*, 882 P.2d at 1340-41.

⁷⁷ See *id.* at 1338.

⁷⁸ See *Romer*, 116 S. Ct. 1620.

⁷⁹ In the Supreme Court Reporter at least. *Romer* is not yet published in U.S. Reports.

⁸⁰ 163 U.S. 537 (1896).

⁸¹ *Romer*, 116 S. Ct. at 1623 (quoting *Plessy*, 163 U.S. at 559). Interestingly enough, Kennedy's invocation of the legendary dissent may have gone too far. In recent years, *Plessy* has become the rallying point for opponents of affirmative action because of Justice Harlan's elegant plea for a "color-blind Constitution." By invoking this dissent, then, the Court has given further intimations that the constitutional eradication of all affirmative actions programs is near. See *Engineering Contractors Ass'n v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996). "The Court wonders, in passing, whether more recent decisions of the Supreme Court have completely closed the door on race-based classifications. In *Romer v. Evans*, . . . the Supreme Court appears to adopt Justice Harlan's famed dissent . . . If this . . . truly is law, and not mere precatory rhetoric, no race-based classification can withstand constitutional scrutiny." *Id.* at 1556 n.11 (emphasis added). One prominent constitutional scholar has also taken note: "[Kennedy's] opening reference in *Romer* to Justice Harlan's famous color-blind dissent might seem to have far-reaching implications for the highly-charged issue of affirmative action in education." Amar, *supra* note 11, at 223.

court decisions.⁸² Immediately after summarizing the Colorado Supreme Court's decision, however, Kennedy halted that line of analysis altogether: "We granted certiorari and now affirm the judgment, but on a rationale *different* from that adopted by the State Supreme Court."⁸³ Justice Kennedy then proceeded to explain the various potential legal ramifications of Amendment 2 and the numerous state and federal laws that would have been affected.⁸⁴ Finally, Kennedy expounded on the constitutional meaning of the case in a mere two and one-half pages.⁸⁵ Attempting to squeeze Amendment 2 into the Court's traditional equal protection framework, Justice Kennedy appeared, as he had throughout oral arguments, simply perplexed.⁸⁶ Kennedy conceded that "Amendment 2 fails, indeed *defies*, even this conventional inquiry."⁸⁷ One paragraph later he reiterated, "Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad."⁸⁸ Further

⁸² *Romer*, 116 S. Ct. at 1623-24.

⁸³ *Id.* at 1624 (emphasis added). Although often overlooked, this point is a substantial one. The Supreme Court could have accepted the Colorado Supreme Court's rationale but did not—indicating at the least that it had some misgivings about the decision. In truth, the differences between the opinions are striking. The Colorado Supreme Court recognized a "fundamental right" and then determined that the state of Colorado had failed to produce a compelling interest with a narrowly-tailored remedy to meet that interest. The court did, however, speak of "substantial interest[s]" and intimated that the statute would have passed something less than strict scrutiny were it subjected to such. *Evans II*, 882 P.2d 1335, at 1346. Furthermore, the Colorado Supreme Court directly engaged and dismissed the *Bowers* dilemma: "The fact that there is no constitutionally recognized right to engage in homosexual sodomy . . . is irrelevant." *Id.* at 1350 (citation omitted). The United States Supreme Court, however, (1) did not mention *Bowers* at all and (2) refused to accept the Colorado Supreme Court's invocation of "strict scrutiny" for this challenge. See *Romer*, 116 S. Ct. 1620. Unlike the Colorado Supreme Court and its suggestions that Amendment 2 would have passed rational basis, though, the Supreme Court then said Amendment 2 failed even this lowest level of scrutiny. See *id.* at 1629. In short, the Supreme Court deliberately refused to affirm either the Colorado Supreme Court's *Bowers* analysis or its invocation of strict scrutiny, affirming perhaps in name only.

⁸⁴ *Romer*, 116 S. Ct. at 1624-27. For a more thorough discussion, see *supra* note 12.

⁸⁵ *Romer*, 116 S. Ct. at 1627-29. While some might be inclined to praise the Court for its rare brevity, the circumstances surrounding the case suggest otherwise. The Colorado Supreme Court's finding of both strict scrutiny and a fundamental right, the momentous ramifications of the holding, the highly controversial nature of the issue and the Court's branding of nearly one million voters as irrational demanded a better and bolder explanation.

⁸⁶ Indeed, it was not only Justice Kennedy but several justices who had appeared fascinated at oral arguments by the unique range and scope of the law:

As Justice Kennedy pointed out . . . here, its everything—thou shalt not have access to the ordinary legislative process for anything that will improve the condition of this particular group—and I would like to know whether *in all of U.S. history* there has been any legislation like this that earmarks a group and says, you will not be able to appeal to your State legislature to improve your status. You will need a constitutional change to do that.

Oral Arguments at *8, 1995 WL 605822, *Romer*, 116 S. Ct. 1620 (No.94-1039) (emphasis added).

⁸⁷ *Romer*, 116 S. Ct. at 1627 (emphasis added).

⁸⁸ *Id.* at 1628.

along, Kennedy asserted, "[t]he absence of precedent for Amendment 2 is itself instructive"⁸⁹ and explained that "[i]t is not within our constitutional tradition to enact laws of this sort."⁹⁰

The Court's difficulty in applying its equal protection doctrine produced an opinion that stretched all the way from conventional equal protection jurisprudence—*Yick Wo v. Hopkins*⁹¹—to sui generis cases—such as *Shelley v. Kraemer*.⁹² Put more succinctly, the opinion floundered from one equal protection case to another—punctuated only by attempts to respond to the dissent's arguments. Not until the final few paragraphs did Justice Kennedy finally shed some light on the Court's inner thinking and rationale. The many problems of fit, the sheer breadth of the amendment, the constitutional entrenchment, and the discontinuous relationship between the rationale and the law proposed all combined to "raise the inevitable inference that the disadvantage imposed [was] born of animosity toward the class of persons affected."⁹³ The Constitution does not tolerate mere animus as a rational basis for a law that seeks simply to disadvantage a political class; therefore, Justice Kennedy con-

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 118 U.S. 356 (1886). *Yick Wo* was one of the earliest and most famous equal protection cases. At issue was a refusal by the San Francisco Board of Supervisors to grant a Laundromat license to Yick Wo, a Chinese alien. Although the ordinance was neutral on its face, such a disproportionate number of Chinese immigrants were being denied licenses "as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they [were] applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of [equal protection]." *Id.* at 373. In the *Romer* context, *Yick Wo* stood for the notion that "[t]he guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Romer*, 116 S. Ct. at 1628 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (quoting *Yick Wo*, 118 U.S. at 369)). Not only is it unclear what that means, but *Romer* and *Yick Wo* decisions are almost the polar opposites of the equal protection spectrum. *Yick Wo* involved a neutral statute on its face that was applied in a discriminatory manner. Amendment 2, by contrast, was nothing if not discriminatory on its face: "[i]t was a kind of legal and social outlawry in cowboy country—a targeting of outsiders, a badge of second-class citizenship, a tainting of Queers, a scarlet Q." Amar, *supra* note 11, at 206. The issue was whether that discrimination was justified or permissible.

⁹² 334 U.S. 1 (1948). *Shelley* dealt with the issue of whether a state's enforcement of a racially restrictive covenant constituted state action for constitutional purposes. Despite holding in the affirmative, the case has been seriously weakened by subsequent rulings—perhaps because the Court feared the logical extension of *Shelley* would be that nearly everything was state action. See *Evans v. Abney*, 396 U.S. 435, 445-46 (1970); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 159 (1990) ("A case like *Shelley v. Kraemer* has generated no subsequent decisions and is most unlikely to."). As a result, *Shelley* is rarely cited for major propositions anymore, and has become more the subject of legal process classes and philosophical debate than anything else. Here, it stands for the ever lucid and wonderfully alliterative proposition that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Romer*, 116 S. Ct. at 1628 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (quoting *Shelley*, 334 U.S. at 22)).

⁹³ *Romer*, 116 S. Ct. at 1628.

cluded that "Amendment 2 violates the Equal Protection Clause."⁹⁴ *Romer*, however, left Court watchers, judges, activists and others meticulously pouring over its words and wondering precisely what the constitution *will* tolerate in this area.

III. THE INKBLOT OF ROMER

While it is improbable that *Romer* will ever come to stand for anything truly momentous in constitutional law,⁹⁵ three models have emerged to explain the case's effects on *Bowers* and on the overall gay rights movement. The first paradigm, as previously articulated, is that *Romer* weakened *Bowers* or even overturned it "sub silentio."⁹⁶ The second paradigm maintains that *Bowers* and *Romer* occupy entirely different spheres of constitutional jurisprudence and, therefore, need not come in conflict. The final model, which this Note ultimately adopts, is that *Romer* stands merely for rational basis review in homosexual equal protection challenges and will, in the future, work side-by-side with *Bowers*—each closing different constitutional doors on the gay rights movement.

