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Homosexuality and the Federal Constitution: A Legal Analysis of the U.S. Supreme Court Ruling in *Romer v. Evans*

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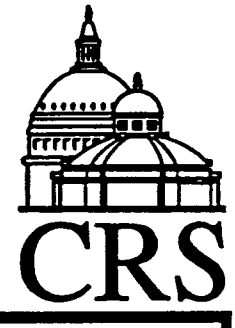

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HOMOSEXUALITY AND THE FEDERAL CONSTITUTION: A LEGAL ANALYSIS OF THE U.S. SUPREME COURT RULING IN *ROMER V. EVANS*

SUMMARY

The U.S. Supreme Court this term in *Romer v. Evans*, decided 6 to 3 that the State of Colorado violated the right of lesbians and homosexuals to Equal Protection of the Laws when it adopted, by voter referendum, Amendment 2 to the State Constitution. That amendment rescinded various state and local laws prohibiting discrimination on the basis of "homosexual, lesbian or bisexual orientation" and barred the statutory enactment of any such civil rights protection in the future. Justice Kennedy's majority opinion affirmed the judgment but not the rationale of the Colorado Supreme Court which had applied "strict scrutiny" to invalidate Amendment 2 based on a "fundamental rights" analysis. Instead, the Kennedy-led majority applied a "rationality" standard to hold that the "broad and undifferentiated disability of a single named group" was irrational and could not be justified by any legitimate state interest.

Bowers v. Hardwick was not mentioned by the *Romer* majority. In *Bowers*, a decade earlier the Court refused, by a 5 to 4 vote, to find that any constitutionally recognized "liberty" interest was contravened by a Georgia State law penalizing homosexual sodomy. *Bowers* was a "conduct" case seeking, in effect, due process protection from state prosecution for homosexual acts rather than safeguards against discrimination by the state based on sexual "orientation." The comprehensive nature of the legal disability visited upon the "isolated group" disadvantaged by Amendment 2, and the "unique" circumstances of its enactment, may also serve to distinguish and diminish the force of *Romer* in other legal and statutory contexts.

The possible fragility of the *Bowers* precedent, and *Romer's* silence as to its status, could lead to future litigation on a variety of fronts.

HOMOSEXUALITY AND THE FEDERAL CONSTITUTION: A LEGAL ANALYSIS OF THE U.S. SUPREME COURT RULING IN *ROMER V. EVANS*

The legal debate over "gay rights" has intensified as courts consider the constitutionality of U.S. military policy towards homosexuals, the custodial rights of homosexual parents, and same-sex marriage laws. After prolonged silence on the matter, the U.S. Supreme Court returned to the fray this term in *Romer v. Evans*,[1] deciding 6 to 3 that the State of Colorado violated the right of lesbians and homosexuals to Equal Protection of the Laws when it adopted, by voter referendum, Amendment 2 to the State Constitution. That amendment rescinded various state and local laws prohibiting discrimination on the basis of "homosexual, lesbian or bisexual orientation" and barred the statutory enactment of any such civil rights protection in the future. Justice Kennedy's majority opinion affirmed the judgment but not the rationale of the Colorado Supreme Court, which had applied "strict scrutiny" to invalidate Amendment 2 based on a "fundamental rights" analysis. Instead, the Kennedy-led majority applied a "rationality" standard to hold that the "broad and undifferentiated disability of a single named group" was irrational and could not be justified by any legitimate state interest.

The *Romer* majority did not even mention *Bowers v. Hardwick*,[2] where the Court a decade earlier refused, by a 5 to 4 vote, to find that any constitutionally recognized "liberty" interest was contravened by a Georgia State law penalizing homosexual sodomy. Of course, *Bowers* was a "conduct" case seeking, in effect, due process protection from state prosecution for homosexual acts rather than safeguards against discrimination by the state based on sexual "orientation." In addition, both the comprehensive nature of the legal disability visited upon the "isolated group" disadvantaged by Amendment 2, and the "unique" circumstances of its enactment, may serve to distinguish and diminish the force of *Romer* in other legal and statutory contexts. Nonetheless, the possible fragility of the *Bowers* precedent, and *Romer's* silence as to its status, could lead to future litigation--of largely unpredictable outcome--on a variety of fronts, a point not lost on Justice Scalia in his *Romer* dissent. This report will review the *Romer* decision and its possible constitutional implications in greater detail.

