The Meaning of Romer v. Evans

Matthew Coles
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by

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My assigned task is to talk about the importance of *Romer v. Evans*,\(^1\) and to speculate a bit about what effect, if any, it is going to have on the movement for lesbian and gay rights in the coming years. I have my trusty crystal ball ready; it has an “8” on the top of it and it usually tells me “ask again later,” but we’ll see what it does on this occasion.

*Romer v. Evans*: “Is it everything or is it nothing?” I’ve heard practitioners and law professors say that *Romer v. Evans* really doesn’t mean anything. Some say it is an aberration, an example of a Court that is unwilling to live with the consequences of a model of equal protection analysis it is unwilling to modify. The Court, as must be obvious by now, is deeply reluctant to use its more aggressive modes of review—strict and intermediate “scrutiny”—on any classifications other than those to which it already applies them (“deeply reluctant” may be a generous way of putting it).\(^2\) The Court has also rejected invitations to completely rethink equal protection analysis.\(^3\)

Those two things together, according to these critics of the opinion, mean that the classification involved in *Romer*—an explicit discrimination

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against lesbians, gay men, and bisexuals—should have been subjected to traditional “minimum scrutiny” rational basis review. That kind of review honestly applied, so the critics say, would never have invalidated the classification. But as the speculation goes, the Court, like most of the rest of the country, knew that the classification in question had no nondiscriminatory goal, and it could not stomach the idea of upholding it. Thus, these critics say, the result was a completely dishonest opinion: the Court believed a certain result was right, could not get it using conventional analysis, was unwilling to rethink the analysis, and so issued an opinion which simply pretended conventional analysis brought about the result it wanted. These critics charge that since the decision was unprincipled, Romer will be of little or no importance in the future.

I've heard other thoughtful practitioners and academics say Romer is another Reed v. Reed. According to them, the Court is almost ready to step up its analysis of sexual orientation classifications to heightened equal protection scrutiny, and Romer is the precursor of the change. Reed v. Reed, of course, was the first case in which the Court invalidated a gender classification, and in Reed the Court also purported to use rational basis review. A couple of years later, tacitly acknowledging that Reed could not really have been a rational basis decision, the Court began applying heightened scrutiny to gender classifications.

So which one of these views is right? I wouldn’t have set it up this way unless I thought the answer was neither (if you are going to knock over a straw man, why not knock over two?). I think Romer v. Evans is neither useless, nor the start of very aggressive Supreme Court review of classifications which discriminate against lesbians and gay men. I don’t think Romer is either unprincipled or dishonest; I think instead it is a small but significant refinement of an almost overlooked, but very sensible backwater of equal protection doctrine. But I am getting ahead of myself. To explain, I need to say a bit more about the decision, and a bit about basic constitutional equality.

4. I’ve been accused of insufferable political correctness for insisting on spelling out “lesbians, gay men, and bisexuals” all the time in discussing the litigation surrounding Colorado’s Amendment 2. I do it because Amendment 2 did it, although it said “lesbians, homosexuals and bisexuals.” COLO. CONST. art. II, § 30b (held unconstitutional by Romer v. Evans). I admit, my faithfulness to its nomenclature only goes so far. It just seems tacky to me to drop bisexuals or the explicit reference to lesbians when the drafters of Amendment 2 went out of their way to make sure both groups were included.


6. Id.

Romer v. Evans, of course, is the case about Colorado’s Amendment 2. The voters of Colorado amended the state constitution to take away the power of state and local governments to protect lesbians, gay men, and bisexuals from any form of discrimination. Amendment 2 explicitly stated that lesbians, gay men, and bisexuals could never be protected by any kind of civil rights laws.

When the U.S. Supreme Court struck down Amendment 2 in Romer, it offered two distinct reasons for doing so. First, the Court said, taking away the power of government to protect any group from discrimination is antithetical to the very concept of equal protection of the laws. This was an idea that had been suggested to the Court by Professor Laurence Tribe. It was an exciting, but novel idea. The Court, like Professor Tribe, did not cite a single case in support of it. The Court, like Professor Tribe, did not refer to any equal protection analysis or theory the Court had ever used before. But novelty is no objection to an idea that turns out to be right. The Professor and the Court are surely right that a state constitutional amendment that forces the state to treat two groups unequally—to put it in the language of equal protection, a constitutional provision which forces the state to treat differently two groups which are similarly situated—would be antithetical to the very idea of constitutional equality. Given who suggested that this is why Amendment 2 was invalid, and given who bought the idea, I’ve more than a little trepidation about admitting I’m not completely convinced that Amendment 2 did this. But maybe it did. And in any event, the idea is neither dishonest nor unprincipled—it is quite the opposite.