A. *BOWERS V. HARDWICK*: THE TERMINALLY ILL PATIENT

1. *The Theory*

The idea that the Court has overturned or soon will overturn *Bowers* has several bases of support. First, the text of the opinion itself invites such a reading. The majority's use of phrases like "animus toward the class,"⁹⁷ "disadvantage . . . born of animosity,"⁹⁸ and "bare . . . desire to

⁹⁴ *Id.* at 1629. Perhaps, more than anything else in the opinion, it is this line that has suggested the weakening, if not full overturning, of *Bowers*. A state's bare desire to delegitimize homosexual conduct no longer suffices as a rational basis. See Sunstein, *supra* note 16, at 62 (contending that "at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior."). Or as another prominent scholar put it, "if the crux of the *Romer* holding is that laws 'born of animosity' toward homosexuals are unconstitutional . . . , then the ruling 'is in very considerable tension with *Bowers*.'" Richard C. Reuben, *Gay Rights Watershed?: Scholars Debate Whether past and Future Cases Will be Affected by Supreme Court's Romer Decision*, 82 A.B.A. J. 30 (July 1996) (quoting Laurence Tribe).

⁹⁵ "[T]his opinion is not the *Roe v. Wade* or *Brown v. Board* of the gay rights movement." Reuben, *supra* note 94, at 30 (quoting Jay Sekulow, chief counsel for the American Center for Law and Justice). But see Joel Edan Friedlander, *Justice Scalia's Kulturkampf*, in RELIGIOUS LIBERTIES NEWS, Vol. 1 No. 1 (Fall 1996) ("Never before has the Supreme Court equated a racial classification with laws prohibiting or disfavoring a type of sexual conduct. This fact alone guarantees that *Romer* will be one of the few cases, such as *Plessy*, that will always be required reading, whether or not it remains good law.").

⁹⁶ Reuben, *supra* note 94, at 30 (quoting Doug Kmiec).

⁹⁷ *Romer*, 116 S. Ct. at 1627.

⁹⁸ *Id.* at 1628.

harm"⁹⁹ to describe Amendment 2 appears to be a direct frontal assault on *Bowers* and its legendary premise that "the law . . . is constantly based on notions of morality."¹⁰⁰ Second, Justice Antonin Scalia's scathing dissent re-affirmed this interpretation of the text: "In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only ten years ago [in *Bowers*]."¹⁰¹ Third, a significant amount of legal literature concurs, although perhaps for different reasons, with Justice Scalia's view that *Romer*, at a minimum, severely undermined *Bowers*.¹⁰²

Whether or not this analysis wins either one's head or one's heart,¹⁰³ it is a plausible analysis rooted in the very language and structure of the decision itself. First, the Court easily could have struck down the statute under much stricter scrutiny,¹⁰⁴ but instead decided "Amendment 2 fails, indeed *defies*, even [rational basis review]."¹⁰⁵ The *Romer* Court later defined this rational basis review stating, "a law will be sustained if it can be said to advance a legitimate government interest, *even if the law seems unwise or works to the disadvantage of a particular group*, or if the rationale for it seems tenuous."¹⁰⁶ Additionally, the Court cited¹⁰⁷ to *Williamson v. Lee Optical*¹⁰⁸ which set the standard for rational basis review: "[i]t is enough that there is an evil at hand for correction, and that *it might be thought* that the particular legislative measure was a rational way to correct it."¹⁰⁹ To say then, as the Court

⁹⁹ *Id.* (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

¹⁰⁰ *Bowers*, 478 U.S. at 196; *see also* ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 112-14 (1996).

¹⁰¹ *Romer*, 1620 S. Ct. at 1629 (Scalia, J., dissenting).

¹⁰² While no author has directly pronounced *Bowers* to be dead, many have come close. *See* Tobias Barrington Wolff, Case Note, *Principled Silence*, *Romer v. Evans*, 116 S. Ct. 1620 (1996), 106 YALE L.J. 247, 252 (1996) (arguing that *Romer* is the forebearer of greater things to come and suggesting indirectly that the *Bowers* rationale is on the way out); Reuben, *supra* note 94, at 30; Sunstein, *supra* note 16, at 64-71. It is, if nothing else, of academic intrigue that the intellectual firepower weakening *Bowers* is being generated by people spanning the entire political spectrum. There are those, like gay rights activists, who think *Bowers* was a hideous cancer on the Constitution and welcome its demise. Others like Justice Scalia, are strong supporters of *Bowers* and cannot understand why it did not lead to a different result in *Romer*—thus undermining its continued viability. *See also* William L. Armstrong, *Court Jesters*, NAT'L REV., Feb. 10, 1997, at 34, 35 (while not going so far as to declare *Bowers* dead, arguing that "the Justices [in *Romer*] totally ignored their own ruling in the 1986 case of *Bowers v. Hardwick*").

¹⁰³ "The initial consensus [on *Romer*] seems to be that while Justice Kennedy's language soared, Justice Scalia's logic held. Justice Kennedy won their *hearts*; Justice Scalia, their *heads*." Amar, *supra* note 11, at 204 (emphasis added).

¹⁰⁴ *See supra* note 83 and accompanying text.

¹⁰⁵ *Romer*, 116 S. Ct. at 1627 (emphasis added).

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.*

¹⁰⁸ 348 U.S. 483 (1955).

¹⁰⁹ *Id.* at 488 (emphasis added).

did, that Amendment 2 “defies” rational basis review is to suggest that something truly rotten lies at the core of the legislation. That suggestion is akin to Blackmun’s assertion in his *Bowers* dissent that “[n]o matter how uncomfortable a certain group may make the majority of this Court, we have held that ‘[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.’”¹¹⁰ In fact, the similarities between Blackmun’s *Bowers* dissent and *Romer* strongly suggest that *Bowers*’s days may be numbered.¹¹¹

Second, Justice Scalia’s dissent only affirmed the majority’s implicitly harsh treatment of *Bowers*. Scalia argued for the direct application of *Bowers* in *Romer*, but the more persuasively he argued, the more it appeared that *Bowers* must, in practice, be dead. Specifically, Scalia’s most powerful statement on the intersection of the two cases came in footnote two where he argued that the Colorado Supreme Court had pronounced the provisions of Amendment 2 unseverable.¹¹² Specifically, the Colorado court had determined that the four characteristics of homosexuality described in Amendment 2¹¹³ were all ways of defining the same class of persons. Consequently, Scalia argued, “if the entire class affected by the amendment takes part in homosexual conduct, practices and relationships—*Bowers* alone suffices to answer all constitutional objections.”¹¹⁴ If Scalia’s analysis is correct (and the Supreme Court nowhere rejects the Colorado Court’s interpretation),¹¹⁵ then *Bowers* should have led to a reversal of the Colorado Supreme Court’s decision and an

¹¹⁰ *Bowers*, 478 U. S. at 212 (Blackmun, J., dissenting) (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975)) (emphasis added). In short, the question was not so much about the relationship between the law and the goal (although Kennedy did call that relationship “discontinuous”) but that the goal itself—disapproving homosexuality and homosexual conduct—was, itself, improper, bad, illegitimate. See BORK, *supra* note 100, at 113 (arguing that the Court’s opinion in *Romer* suggests “all disapprovals [of homosexual conduct] are to be disallowed as mere animus”).

¹¹¹ Consider also this quote: “A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.” *Bowers*, 478 U.S. at 211-12 (Blackmun, J., dissenting).

¹¹² See *Romer*, 116 S. Ct. at 1633 n.2.

¹¹³ Those four characteristics were: “sexual orientation, conduct, practices and relationships.” *Id.* (quoting Amendment 2).

¹¹⁴ *Romer*, 116 S. Ct. at 1633 n.2 (Scalia, J., dissenting).

¹¹⁵ It is unlikely that the Supreme Court even has the power to disregard or supplant a state supreme court’s interpretation of a state statute under its own laws or constitution. For guidance, see United States Constitution art. III § 2[2] and the Judiciary Act of 1789 limiting the Supreme Court’s appellate jurisdiction to cases involving matters of federal law only. Clearly, this case involves a matter of federal law—the Fourteenth Amendment. However, within that federal issue, the question is whether the Supreme Court can provide its own interpretation of a state statute or must it defer to the state’s interpretation. See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (holding that the Supreme Court must accept as final a state court’s decision on matters of state law). But see *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (holding that the Court may review a state’s substantive contracts law in order that the Contracts Clause of the Constitution “not become a dead letter”).

affirmation of Amendment 2. But *Romer* struck down Amendment 2; therefore, one of the three links in the logical chain—(1) *Bowers* is good law, (2) *Bowers* was on point, (3) the majority agreed that *Bowers* was on point—must have broken down. Arguably, that link was the continuing legal vitality of *Bowers*.