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1 116 S.Ct 1620 (1996).

2 478 U.S. 186 (1986).

BACKGROUND

On November 3, 1992, Colorado voters approved Amendment 2, a referendum amending the state constitution. The amendment prohibited the state and its political subdivisions from adopting or enforcing any law, policy, or regulation that provided authority for claims of minority or protected status, quota preferences, or protection from discrimination to be based on "homosexual, lesbian or bisexual orientation."[3] The immediate effect of the referendum was to repeal local ordinances in Aspen, Boulder, and Denver prohibiting sexual orientation discrimination in employment, housing, and public accommodations, and an executive order by the Governor directing state agency-heads to "ensure non-discrimination" in hiring and promotion based on "sexual orientation," among other coverage grounds.[4] Significantly, the measure also foreclosed ordinary legislative channels to future gay rights lobbying efforts by, in effect, requiring proponents to achieve their goals through the state's constitutional amending process.

The Colorado trial and appellate courts each applied "strict scrutiny" Equal Protection review to condemn Amendment 2, but on the basis of somewhat differing rationales. In granting preliminary relief, state district court judge Bayliss strongly indicated that Amendment 2 would be found invalid unless justified by a "compelling" state interest because it infringed the "fundamental" right of an "independently identifiable group . . . not to have the state endorse and give effect to private biases." The Colorado State Supreme Court likewise invoked "fundamental rights" analysis as a basis for strictly scrutinizing the purpose and effects of the law, but differently conceived of the group right involved.[5] Thus, for Chief Justice Rovoira, the right to "equal participation in the political process" was "fundamental" under the Equal Protection Clause. The Colorado High Court rooted this right in precedents involving direct restrictions on the exercise of the right to vote, reapportionment, candidate eligibility requirements, and other governmental attempts to limit the ability of certain

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3 The amendment reads:

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

4 Executive Order No. D0035 (Dec. 10, 1990).

5 *Evans v. Romer*, 854 P.2d 1270 (Colo.)(en banc)(issuing a temporary injunction), *cert. denied*, 114 S.Ct 419 (1993).

groups to enact legislation through normal political processes.[6] As a result, it was secured to all "independently identifiable groups"--not just those who are members of traditionally suspect classes, such as racial or ethnic minorities--and any infringement of that right had to pass strict judicial scrutiny.

The mode of constitutional analysis adopted by the Colorado court provides helpful perspective for an examination of Justice Kennedy's opinion in *Romer*. But note, first, that three basic standards have evolved for judicial review of legislation under the Equal Protection Clause: strict scrutiny, as applied by the *Romer* state courts, imposes a burden of justification for legislative action that the government seldom, if ever, is able to meet; a heightened or "intermediate standard" of judicial review that is more tolerant of distinctions or classifications drawn by the legislature or in government regulation; and a deferential "rationality" standard that almost always leads to judicial vindication of the government's defense of class-based distinctions in economic and social legislation. If the statute classifies by a "quasi-suspect" class, such as gender[7] or illegitimacy[8], the intermediate standard of review applies, and the court will uphold the law only if it is substantially related to an important governmental interest. There are two circumstances under which strict scrutiny will apply: the statute classifies by a "suspect" class--such as race, alienage, or national origin[9]--or the statute impinges fundamental rights protected by the Constitution.[10] Laws that are subject to this most "searching" standard of judicial review will be sustained only if they are supported by a "compelling state

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6 Specifically, the Colorado court pointed to U.S. Supreme Court rulings which had disapproved of popularly-inspired governmental restructuring to "fence out" or prevent minority groups from securing legislative favorable to their interests. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Supreme Court disapproved a voter-initiated amendment to the California Constitution, known as Proposition 14, which repealed laws interfering with the sale or lease of private property and prevented their reenactment, since it would have created a constitutional right to discriminate on racial grounds. *Hunter v. Erickson*, 393 U.S. 385 (1969) invalidated a city charter amendment adopted by the voters of Akron, Ohio that required any fair housing legislation to be ratified by public referendum, since it selectively imposed heavier electoral burdens on laws favored by groups opposing racial, ethnic and religious discrimination in housing. "[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) relied on *Hunter* to strike down a vote initiative to prohibit student busing for desegregation purposes because it impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secured public benefits.