On a more general level, Justice Scalia also indicated that the *Romer* majority had put its weight “behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”¹¹⁶ Similarly, he extrapolated from the majority opinion a “pronounc[ement] that ‘animosity’ toward homosexuality . . . is evil.”¹¹⁷ These suggestions, in a much larger institutional sense, struck at the very essence of *Bowers*; in short, moral condemnation of homosexual acts is no longer legitimate, acceptable or constitutionally permissible to justify legislation. Under Justice Scalia’s reading of *Romer*, therefore, a state’s bare desire to delegitimize homosexual conduct is no longer a legitimate governmental objective (as bias against African-Americans or Christians would not be);¹¹⁸ it is itself a violation of the Equal Protection Clause.

Third, numerous legal commentaries suggest that “the two decisions are inconsistent . . . and as a result not much is left of *Hardwick*.”¹¹⁹ As professor Laurence Tribe, perhaps the nation’s foremost constitutional scholar, phrased it, “[I]f the crux of the *Romer* holding is that laws ‘born of animosity’ toward homosexuals are unconstitutional . . . , then the ruling is in very considerable tension with *Bowers*.”¹²⁰ If *Bowers* has not been overruled, at the least “[its] force . . . may be somewhat blunted . . . by *Romer*’s indication of the mood of the Court.”¹²¹ Or, as Professor Doug Kmiec summarized, “If *Bowers* remained good law, then [Colorado] would have [had] a rational basis for the constitutional amendment that was at issue in *Romer*.”¹²²

More explicitly, three authors have devoted entire articles to mapping *Romer* onto *Bowers* and inspecting the remains.¹²³ All three predict the imminent demise of *Bowers*. One author prognosticates that *Romer* will become for the gay rights movement what *Reed v. Reed*¹²⁴ was for the women’s rights movement—an initially limited victory based on ra-

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

¹¹⁷ *Id.*

¹¹⁸ See Sunstein, *supra* note 16, at 62 (contending that “at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior”).

¹¹⁹ Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 374 (1997).

¹²⁰ Reuben, *supra* note 94, at 30.

¹²¹ *Id.* (quoting Stanford Law Professor Kathleen Sullivan).

¹²² *Id.* (quoting Doug Kmiec of Notre Dame Law School).

¹²³ See Grey, *supra* note 119; Joslin, *supra* note 59; Wolff, *supra* note 63.

¹²⁴ 404 U.S. 71 (1971).

tional basis review that eventually, "usher[ed] in the era of heightened scrutiny."¹²⁵ Certainly, *something* historic has occurred in that, "[f]or the first time in its history, the Supreme Court has drawn a line that the state may not cross in its treatment of gay people;"¹²⁶ it is not a stretch to imagine the Court extending that line in the future.¹²⁷ A second author describes *Romer* as finally smashing through the legal roadblock that was *Bowers v. Hardwick*.¹²⁸ More likely, *Romer* has at least foreclosed the lower courts from "blindly rely[ing] on *Hardwick* to uphold the proposition that discrimination against homosexuals is constitutionally permissible."¹²⁹ A third commentator, Thomas Grey, Professor of Law at Stanford University, describes the logic and vitality of *Bowers* as being slowly eroded by a contrary holding—if not by explicit reasoning.¹³⁰ Irrespective of their differences, all seem in agreement with the man who lost the *Bowers* case that, "*Bowers* is 'not long for this world.'"¹³¹

2. *The Effects*

The practical effects of such a legacy would be monumental. Gay rights advocates could once again introduce issues of gay conduct and sexuality, dormant since *Bowers*, into the courtroom.¹³² Present, and future, anti-gay rights legislation would be dead on arrival.¹³³ Further, this interpretation of a weakened or overruled *Bowers* would also strongly bolster status-based claims of homosexuals in areas like civil rights, military dismissals and elsewhere.¹³⁴ While the gay-marriage issue is a fantastically complicated one, a strong reading of *Romer* could certainly add

¹²⁵ Wolff, *supra* note 63, at 250. Indeed, there are many similarities between the cases: both were statutes struck down under rational basis review in the face of hostile precedent and both could have been decided on different grounds.

¹²⁶ *Id.* at 247. That a line was drawn at all is quite significant given that the Court had refused to expand its laundry list of privacy rights when it came to homosexuals.

¹²⁷ See *id.* at 252 ("[S]ilence, when properly deployed, can testify to a fundamental shift in the Court's attitude toward discrimination against a disfavored group.").

¹²⁸ See Joslin, *supra* note 59, at 225, 247.

¹²⁹ *Id.* at 237.

¹³⁰ See Grey, *supra* note 119, at 385-86.

¹³¹ Reuben, *supra* note 94, at 30 (quoting Laurence Tribe). If so, I am sure the irony will not be lost on Tribe—the man who lost the *Bowers* decision. *Romer* may well begin the movement to overrule *Bowers*, and the Court found nothing perhaps so persuasive in reaching its decision as Laurence Tribe's Amicus Brief and its *per se* rule. See Wolff, *supra* note 63, at 249 n.12.

¹³² It is interesting to note that some commentators are already urging such a move, even in spite of *Bowers*. See Bruce, *supra* note 22, at 1179-80.

¹³³ This point is probably the least controversial, and the Supreme Court's recent decision to vacate *Equality II* bolsters this argument irrespective of whether *Bowers* has been overruled or not. See *Equality III*, 116 S. Ct. at 2519.

¹³⁴ See *supra* notes 52-60 and accompanying text (describing how *Bowers* was imported into the equal protection realm and came to stand for the notion that homosexuals deserve only rational basis review which, *Romer* aside, is a highly deferential standard).

some much needed intellectual fodder to the discussion.¹³⁵ As Professor Cass Sunstein has said, "[The Defense of Marriage Act] raises serious issues under the equal protection component of the [D]ue [P]rocess [C]ause in the aftermath of the Supreme Court's recent decision in *Romer v. Evans*."¹³⁶ Finally, if the framing of the entire legal debate for the gay rights movement stems from its first devastating defeat in *Bowers*,¹³⁷ it is quite possible that the death of *Bowers* will become the moment of conception for a new, and ultimately successful, gay rights movement.

3. Cases Supporting the Position

Three recent cases that help flesh out what this reading of *Romer* would look like are: *Nabozny v. Podlesny*,¹³⁸ *Angelilli v. Conshohocken*,¹³⁹ and *Equality III*.¹⁴⁰ While none of these cases goes so far as to pronounce *Bowers* dead, they may be forerunners of its imminent demise. In *Nabozny*, the defendants, public school officials, attempted to rely on *Bowers* to justify fairly shocking and reprehensible treatment of a homosexual student.¹⁴¹ The Seventh Circuit, however, found that reliance to be misplaced for two reasons. First, *Bowers* dealt with conduct and not status.¹⁴² In the court's words, "*Bowers* addressed the criminalization of sodomy. The defendants make no mention of sodomy as a motive for their discrimination. To the contrary, the defendants offer us no rational basis for their alleged conduct."¹⁴³ Second, and perhaps more importantly, *Romer* now precludes reliance on *Bowers*: "Of course *Bowers* will soon be eclipsed in the area of equal protection by the

¹³⁵ Once, or if, the gay-marriage debate filters down past the Full Faith and Credit Clause and Congress's power thereunder (e.g. Congress recently passed the Defense of Marriage Act which purports to give states the power to refuse recognition of same sex marriages granted by sister states) it may well be that courts will have to decide if recognizing same-sex marriages is against a state's strong public policy. Evidence of such a policy would presumably be derived from sources like anti-sodomy laws or laws similar to Amendment 2. To the extent these laws are not constitutionally permissible, they cannot be used as evidence. See BORK, *supra* note 100, at 112 (acknowledging that against state policy arguments often succeed, but suggesting "[t]he Court's response [to such arguments] is in some doubt because it has recently shown a tendency to view homosexuality as a matter of required moral indifference under the Constitution").

¹³⁶ *The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 44 (1996) (statement of Cass Sunstein).

¹³⁷ See Hunter, *supra* note 58, at 1717.

¹³⁸ 92 F.3d 446 (7th Cir. 1996).

¹³⁹ No. Civ.A. 96-3391, 1996 WL 663871 (E.D. Pa. Nov. 15, 1996).

¹⁴⁰ 116 S. Ct. 2519 (1996) (vacating and remanding judgment in light of *Romer*).

¹⁴¹ See *Nabozny*, 92 F.3d at 451-53 (detailing the horrific harassment, abuse and violence that Nabozny was subjected to at the hands of his peers and the complete unresponsiveness of the school's administrators).

¹⁴² See *id.* at 458.

¹⁴³ *Id.*

Supreme Court's holding in *Romer v. Evans*.¹⁴⁴ Although the court did not explicitly cite *Romer* as precedent for reversing the summary judgment that the lower court entered against Nabozny's equal protection and due process challenges,¹⁴⁵ "[*Romer*] bolster[ed] [its] analysis to some extent."¹⁴⁶

The second case, *Angelilli*, while not directly confronting the issue either, granted tacit support to the idea that *Romer* severely weakened *Bowers*. The plaintiffs in *Angelilli* "urge[d] the court to ignore *Bowers* . . . , claiming it was an aberration that has been subsequently 'reversed' by the Supreme Court [in *Romer*]."¹⁴⁷ Although the court did not adopt that specific language, it did deny the defendant's motion to dismiss the intimate association/privacy claims against him which were based, in part, upon this broad reading of *Romer*.¹⁴⁸ In short, it refused to say that *Romer* did not overrule *Bowers*.

The third case of note, *Equality III*, involved an amendment (Issue 3) to the Charter of Cincinnati that denied certain rights to homosexuals *as homosexuals* in a manner similar to Amendment 2.¹⁴⁹ The crucial differences between the amendments, for the purposes of this analysis, are in the language¹⁵⁰ and the governmental level at which they were enacted.¹⁵¹ The district court in *Equality I* deemed homosexuals a quasi-suspect class, subjected the ordinance to intermediate scrutiny, and invalidated it under the Equal Protection Clause of the Fourteenth Amendment.¹⁵² The Sixth Circuit, in an opinion that reads something like Scalia's dissent in *Romer*, upheld the ordinance under rational basis re-

¹⁴⁴ *Id.* at 458 n.12.

¹⁴⁵ Nor did the court describe, in any detail, the manner in which *Bowers* will soon be "eclipsed."

¹⁴⁶ *Nabozny*, 92 F.3d at 458 n.12.

¹⁴⁷ *Angelilli*, 1996 WL 663871 at *4.

¹⁴⁸ *See id.* at *3.

¹⁴⁹ *Equality I*, 860 F. Supp. 417, 422 (S.D. Ohio 1994), *rev'd* 4 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2519 (1996).

¹⁵⁰ The precise language was as follows:

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Cincinnati City Charter Art. XII.

¹⁵¹ Amendment 2 was a statewide referendum and Issue 3 applied to the city of Cincinnati.

¹⁵² *Equality I*, 860 F. Supp. 417.

view.¹⁵³ The court of appeals's reasoning was two-fold: (1) because "homosexuals are generally not identifiable . . . on sight unless they elect to be so identifiable by conduct . . . they cannot constitute a suspect class or a quasi-suspect class;"¹⁵⁴ and (2) the statute in question was constitutional even if "status-based" because it "imposes no punishment or disability . . . but rather merely removes previously legislated special protection against discrimination."¹⁵⁵ On writ of certiorari, however, the Supreme Court vacated and remanded in light of *Romer*.¹⁵⁶

That the Supreme Court vacated and remanded (irrespective of the ultimate outcome) suggests that *Romer* might have an impact, at the very least, on Issue 3 and other referendums. Scalia's highly unusual dissent from the grant of certiorari also supports the idea that the Court's vacating of the judgment extends *Romer*:

[T]he consequence of [*Romer's*] holding is that homosexuals in a city (or other electoral subunit) that wishes to accord them special protection cannot be compelled to achieve a state constitutional amendment in order to have the benefit of that democratic preference. . . . Thus, the consequence of holding *this* provision [Issue 3] unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals.¹⁵⁷

In other words, what nearly all commentators and even the parties to *Romer* had accepted—that neither municipalities nor states were constitutionally mandated to pass antidiscrimination laws based on sexual orientation¹⁵⁸—was now in question as well.

Although these cases do not a reversal of precedent make, one can see the broad outlines of *Bowers's* erosion. As Tobias Wolff points out, the Court has drawn a line in the sand for the first time.¹⁵⁹ The mood and tone, if not the strict holding, could well lead to the eclipsing of *Bowers*. Although it is hard to imagine the Court taking another homosexual sodomy case, it may not even be necessary.

¹⁵³ See *Equality II*, 54 F.3d 261; see also Kenton, *supra* note 23, at 886 (reviewing the history of the case and outlining the argument for quasi-suspect status).

¹⁵⁴ *Equality II*, 54 F.3d at 267.

¹⁵⁵ *Id.* at 267 n.4.

¹⁵⁶ See *Equality III*, 116 S. Ct. 2519 (1996). In *Equality IV*, the Sixth Circuit once again upheld Issue 3 as consistent with the Equal Protection Clause. *Equality IV*, 1997 WL 656228, at *10-11.

¹⁵⁷ *Equality Foundation III*, 116 S. Ct. at 2519 (Scalia, J., dissenting).

¹⁵⁸ "But surely the cities were not constitutionally obliged to pass these private discrimination codes. The federal Constitution generally does not require that the government prohibit private discrimination. . . . [and] repeal is no different from failure to enact." Amar, *supra* note 11, at 206-07.

¹⁵⁹ See Wolff, *supra* note 63, at 247.

4. *Difficulties Inherent in Such a Reading*

There are several problems with this line of analysis. First, few cases of the stature and infamy of *Bowers* are overruled by mere implication.¹⁶⁰ Lower courts were not left floundering for years in the 1950s questioning whether *Brown v. Board of Education*¹⁶¹ overturned *Plessy v. Ferguson*.¹⁶² The Court made it clear. Given the weight and precedential value of *Bowers* on so many types of litigation,¹⁶³ the Court could not truly hope to avoid the political firestorm that overruling *Bowers* would entail yet achieve the same result de facto. The result is highly unlikely to come about de facto, and if *Bowers* is no longer good law the Court would say so. Second, there is little about the Rehnquist Court that suggests either sensitivity to, or sympathy for, the gay rights movement.¹⁶⁴ Third, the Court has done little to articulate any guiding principles by which lower courts could invalidate laws previously validated by *Bowers*.¹⁶⁵ In a sense, the Court identified the law in question as unique—it was too narrow and yet somehow overbroad and it altered the political process in a way that made it too difficult for advocates of gay rights.¹⁶⁶ Therefore, it could not in any way be rationally related to an identifiable governmental purpose. This logic may be sufficient for a Supreme Court holding,¹⁶⁷ but *Romer* is not the kind of opinion from which judges can readily extrapolate that the mighty *Bowers* is dead.¹⁶⁸

B. *BOWERS v. HARDWICK*: DISTINGUISHED FROM *ROMER*

1. *The Theory*

A second school of thought contends that the *Romer* majority correctly omitted *Bowers* from its decision because Amendment 2 did not directly implicate what was at issue in *Bowers*: homosexual conduct. Far from silently overruling *Bowers* then, the Court merely distinguished it.

¹⁶⁰ The Court's failure to engage the *Bowers* question was particularly noticeable given Scalia's repeated references to it, including "*Bowers* alone suffices to answer all constitutional objections." *Romer*, 116 S. Ct at 1633 n.2.

¹⁶¹ 349 U.S. 294 (1954).

¹⁶² 163 U.S. 537 (1896).

¹⁶³ See *supra* notes 48-60 and accompanying text.

¹⁶⁴ Two members of the Court, Justices Rehnquist and Thomas, joined in Scalia's withering dissent which, although far from being an attack on homosexuals, was also far from sympathetic. Furthermore, O'Connor was in the majority in the *Bowers* decision and Kennedy and Souter are both generally moderates on "cultural" issues.

¹⁶⁵ Which brings us back to the title of this Note. Courts may see something in *Romer* that calls these laws into question, but few will agree about what they see.

¹⁶⁶ See *Romer*, 116 S. Ct. at 1628.

¹⁶⁷ The Supreme Court need not do more than decide live cases and controversies under Article III; it is under no legal obligation to provide broad guidelines for the lower courts.

¹⁶⁸ Empirical evidence for this statement does exist. Although some judges have taken tepid steps in that direction, no one has yet declared the overruling of *Bowers*.

The ideological father of this reading is Professor Akhil Amar of Yale Law School and his most recent article entitled, "*Attainder and Amendment 2: Romer's Rightness*."¹⁶⁹ Discussing the majority's treatment (or lack thereof) of *Bowers*, Amar writes:

Look here, Justice Kennedy is saying. There is all the difference in the world between legislative deprivations based on *status* and punishments based on *conduct*. To think otherwise is terminally silly (though Kennedy is far too polite to say so bluntly). Thus, whether or not certain forms of sexual conduct may be criminalized—a question the Court need not and therefore does not reach—mere orientation cannot be criminalized or used by law to disenfranchise or degrade.¹⁷⁰

This argument concerning the distinction between status and conduct is re-enforced by the related notion that the two cases invoked two separate and historically dissimilar clauses of the Fourteenth Amendment: the Due Process Clause (*Bowers*) and the Equal Protection Clause (*Romer*). Because the two clauses occupy two very different spheres in constitutional law,¹⁷¹ the cases need not directly implicate one another.¹⁷²

These somewhat general distinctions find particular validation because the Court in *Bowers* dealt solely with the act of homosexual sodomy¹⁷³ and explicitly refused to engage any equal protection issues.¹⁷⁴ Seen in this light, Justice Kennedy's failure to mention *Bowers* is not a failure at all.¹⁷⁵ *Romer* was an equal protection case and *Bowers* was a substantive due process case. *Bowers* dealt with persons engaging in a criminally proscribed act while *Romer* dealt with depriving a class of people certain, albeit somewhat benign, political rights. Moreover, as Amar writes, "one need not cite a case to distinguish it; and in a deft paragraph Justice Kennedy explains how *Bowers*—far from being the

¹⁶⁹ Amar, *supra* note 11.