7 *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

8 *E.g. Trimble v. Gordon*, 430 U.S. 762 (1977).

9 *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

10 *E.g. San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

interest" and are "narrowly tailored" to achieve that interest in the least restrictive manner possible.[11]

The approach of the Colorado Supreme Court extended strict scrutiny to a law classifying persons on the basis of sexual orientation without deciding whether homosexuals, lesbians, or bisexuals constitute a "suspect class." The suspect class contention has met with near universal rejection by the courts since *Bowers v. Hardwick* and was not even an issue on appeal in *Romer*. In effect, however, the fundamental rights analysis permitted the Colorado courts to circumvent that more controversial issue, yet thrust on the state the same weighty burden of justification for Amendment 2, virtually assuring a judicial finding of invalidity. Of course, this approach is inherently limited to legislation that impinges without justification upon rights--procreation,[12] access to the judicial process,[13] interstate travel,[14] and voting[15]--that have been declared "fundamental" by the Supreme Court for constitutional purposes.

Various elements of the Colorado courts' reasoning reverberate in Justice Kennedy's opinion for the *Romer* majority of the U.S. Supreme Court, but with important distinctions that may narrow its force as precedent in other factual contexts. Amendment 2's main constitutional defects, for Justice Kennedy, were the "sweeping and comprehensive" nature of the legal disability it imposed and the fact that it targeted a "solitary class" for legal disenfranchisement, all without "rational" justification. The gist of his analysis was that "Amendment 2 fails, even defies" traditional equal protection analysis because its "impos[es] a broad and undifferentiated disability on a single named group," a disability so sweeping as to be seemingly "inexplicable by anything but animus toward the class that it affects." Notably, however, Justice Kennedy did not explicitly adopt the fundamental rights analysis employed by the state courts nor did the majority formally confer "suspect class" status upon the group or class of individuals disadvantaged by Amendment 2. Instead of "strict scrutiny" applied to defeat the measure below, the *Romer* majority framed its constitutional analysis in terms of traditional "rational basis" equal protection. Rationality review is typically quite lenient: "Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, . . . this Court properly exercises only a limited review power . . ."[16] At least in theory, it is most deferential to the state, that is, it permits legislative classifications that discriminate for any "reasonable" or "legitimate" governmental purpose.

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11 *Adarand Constructors v. Pena*, 115 S. Ct 2097 (1995).

12 *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

13 *Douglas v. California*, 372 U.S. 353 (1963).

14 *Shapiro v. Thompson*, 394 U.S. 618 (1969).

15 *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

16 *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

It may be open to question, however, whether the *Romer* majority, by summarily rejecting Colorado's asserted justifications for Amendment 2, may have implicitly adopted a less deferential approach to state legislative classifications than traditional rational basis review. In *Romer*, the withdrawal of legal protection from lesbians and homosexuals was defended by the state as an expression of respect for the associational freedoms other citizens, particularly landlords or employers who have personal or religious objections to homosexuality, and in the interest of conserving resources to combat discrimination against other groups. "Rational basis" equal protection review ordinarily dictates judicial approval of governmental classifications in laws that discriminate on grounds other than race, gender, or ethnicity if any set of circumstances could reasonably or rationally be conceived to support the challenged state action. The Court has even held that burden is on the challenger, not the government, to prevail by discrediting all conceivable justifications. "A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. . . . [T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."[17] Nonetheless, the *Romer* majority dismissed the justifications advanced by the State in favor of Amendment 2 with minimal explanation other than its conclusion that "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."