¹⁷⁰ *Id.* at 228.

¹⁷¹ "[A]s it has come to be understood, the Equal Protection Clause is tradition-correcting. Whereas the Due Process Clause is generally tradition-protecting." Sunstein, *supra* note 16, at 67.

¹⁷² See *id.*

¹⁷³ See *Bowers*, 478 U.S. at 188 n.2 (expressing no opinion on "the constitutionality of the Georgia statute as applied to other acts of sodomy"); Bruce, *supra* note 22, at 110-11 (arguing that the Court's obsessive focus on *homosexual* sodomy was misguided and allowed them to evade difficult questions).

¹⁷⁴ See *Bowers* 478 U.S. at 188 n.2, 196 n.8.

¹⁷⁵ Kennedy's silence has been referred to as "principled" or representing the "minimalist approach." Sunstein, *supra* note 16, at 64-69; Wolff, *supra* note 63, at 252. In this context, it may well be that he is silent because one does not discuss cases that are not on point.

'case most relevant'—is a case not remotely relevant."¹⁷⁶ Thus, according to Amar, Kennedy distinguished *Bowers* by stating:

Davis v. Beason, . . . not cited by the parties but relied upon by the dissent, is not evidence that Amendment 2 is within our constitutional tradition, and any reliance upon it as authority for sustaining the amendment is misplaced. . . . To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling . . . [is] most doubtful To the extent that *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable.¹⁷⁷

There stands *Bowers* then, alive, well, and distinguished.

2. *The Effects*

What Professor Amar does *not* seem to realize is that the effects of such a holding would be enormous. Sodomy would cease to be the unseverable link between homosexuals as a group and their legal identity. Sodomy, quite simply, would no longer constitute "the behavior that defines the class."¹⁷⁸ Further, all the cases that relied on such logic,¹⁷⁹ importing *Bowers* into the equal protection realm, would be called into question. There would be new potential for civil rights cases, same sex marriages, and challenges to the military's "Don't Ask, Don't Tell" discharge policy.¹⁸⁰ Finally, although courts would still not have much guidance on the appropriate level of review for homosexuals' equal protection challenges, or on the question of whether homosexuals constitute a suspect or quasi-suspect class, at least the courts would know how *not* to analyze these claims: against the backdrop of *Bowers*. In short, *Bowers* would no longer be the Monster in the middle of Maple Street—a towering and hideous beast allowing none to pass along the arduous road to homosexual rights.

¹⁷⁶ Amar, *supra* note 11, at 227.

¹⁷⁷ *Id.* at 227-28 (quoting *Romer*, 116 S. Ct. at 1628) (citations omitted).

¹⁷⁸ *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

¹⁷⁹ See *supra* notes 57-58 and accompanying text.

¹⁸⁰ Whereas the impact of such a reading can never be *precisely* gauged (particularly given the ferociously complex nature of certain issues like same-sex marriages), generalizations can, indeed must, be made. At a minimum, the court's statement in *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), that "[a]fter *Hardwick*, it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm" is no longer true. *Bowers* is not a carte blanche invitation for discrimination against homosexuals in all areas of law.

3. Cases Supporting the Position

Perhaps the strongest empirical evidence that *Bowers* has been distinguished and a new standard in equal protection jurisprudence has arrived is the recent district court case of *Swage v. Inn Philadelphia and Creative Modeling, Inc.*¹⁸¹ *Swage* centered, in part, on the issue of whether Title VII covers same-sex sexual harassment.¹⁸² For a variety of legal reasons,¹⁸³ the court refused to adopt the bright line rule that same-sex sexual harassment is never actionable; included in the court's rationale was *Romer* with all of its ideological trappings.¹⁸⁴ While *Swage* did not discuss *Romer* in its larger textual analysis, the court used *Romer* as an important weapon in beating back "the absolutist approach that same sex harassment is never actionable."¹⁸⁵ *Romer*, the court argued, mandated that "homosexuals cannot be denied protection against discrimination available to all others."¹⁸⁶ While it is not entirely clear how the court discerned this holding from the ever-ambiguous *Romer* decision,¹⁸⁷ it is clear that *Romer* provided further firepower to a court already sympathetic to homosexual rights. In this context, the Supreme Court's vacating of *Equality II*¹⁸⁸ appears sharper as well. Perhaps *Bowers* is good law, but state laws that seek to classify individuals by a single characteristic (homosexual sodomy) and then deny them political protections across the board¹⁸⁹ are subject to some sort of searching scrutiny.¹⁹⁰

¹⁸¹ No. Civ.A. 96-2380, 1996 WL 368316 (E.D. Pa. June 21, 1996).

¹⁸² *Id.* at *1.

¹⁸³ These reasons include the ambiguous wording of the statute (including the term sex), the indeterminate legislative history and the general illogicality of the interpretation that same-sex harassment is never actionable. See *id.* at *2-*3.

¹⁸⁴ Certainly the direct legal issues were not analogous but found common ground in the notion that "to conclude that same gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws that govern the workplace conduct of heterosexuals." *Id.* at *3 (quoting *Pritchett v. Sizeler Real Estate Management Co., Inc.*, 1995 WL 241855 (E.D. La. Apr. 25, 1995)).

¹⁸⁵ *Id.* at *3.

¹⁸⁶ *Id.*

¹⁸⁷ In a sense the Court actually seemed to say the opposite in *Romer*. Homosexuals could be denied the same rights accorded to all others. Certainly Congress has never extended civil rights to homosexuals and no one has suggested that this policy is under fire after *Romer*. Further, even sympathizers of the decision maintain that this reading cannot be right. "But surely the cities were not constitutionally obliged to pass these private discrimination codes. The federal Constitution generally does not require that the government prohibit private discrimination." Amar, *supra* note 11, at 206.

¹⁸⁸ *Equality III*, 116 S. Ct. 2519; see *supra* notes 149-57 and accompanying text.

¹⁸⁹ See *Romer*, 116 S. Ct. at 1627-29.

¹⁹⁰ While the court technically applied the lowest level of review available, rational basis, some commentators have described the scrutiny that the Court applied as "rational basis with bite." Bruce, *supra* note 22 at 111 n.64. Still other authors have analogized it to "active" rational basis review probing the record and minds of legislators to make sure animus is not afoot (although as the author points out there is no record to probe in a referendum). See Delchin, *supra* note 99, at 14; see also William M. Wilson III, *Romer v. Evans: "Terminal*

The distinction between punishing conduct and classifying by status, then, is alive and well. Furthermore, homosexual equal protection challenges have potential, at the very least in regards to overbroad laws similar to Amendment 2 (*Equality*) and perhaps even in other areas like civil rights (*Swage*). While not explicitly expanding the notion of homosexual rights through a stricter standard of review or suspect/quasi-suspect status, *Romer* symbolizes the inception of a much broader but somewhat ill-defined movement to strengthen homosexuals' equal protection challenges.¹⁹¹

4. *Difficulties Inherent in such a Reading*

While intriguing at points, this reading is not the strongest or most persuasive interpretation of *Romer*. Although it is true that a court need not name a case to distinguish it,¹⁹² more than silence is usually needed.¹⁹³ Because it was dealing with precedent as well-known and powerful as *Bowers*, the majority needed to delineate something more than a vague feeling or premonition that this law in question was wrong or weird¹⁹⁴ to have any serious hope of evicting the *Bowers* rationale from the equal protection realm.¹⁹⁵

Silliness, or Enlightened Jurisprudence?, 75 N.C. L. REV. 1891, 1930 (1997) (maintaining that the Court's use of active rational basis review parallels the earlier case of *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). In some sense, it is not unlike the level of review under the Administrative Procedure Act for agency rulemaking and adjudication.

¹⁹¹ There is much evidence to suggest that the present Court is very suspicious of laws that seek to categorize and/or exclude certain groups. See *United States v. Virginia*, 116 S. Ct. 2264 (1996) (condemning VMI's all-male admissions policy); *Adarand v. Peña*, 515 U.S. 200 (1995) (invalidating a Department of Transportation regulation giving special preferences to minority owned businesses).

¹⁹² See Amar, *supra* note 11, at 227.

¹⁹³ Particularly when one considers that nearly all legal commentators (as well as the dissent) discussed *Bowers* in the wake of *Romer*. In essence, the majority was virtually the only group that did not address the issue in some way.

¹⁹⁴ Indeed, among the many theories, arguments and ideas the Court refused to *overtly* adopt was the notion of a "per se" violation outlined in an Amicus Brief by Laurence Tribe. Amicus Brief, *Romer*, 116 S. Ct. 1620, Brief of Laurence Tribe et al., 1995 WL 862021 (No. 94-1039). Tribe's complex and well-reasoned analysis appears to have greatly influenced the Court. However, the only portion of the brief that the Court explicitly adopted was Tribe's statement that: "Never since the enactment of the Fourteenth Amendment has this Court confronted a measure quite like Amendment 2—a measure that, by its express terms, flatly excludes some of a state's people from eligibility for legal protection from a category of wrongs." *Id.* at *3. This quotation translated loosely into the Court's assertion that Amendment 2 "is not within our constitutional tradition . . . [and] is itself a denial of equal protection of the laws in the most literal sense." *Romer*, 116 S. Ct. at 1628. At a minimum, Tribe's brief fueled the Court's ongoing fascination with the uniqueness of Amendment 2.

¹⁹⁵ Particularly when everything about the decision smacked of *sui generis* and the Court applied only rational basis review with no fundamental right and no suspect classification. It would be asking too much for a lower court to see this reading through to its eventual conclusion when it is unclear that the Supreme Court knows what its eventual conclusion is.

Further, numerous lower court rulings over the years conflating status and conduct exacerbated the need for the Court to engage the issue more directly.¹⁹⁶ Mere admission of homosexual orientation or of a homosexual marriage has been sufficient in military cases to indicate a propensity to engage in homosexual conduct, which in turn has been sufficient to justify a discharge.¹⁹⁷ Professor Amar may call such reasoning "most troubling,"¹⁹⁸ but it has prevailed in the lower court opinions.¹⁹⁹ Perhaps, as Professor Amar argues, there is a world of difference between status and conduct and *Bowers* does not apply to status-based equal protection challenges, but the Court never acknowledged or discussed the numerous rulings to the contrary. Indeed, it is telling that Amar²⁰⁰ appears to think them almost entirely inconsequential.²⁰¹ In short, it simply requires too great of an intellectual leap of faith to extrapolate that *Romer*, which does not even mention *Bowers* or the case law that sprung from it, distinguished *Bowers*.

Finally, delving even further, one of the several explanations Professor Amar offers for the Court's silence seriously undermines his argument about *Bowers* being distinguished: "[P]erhaps some Justices in the majority still approve of *Bowers* and would resist an explicitly negative 'but see' citation."²⁰² If the citation would be explicitly negative then *Romer* is contradicting, not distinguishing, *Bowers*. Moreover, if some justices in the majority thought *Romer* contradicted *Bowers*, then, as Justice Scalia maintained, they deliberately ignored direct precedent. At the very least, the Court's failure to respond to Scalia was insufficient to counteract the logical and legal precedents supporting his position, and we are left looking for a more plausible reading of *Romer*'s impact on *Bowers*.

¹⁹⁶ See *supra* notes 57-59.

¹⁹⁷ This line of reasoning is what Scalia was getting at when he wrote: "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct." *Romer*, 116 S. Ct. at 1631. Although Scalia was not referring to the military line of cases, the comparisons are obvious, and he does cite military cases like *Ben Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). See *Romer*, 116 S. Ct. at 1632.

¹⁹⁸ Amar, *supra* note 11, at 231.

¹⁹⁹ See *supra* note 57-58.

²⁰⁰ To the extent under this reading that we are inclined to believe that Amar is thinking like the Court.

²⁰¹ Amar devotes only one half of a footnote to mentioning the many "lower court opinions [that] collapse the *obvious* analytic distinction between homosexual orientation and homosexual conduct." Amar, *supra* note 11, at 235 n.124 (emphasis added).

²⁰² Amar, *supra* note 11, at 205 n.234.

C. *BOWERS & ROMER* AS SCYLLA AND CHARYBDIS²⁰³ OF THE GAY RIGHTS MOVEMENT: THE MOST VIABLE OPTION LEFT

1. *The Theory*

In what is developing into not only a surprise but a constitutional tale rich with irony,²⁰⁴ *Romer v. Evans*, initially celebrated as a major victory for the gay rights movement,²⁰⁵ may well have become the proverbial nail in the coffin of the very same movement. Although scholars disagreed for years about whether the rationale and underpinnings of *Bowers* extended to the Equal Protection realm,²⁰⁶ they generally agreed on what would resolve the dispute: (1) a direct overruling of *Bowers* or (2) a Supreme Court case involving an equal protection challenge based on homosexuality.²⁰⁷ This section deals with *Romer* in the latter context and details its devastating effects on the gay rights movement.²⁰⁸

The *Romer* fact-pattern may have provided Court watchers with the scenario they wanted: a Supreme Court case involving an equal protection challenge based on homosexuality.²⁰⁹ Interestingly, the Court re-

²⁰³ The reference is to the two hideous monsters who harass Odysseus on his way through the Straits of Messina. HOMER, *THE ODYSSEY*, (Robert Fitzgerald trans., Doubleday & Company Inc., 1961).

²⁰⁴ This legal tale is actually rich with many ironies. One of which can be found in the similarities between *Romer* and the historic case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), cited by the majority opinion in *Romer*. See *supra* note 92. *Romer* is beginning to look something like *Shelley* in that it was initially heralded as something of a landmark case for a particular class but the holding eventually became limited to its particular set of facts. It is unlikely that this is the proposition for which the Supreme Court cited *Shelley*. But cf. Board of County Comm'rs v. Umbehr, 116 S. Ct. 2361, 2373 (1996) (Scalia, J., dissenting) (arguing that the Court has portrayed decisions like *Romer* as "sui juris" as well but really they represent "a major, undemocratic restructuring of our national institutions and mores.").

²⁰⁵ See Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War and Romer v. Evans*, 72 NOTRE DAME L. REV. 345, 347-48 ("media and academic spin doctors have proclaimed *Romer* as a landmark victory for gay rights"); David A. Kaplan and David Klaichman, *A Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24; Linda Greenhouse, *Gay Rights Laws Can't Be Banned, High Court Rules*, N.Y. TIMES, May 21, 1996, at A1.

²⁰⁶ See *supra* notes 58-59 and accompanying text.

²⁰⁷ See Kenton, *supra* note 23, at 873. It was thought to be particularly helpful for the Supreme Court to enunciate the appropriate level of review for, and status of, homosexuals as a class. *Id.*

²⁰⁸ It is interesting that *Romer* was the case taken by the Court instead of the more noteworthy *Equality II*, 54 F.3d 261 (6th Cir. 1995). Most people thought the latter case had a better chance for a grant of certiorari given that the district court had found homosexuals to be a quasi-suspect class deserving of intermediate scrutiny. See *Equality I*, 860 F. Supp. at 440. Because the "Court has never addressed whether homosexuals constitute a suspect or quasi-suspect class," *Equality II* seemed ripe for review. Kenton, *supra* note 23, at 873. The Court's decision to hear *Romer*, then, lends further credence to the idea that the Court was not interested in deciding a landmark case for the homosexual rights movement.

²⁰⁹ If nothing else, this case might become that one case because (1) it is only the second case the Supreme Court has heard on homosexual rights and (2) the Court is generally reluctant to take on cases that would place itself as a combatant in America's "Culture Wars."

jected the Colorado Supreme Court's finding of a "[fundamental] right to participate equally in the political process"²¹⁰ and its subsequent demand that the state produce a compelling interest to justify the infringement.²¹¹ The Supreme Court, therefore, declined a convenient opportunity to sidestep the direct question of homosexual rights and, thus, likely cemented their opinion as a weighty (if ambiguous) decision in the area of homosexual rights.²¹²

Outside of its narrow holding that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment, the Court decided few things of import. It did, however: (1) refuse to recognize a fundamental right,²¹³ (2) decline to extend any type of suspect status to homosexuals,²¹⁴ and (3) apply mere rational basis review.²¹⁵ It is the latter two acts that may become the true legacy of *Romer*.

²¹⁰ *Evans I*, 854 P.2d at 1285.

²¹¹ "We granted certiorari and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court." *Romer*, 116 S. Ct. at 1624.

²¹² As a result the case left the Supreme Court as more of a gay rights case than it was when it entered. Such a move is all the more monumental given that the issue of homosexuals rights is the more complicated, thorny and emotionally charged issue. See generally Rabkin, *supra* note 4, at 4 (invoking Scalia's use of *Kulturkampf* as a starting point for a discussion of America's culture wars and the manner in which the Court has consistently shown up "on the side of elite opinion, which is to say, liberal opinion"); Joel Edan Friedlander, *Justice Scalia's Kulturkampf*, in *RELIGIOUS LIBERTIES NEWS*, Vol. 1 No. 1 (Fall 1996) (arguing that the majority in *Romer* has taken a strong position in the culture wars and conservative justices must, rather than adopt neutral principles, aggressively pursue culturally conservative positions to counteract the force of the liberals on the Court).

²¹³ See *Romer*, 116 S. Ct. at 1631 n.1, (Scalia, J., dissenting) ("And the Court implicitly rejects the Supreme Court of Colorado's holding . . . that Amendment 2 infringes upon a 'fundamental right' of 'independently identifiable class[es]' to 'participate equally in the political process.'") (quoting *id.* at 1624).