The answer may lie in Justice Kennedy's repeated allusions to a possible class-based "animus" by Colorado voters and to the "disadvantage . . . born of animosity toward the class of persons affected" that may have motivated the popular effort to adopt Amendment 2. This may have provoked the Court to apply an "active" standard of judicial review more rigorous than traditional rationality but less demanding than strict scrutiny. The leading example of such an approach is *Cleburne v. Cleburne Living Center*[18] where the Court invalidated a municipal requirement that homes for the mentally retarded obtain a special permit not required of other care and multiple dwelling facilities. In so doing, the Court rejected the holding of the Court of Appeals that mental retardation was a quasi-suspect classification under the Equal Protection Clause. However, the Court went on to apply an "active" rationality review and struck down the City requirement: "[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment buildings, multiple dwellings, and the like."[19] The Court concluded: "[The] short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[20] An "invigorated" rationality standard is also apparent in certain

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17 *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

18 473 U.S. 432 (1985).

19 *Id.* at 448

20 *Id.* at 450.

lower federal court decisions which have called for an affirmative governmental showing of the "rational basis" for traditional military policies toward homosexuals.

Justice Scalia, joined by Justice Thomas and the Chief Justice in dissent, drew largely from *Bowers v. Hardwick*, arguing in effect that state power to criminalize homosexual conduct necessarily entailed authority to impose lesser sanctions "merely disfavoring" such conduct. He also insisted that Amendment 2 had been adopted by the "most democratic procedures" for the "eminently reasonable" purpose of curbing "piecemeal deterioration of the sexual morality favored by a majority of Coloradans," and chided the majority for promoting the "elitist" judgment that "'animosity' toward homosexuality is . . . evil."

ANALYSIS

The most immediate effect of *Romer*, of course, will be felt in other state and local jurisdictions with laws like Amendment 2, adopted by statute, ordinance, or constitutional amendment to bar legal protection for lesbians and homosexuals. A month after *Romer*, for example, the Court granted a petition to review *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* and promptly remanded for reconsideration by the Sixth Circuit in light of *Romer*.[21] Cincinnati, Ohio voters had enacted a similar measure at the city level one year after the passage of Amendment 2. Issue 3 was a city charter amendment that prohibited the city from enacting any law or policy that gave rise to a claim of discrimination in employment, housing, or public accommodations on the basis of sexual orientation. Gay rights proponents challenged the measure in federal district court and won on a variety of issues, including the right to equal political participation. The Sixth Circuit subsequently reversed and a petition for certiorari was filed.[22] Reportedly, at least eight other states have had campaigns underway for similar state constitutional amendments.[23]

The long range legal implications of *Romer* are more difficult to decipher. The decision has to be read, first, in light of the "exceptional" and "unprecedented" nature of the state law under challenge which, according to Justice Kennedy, amounted to "a general announcement that gays and lesbians shall not have any particular protections from the law." Indeed, it was the "broad and undifferentiated" character of the legal disability imposed, more than any other factor, that convinced the majority of Amendment 2's illegitimate birthright, leading to its invalidation after only a cursory inquiry into rational

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21 No. 95-239, 64 U.S.L.W. 3122 (S.Ct. 6-17-96).

22 *Equality Foundation v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio), *aff'd in part, vacated in part*, 54 F.3d 261 (1995), *pet. for cert. filed*, No. 95-239) 64 U.S.L.W. 3122 (U.S. 8-10-95).

23 *See Fight the Right Project, National Gay and Lesbian Task Force Policy Institute, Anti-Gay Initiative Under Consideration I* (1993).

basis. Accordingly, *Romer* may be a faulty predictor of the outcome in future cases alleging homosexual discrimination over a narrower field--whether marriage, domestic relations and custody matters, military policy or otherwise--where judicial inquiry into legislative rationale may be more meaningful. In particular, the impact of *Romer* on the legal controversy surrounding the rights of gays in the military may still have to be viewed through the prism of the established constitutional principle according "special deference to the military in the conduct of its own affairs.[24]

A second major contributor to the demise of Amendment 2 was the fact that it visited legal disability upon a "single *named* group," identified by a "single trait," and set apart for "disfavored legal status or general hardship." Consequently, had Amendment 2 been framed in neutral terms to negate legal protection for heterosexuals as well as homosexuals on the same generic ground --i.e. substitute "sexual orientation" for "homosexual, lesbian, and bisexual . . ."--it might possibly have withstood the *Romer* challenge and accomplished its intended objective. Similarly, while the state may not legally disable a specific group without rational basis, *Romer* did not decide--nor does it necessarily imply--that state legislation that omits certain groups from civil rights coverage or other legal benefits is thereby subject to equal protection challenge. No affirmative duty to legislate is necessarily implied by *Romer*. Thirdly, extracted from its specific factual context, the scale of protection afforded by the decision may be limited to traditional rational basis review which, as explained above, is the equal protection standard most tolerant of distinctions drawn between persons and groups in law and governmental policymaking. In other words, the Court's analysis and decision may have been the same if the "single named group" had been lawyers, smokers, or hazardous waste disposers instead of gay rights advocates. Note, however, that due to the lack of elaboration provided by the majority's relatively terse opinion, any conclusions on these and related legal issues are mere speculation until the Court speaks again.

Nonetheless, by finding that Amendment 2 discriminated against homosexuals, lesbians, and bisexuals as a group--even though not a "suspect" class--*Romer* may have blunted the persuasive force of *Bowers v. Hardwick*. *Bowers*, as noted, had refused to fashion a due process right of privacy to protect persons engaged in homosexual conduct, a holding that had since been widely invoked by federal appellate courts to reject most discrimination claims based on homosexual status as well. "If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open. . .to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[25] Indeed, Justice Scalia urged much the same view in his *Romer* dissent, "If it is constitutionally permissible for a State to make homosexual conduct criminal,

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24 *See* IB96029, "Homosexuals and U.S. Military Policy: Current Issues," at p. 6 (Legal Challenges)(updated June 14, 1996).

25 *Padula v. Webster*, 822 F. 2d 97, 103 (1987).

surely it is possible for a State to enact other laws merely *disfavoring* homosexual conduct."[26] It seems unlikely now that *Bowers* will be viewed to stand for more than its specific holding--that there is no constitutionally protected liberty interest in homosexual conduct--but even that principle may be less secure given the decision's narrow 5-4 margin and the Court's reconstitution in the past decade.

A final comment on the same sex marriage issue. The Hawaiian state courts are presently considering the constitutional status of that state's policy forbidding same-sex marriage pursuant to an earlier judicial determination that sex is a "suspect classification" for equal protection purposes under the state constitution.[27] As noted, *Romer* made no explicit suspect class determination--indeed, the issue was not even raised on appeal--and Justice Kennedy employed a rationality standard to evaluate Amendment 2. State prohibitions on same sex marriage, while they carry obvious economic and social consequences, may be distinguishable from the wholesale withdrawal of legal protection for homosexuals and lesbians imposed by Colorado. First, by defining marriage as the union of a man and woman, it may be more difficult to argue that these laws impose a "special disability" on a "named group" since they are neutral on their face and apply to all persons regardless of sexual orientation. Moreover, in *Bowers v. Hardwick*, the Court denied homosexual conduct shelter within the zone of constitutional privacy primarily by reason of historical and constitutional tradition. All thirteen original states had anti-sodomy laws when the Bill of Rights was ratified, and contemporary laws remained in most states, so that "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."[28] The Court also explicitly denied any constitutional "connection between family, marriage, or procreation" and "homosexual activity." Arguably, cultural history and tradition may likewise be factors relevant to judicial evaluation of the same-sex marriage rights after *Romer*, at least until *Bowers* is explicitly overruled.

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26 Opinion of Scalia, J. (dissenting)(slip opinion) at p. 7.

27 *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

28 478 U.S. at 194.