²¹⁴ See *id.* (Scalia, J., dissenting) ("The trial court rejected the respondents' argument that homosexuals constitute a 'suspect' or 'quasi-suspect' class, and respondents elected not to appeal that ruling to the Supreme Court of Colorado."). The failure to outline any sort of suspect status is telling given that the Court had declined the fundamental right invitation. Thus, the law in question could only be subjected to rational basis review. "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer*, 116 S. Ct. at 1627 (citing *Heller v. Doe*, 113 S. Ct. 2637, 2642-2643 (1993)).

²¹⁵ See *Romer*, 116 S. Ct. at 1627-1629. For an extended comparison between traditional rational basis review and the rational basis review applied in *Romer*, see *supra* notes 103-111 and accompanying text. See also *Romer*, 116 S. Ct. at 1632 n.1 (Scalia, J., dissenting) (summarizing that the "Court evidently agrees that 'rational basis'—the normal test for compliance with the Equal Protection Clause—is the governing standard."). The Court seemed to have painted itself into something of a corner here because laws rarely fail to pass muster under rational basis review. See *TRIBE*, *supra* note 56, at 1442-43 (1988); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 541 (2nd ed. 1991). Furthermore, once the Court established rational basis as the standard, the path ahead looked particularly thorny for a variety of reasons. First, the rationale proffered by the state seemed rational under a traditional *Bowers* approach—especially given that the Colorado Supreme Court interpreted the statute as not severable in the way it classifies homosexuality. "[I]f that premise is true—if the entire class affected by the Amendment takes part in homosexual conduct, practices and relationships—

Considering *Romer* in all its complexity, one must keep in mind that the Court did not explicitly declare "homosexuals are not to be considered a suspect class" or, alternatively, "there is no fundamental right to participate equally in the political process." It simply did not affirmatively announce either proposition. Nor did the Court decide that rational basis review was the proper scrutiny for either homosexuals' equal protection challenges generally or even this law specifically. Instead, the Supreme Court simply said, "the principles [Amendment 2] offends . . . o are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose . . . and Amendment 2 does not."²¹⁶ Thus, at a minimum, *Romer* changed nothing; it yielded no new legal rules or standards. At the maximum interpretation, however, the Supreme Court's silence indicated that rational basis review is appropriate for equal protection challenges based on homosexuality and that homosexuals do not constitute a suspect or quasi-suspect class.

2. *The Effects*

If *Romer* stands for the propositions that homosexuals do not constitute a suspect class and their equal protection challenges are subject to rational basis review, the effects will be subtle yet profound.²¹⁷ Under such a reading, on the one hand *Romer* would merely be rubber-stamping the status quo. On the other hand, given the adverse case law and the hopes that had been pinned on this case, the Supreme Court's preservation of the status quo would be significant indeed. Certainly, the current military policy would stand up under rational basis review as it has for years—and there is already evidence that this is happening.²¹⁸ Questions

Bowers alone suffices to answer all constitutional objections." *Romer*, 116 S. Ct. at 1633 n.2 (Scalia, J., dissenting). Second, Amendment 2 would likely have passed a rational basis test if subjected to such by the Colorado Supreme Court. See *supra* note 83. Third, the law looked rational on its face and, even more, one could imagine other conceivable justifications for the law not proffered. See generally Delchin, *supra* note 99, at 14 (arguing that it is virtually impossible for courts to discern voter motivation on referendums, thus making it virtually impossible in theory for the Court to invalidate referendums under rational basis review).

²¹⁶ *Romer*, 116 S. Ct. at 1629. The implication being if it doesn't pass even this bare minimum requirement, the Court need not specify the appropriate level of review.

²¹⁷ Given that the status/conduct distinction was a major force for pro-gay rights litigators, the Court may have severely dashed their hopes.

²¹⁸ The rationale given by the military has stood up to rational basis review for years and is likely to continue doing so—especially given that the newest policy is the most lenient in years and only establishes a rebuttable presumption of homosexual conduct for those admitting to be homosexuals. See 32 C.F.R. pt. 41, app. A (1995); Phillips v. Perry, 106 F.3d 1420 (1997) (upholding the military's policy even in the wake of *Romer*); see also Richenberg, *infra* note 223 (strongly doing the same); Warren L. Ratliff, Case Note, "Upholding 'Don't Ask, Don't Tell,'" Thomason v. Perry, 80 F.3d 915 (4th Cir.), cert. denied, 1996 WL 396112 (U.S. Oct. 21, 1996) (No. 96-1), 106 YALE L.J. 531, 531 (1996) ("This Case Note argues that constitutional challenges to the DADT [Don't Ask, Don't Tell] policy have little chance of success under the current standard of review.").

of civil rights would also likely come out no differently without an explicitly higher standard of review or further congressional guidance on the subject.²¹⁹ Although *Romer* does perhaps bolster the argument for making same-sex discrimination actionable, it is only in a very vague and attenuated way. Even for laws similar to Amendment 2, *Romer* casts little doubt on their continued validity.²²⁰ Finally, the issue of gay marriage is highly complicated, but such a legacy for *Romer* would likely have few significant effects on that debate either.²²¹

3. Cases Supporting the Position

Several recent federal cases outline the possibility that *Romer* stands for three basic legal propositions: (1) homosexuals are not a suspect class; (2) there is no fundamental right to participate equally in the political process; and (3) rational basis is the appropriate standard of review for homosexuals' equal protection claims. Three of these relevant cases are: *Hyrnda v. United States*,²²² *Richenberg v. Perry*,²²³ and *Equality IV*.²²⁴ While the first two cases exhibit some nuanced differences, both involve essentially the same issue—involuntary discharge under the military's "Don't Ask, Don't Tell" policy²²⁵—and both draw on *Romer* for intellectual firepower. *Equality IV*, in contrast, is noteworthy primarily for the impact *Romer* did not have.

In *Richenberg*, the plaintiff, a United States Air Force Member, was honorably discharged from the military after "informing his commanding officer that he [was] homosexual."²²⁶ His central argument was that "10 U.S.C. § 654(b) [federal statute authorizing the military policy] and DOD Directive 1332.30 [the military policy] violate the Fifth Amendment's Due Process Clause, and particularly its equal protection compo-

²¹⁹ Currently, the issue is ambiguous at best as to what Congress intended by the term "sexual discrimination." The legislature would have to speak loudly and clearly because Congress, traditionally, as Justice Scalia pointed out in dissent, has repeatedly been explicit in its refusal to enact civil rights legislation based on sexual orientation. See *Romer*, 116 S. Ct. at 1637 (noting the "more plebeian attitudes that . . . still prevail in the United States Congress").

²²⁰ See *supra* notes 60, 239-42 and accompanying text.

²²¹ See Duncan, *supra* note 205, at 357 (citations omitted) ("The case for conventional marriage laws may be debatable, but it is neither irrational nor invidious. And *Romer* is no threat to the heterosexual paradigm of civil marriage."). But see *supra* note 135.

²²² 933 F. Supp. 1047 (M.D. Fla. 1996).

²²³ 97 F.3d 256 (8th Cir. 1996), cert. denied, 118 S. Ct. 45 (1997).

²²⁴ *Equality IV*, Nos. 94-3855, 94-3973, 94-4280, 1997 WL 656228 (6th Cir. Oct. 23, 1997).

²²⁵ See *Hyrnda*, 933 F. Supp. at 1049-50; *Richenberg*, 97 F.3d at 260. "Don't Ask, Don't Tell" is the military's most recent, and likely most lenient, anti-homosexual discharge policy. The policy, which became effective on October 1, 1993, directs the military to refrain from inquiring into the sexual orientation of recruits and service members in addition to curtailing military investigations into the sexual habits of its service members. See *Policy Guidelines on Homosexual Conduct in the Armed Forces*.

²²⁶ *Richenberg*, 97 F.3d at 260.

nent,²²⁷ by adopting an irrational and 'constitutionally repugnant' presumption that discriminates against homosexuals on the basis of their 'status.'²²⁸ In other words, the plaintiff directly challenged the military's ongoing policy of equating homosexual status with homosexual conduct.

The court, however, was not particularly sympathetic to Richenberg's arguments. It rejected his argument that the court "should apply heightened scrutiny because homosexuality is a suspect classification."²²⁹ As authority for applying rational basis review, the court cited "[f]ive other circuits [who had] declined to give heightened scrutiny."²³⁰ Making it clear that it was referring to homosexuals as a class, the court also cited *Romer*: "The Supreme Court applied rational basis review in reviewing a state constitutional amendment adversely affecting homosexuals"²³¹ Interestingly, the next cite was to *Bowers*!²³² After it established this low level of review, the court held that "given these rational concerns [residential living, troop morale, etc.], Congress and the President may rationally exclude those with a propensity or intent to engage in homosexual acts."²³³ In short, upholding the military's policy became a mere formality.²³⁴

In *Richenberg*, then, the Eighth Circuit used *Bowers* and *Romer* together to apply rational basis review to an equal protection challenge based on homosexuality. *Romer* was directly on point but *Bowers* still provided support. Eventually, *Bowers* may disappear entirely from the equal protection realm leaving only *Romer*, isolated from its holding, upholding the principle of rational basis review in equal protection challenges.

Although *Hyrnda*—a related, but somewhat less complex, military discharge case—did not address the more difficult legal issue of whether

²²⁷ Some, like this author, would question the rationality of the Due Process Clause having a silent equal protection component, but thus is the legacy of *Bolling v. Sharpe*, 347 U.S. 497 (1954), and it has not been questioned in years.

²²⁸ *Richenberg*, 97 F.3d at 260.

²²⁹ *Id.*

²³⁰ *Id.* at 260. These included *Steffan v. Perry*, 41 F.3d 677 (D.C.Cir. 1994) (en banc); *Meinhold v. Department of Defense*, 34 F.3d 1469 (9th Cir. 1994); *Ben-Shalom v. Marsh*, 881 F.2d 454, 456 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984). These are the very cases the Supreme Court refused to consider in *Romer*, but obviously still present formidable opposition and will not be overruled or challenged by implication alone.

²³¹ *Richenberg*, 97 F.3d at 260 n.5.

²³² *See id.*

²³³ *Id.* at 262.

²³⁴ "In conducting rational basis review, we presume that the statute and implementing Directive are valid, placing the burden on Richenberg to show that they are not rationally related to any legitimate government purpose." *Id.* at 261; *see also supra* note 54.

a mere declaration of homosexual orientation (as was the case in *Richenberg*) is sufficient to support a discharge,²³⁵ it did indicate that *Romer* altered no legal principles or rules in the military context. The military discharged the plaintiff in *Hyrnda* not simply for an admission of homosexual orientation,²³⁶ but also for admitted homosexual conduct.²³⁷ In applying mere rational basis review, the court cited all the federal circuits (under the military's older but similar policy) as well as *Romer*: "The United States['s] constitutional promise that no person shall be denied the equal protection of the law co-exists with the realization that most legislation classifies for one reason or another, resulting in disadvantage to various groups or persons."²³⁸ While nothing historic, this case re-emphasized the point that *Romer* is unlikely to affect the military's policy. If anything, it appears strengthened.

Finally, the Sixth Circuit's most recent pronouncement in the *Equality Foundation* odyssey provides perhaps the strongest evidence that *Romer* will be limited to its specific facts leaving behind only a damning legacy of rational basis review for homosexual equal protection challenges.²³⁹ The question of how far *Romer* would reach was always a matter of contention, but most scholars thought it would at least implicate other laws that looked like Amendment 2. In *Equality IV*, however, the Sixth Circuit said, in effect, maybe not. Reconsidering the case on remand from the Supreme Court and in light of *Romer*, the Sixth Circuit held nonetheless that "the salient operative factors which motivated the *Romer* analysis and result were unique to that case and were not implicated in [*Equality II*]."²⁴⁰ The Cincinnati City Charter Amendment was less constitutionally suspect for two reasons: (1) it was significantly less restrictive than Amendment 2 and (2) its realm of application was much narrower. Citizens throughout the state will not have to lobby their legislators, as would have been the case after Amendment 2, to pass a constitutional amendment in order to seek access to their legislature. In distinguishing *Romer*, the Sixth Circuit wrote: "In essence, the high Court resolved that a state constitutional amendment which denied

²³⁵ The court did not need to reach the issue because the plaintiff had admitted not only to being a homosexual but to committing homosexual acts—conduct that was certainly grounds for dismissal even under the most sympathetic of court precedent. See *Hyrnda*, 933 F. Supp. at 1052-53.

²³⁶ The court defined a homosexual as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." *Hyrnda*, 933 F. Supp. at 1050 (quoting DOD Dir. 1332. 14 Pt. 1 § H(1)(b)(1)) (This statute is now known as the military's "old policy.").

²³⁷ See *id.* at 1052. The conduct is what allowed the court not to have to reach the more difficult issue of equating status with conduct.

²³⁸ *Id.* at 1052 (citing *Romer*).

²³⁹ *Equality IV*, 1997 WL 656228 (6th Cir. Oct. 23, 1997).

²⁴⁰ *Id.* at *4.

homosexuals any opportunity to attain state law protection, even from municipalities or other local entities within that state which desired to accord them special legal rights, could not be justified . . . o'²⁴¹

Even more telling than the impact *Romer* did not have in *Equality IV*, however, was the impact that it did have on the case. In *Romer*, the Sixth Circuit observed, the Court "resolved that the deferential 'rational relationship' test, that declared the constitutional validity of a statute or ordinance if it rationally furthered any conceivable valid public interest, was the correct point of departure for the evaluation of laws which unlikely burden the interests of homosexuals."²⁴² Amazingly, then, *Romer* did influence *Equality IV* but rather than compelling the invalidation of Issue 3 by force of logic, *Romer* directly led to a second upholding of the amendment by cementing rational basis review as the appropriate standard of review for *Equality IV* and many homosexual rights cases to come.

Of course, two of the cases discussed above are military cases—and courts' deference to the military is legendary²⁴³—while the third involved unique circumstances not likely to repeat. Nonetheless, an outline of *Romer's* legacy is beginning to emerge in the lower courts and it looks very small indeed.

4. *Difficulties Inherent in Such a Reading*

Although *Bowers* and *Romer* working side-by-side to defeat due process and equal protection challenges is conceptually the strongest reading,²⁴⁴ it is far from flawless. The points of vulnerability are essentially three-fold. First, the Supreme Court's narrow holding in *Romer* was that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment. At the most basic level then, the Court *affirmatively limited* the manner in which states can treat homosexuals. While it may be that this constitutional mini-splash will produce only imperceptible ripples, the burden of proof would seem to remain on those trying to

²⁴¹ *Id.* at *9.

²⁴² *Id.* at *3. Although the Sixth Circuit did discuss the possibility that the Supreme Court applied an "'extra-conventional' application of equal protection principles," that application had "no pertinence to the case [at hand]." *Id.* at *6. Further, the Sixth Circuit, as a practical matter, appeared to be applying traditional rational basis review.

²⁴³ "The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area *has the Court accorded Congress greater deference.*" *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (upholding the military's policy of selecting only men for duty through the selective service) (emphasis added); *see also* *Hirabayashi v. United States*, 320 U.S. 81 (1944) (upholding as a wartime necessity the military's World War II order of a specific curfew for persons of Japanese ancestry); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the forced relocation of persons of Japanese ancestry from the West coast to internment camps during World War II).

²⁴⁴ Emerging victorious in some sense as the *least weak* reading.

limit *Romer* not on those suggesting it might implicate other laws or other areas of law. Only time, and of course further litigation, will tell just how far, if at all, the ripples will spread. Second, the Supreme Court in *Romer* never explicitly established rational basis review as the appropriate standard for homosexuals' equal protection challenges; it merely invalidated Amendment 2 under the lowest scrutiny necessary.²⁴⁵ Thus, extracting "rational basis review" out of *Romer* is questionable. Finally, given the highly ambiguous and complex nature of Amendment 2, it is difficult to make any accurate predictions as to precisely what other laws *Romer* will affect. Caution is to be held in the highest regard.

CONCLUSION

In *Romer v. Evans*, the United States Supreme Court upheld a decision of the Colorado Supreme Court that struck down a 1992 Colorado state referendum banning homosexual preferences. Beyond that, *Romer* is nothing if not ambiguous. Perhaps it was because of the strange nature of the law. Perhaps it was because of the controversial nature of the subject matter. Perhaps it was because the Justices themselves could not agree on anything more substantial than a holding. Whatever the cause, the result was inkblot jurisprudence.²⁴⁶

From that inkblot, three separate models or readings of the case, and its impact on the homosexual rights movement, have emerged: (1) *Romer* overruled *Bowers*; (2) *Romer* distinguished *Bowers*; (3) *Romer* and *Bowers* will work side-by-side to defeat different constitutional challenges by homosexuals. Each reading is viable and any of the three may emerge as the predominant legacy of *Romer* in the future. Nonetheless, the notion that *Bowers* and *Romer* will work side-by-side—warts and all—seems the strongest and most logical at this point. Given no other legal building blocks to work with, lower courts, even those sympathetic to the gay rights movement or the status/conduct distinction often urged by gay rights advocates, may well have to conclude that *Romer* will strike down little more than laws that look like Amendment 2. Taken to its logical extreme, the case may even act as a vindication of the lower courts' prior policy of importing *Bowers* into the equal protection realm to deny homosexual rights challenges or, at the least, to subject them to the lowest scrutiny possible. If any new or different life is to be injected into the case, the Supreme Court will once again have to grant certiorari and de-

²⁴⁵ See *supra* note 94 and accompanying text.

²⁴⁶ See *supra* note 61.

cide another case or controversy. Until then, lower courts will be left interpreting the inkblot.

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