But while this is the most intellectually breathtaking part of the case, I suspect it will not have too much significance in the future. It can be argued that any state constitutional provision that withdraws the power of government to legislate on a certain subject as to one group of citizens

8. COLO. CONST. art. II, § 30b.
9. Id.
12. See Romer, 116 S. Ct. at 1627-28. I am referring here to what the Court identifies as the first of two points it makes in Section III of its opinion. The Court cites cases, but upon examination, all of the references are in support of collateral points and passing observations. See id.
but not others always violates equal protection. This is the fraternal twin of the argument that the Colorado Supreme Court accepted in its decision striking down Amendment 2. 13 But that is not what the U.S. Supreme Court said in Romer. In holding that Amendment 2 was antithetical to equal protection, the Court emphasized its broad sweep at least as much as the fact that it took away the government’s power to respond to one group of constituents. 14 And the Court—following Professor Tribe’s suggestion—seemed to think that it was because Amendment 2 took away the state’s ability to protect one class of people from discrimination that it was so clearly a violation of equal protection. 15 Because this part of the opinion emphasized Amendment 2’s breadth and the fact that it took away the power to protect people from discrimination, 16 it seems most unlikely that the Court will ever use Romer to strike down even a constitutionally based but narrow restriction of the legislature’s ability to enact certain legislation—like a reporter’s shield, a prohibition on some types of regulation of banks or insurance companies, or even a prohibition on legislation recognizing same sex domestic partnership.

This part of the opinion is unlikely to be applied to anything much narrower than a selective anti-civil rights initiative like Amendment 2. That does not mean it is insignificant. It means the anti-gay, anti-civil rights initiatives should be finished. 17 And that should mean that this loathsome device won’t be used on any other group of Americans either. But once those who promote devices like Amendment 2 understand that they can no longer be used, the device is likely to disappear from the

14. See Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”) (emphasis added).
15. See id. (“The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”) (emphasis added). This is an idea with some definite appeal—the Congress which passed the original law against public accommodations discrimination doubtless would have agreed. See The Civil Rights Cases, 109 U.S. 3 (1883).
17. I note here that the Sixth Circuit does not agree with me on this point. See Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 294-301 (6th Cir. 1997) (upholding the Cincinnati anti-gay civil rights amendment to the Cincinnati charter in part by narrowly construing the holding of Romer v. Evans). I suspect that this case is not over yet.
political landscape, so this part to the Romer decision is not likely to
generate a lot of litigation.\textsuperscript{18}

If Romer is to have enduring significance beyond the area of anti-
civil rights initiatives, it will come from the second explanation the Court
gave for striking down Amendment 2. That was, the Court said, that it
utterly lacked any rational basis.\textsuperscript{19} This is the part of the opinion on
which people usually focus their accusations of dishonesty. Classifications are supposed to pass that test if anyone can think of a
legitimate aim that treating the two groups differently might advance.\textsuperscript{20} It
truly is difficult to come up with classifications that cannot pass this test,
and on some occasions, the Court has made it seem that it is virtually
impossible.\textsuperscript{21} But Amendment 2 may have been a classification that
really did not have a rational basis. To explain why, I want to step back
for a moment and ask you to slog through a little bit of very basic
fundamental equal protection with me.

One of the great clichés of constitutional law is that there are three
tests for equal protection violations.\textsuperscript{22} There’s the “strict scrutiny” test,
where we ask, “Has the government proven that this classification is
essential to achieve a compelling interest and that there’s no less
discriminatory way of doing it.”\textsuperscript{23} There’s the intermediate test where we
ask, “Does this classification substantially further some important
governmental objective?”\textsuperscript{24} And there’s the rational basis test where we
ask, “Could any rational person believe that this classification would help
to achieve some conceivable, legitimate government interest?”\textsuperscript{25} These
three questions are, of course, basically all the same question, asked with
different adjectives. The “strict scrutiny” adjectives load the case up
against the government, the rational basis adjectives load the case up

\textsuperscript{18.} Hunter v. Erickson, 393 U.S. 385 (1969), put an end to similar devices aimed at
African Americans, although Reitman v. Mulkey, 387 U.S. 369 (1967), the first Supreme Court
decision to knock one down, did not. That could mean that I’m an optimist, and that it takes
two Supreme Court decisions to bat these things down. More likely it was simply that Reitman
was just not clear enough; I think Romer is.

\textsuperscript{19.} Romer, 116 S. Ct. at 1627.

\textsuperscript{20.} See, e.g., FCC v. Beach Communications, 508 U.S. 307 (1993); Heller v. Doe, 509

\textsuperscript{21.} See, e.g., Kotch v. Board of River Port Pilot Comm’rs, 330 U.S. 552 (1947).


\textsuperscript{24.} See Craig v. Boren, 429 U.S. 190, 197 (1976). See also United States v. Virginia,
116 S. Ct. 2264, 2274 (1996) (finding that the government must show an “exceedingly
persuasive” justification for gender classifications).

against the party who is attacking the classification, and the intermediate adjectives—well, they seem to give the Court some maneuvering room. But put aside the adjectives, and all three tests ask, "Does treating these two groups of people differently somehow achieve a legitimate government purpose or not?"

If you turn that basic question around into a statement, you have the central premise of constitutional equality. That premise is that you treat people equally even though you treat them differently if it can be said that treating them differently is going to achieve some legitimate purpose for all. Now you can think, as some people do, that this central premise is, to put it politely, a lawyer's gloss on the idea of equality added either to make equality a workable legal principle or to cripple it, depending on your perspective. You can think, as some people do, that the premise describes a special concept of equality. Or you can think, as I do, that the premise is actually a very good description of the concept of equality most of us use in our everyday lives. We don't really think I treat two students "unequally" if I give one a quarter and the other two dimes and a nickel, even though I've treated them differently. We don't think I've treated them unequally unless the idea was to provide money for parking where the meters only accept quarters. Then I have treated them unequally, even though I gave both twenty-five cents. Thus, whether both students were treated equally depends on the purpose; down to earth "equality" is the same thing as constitutional equality. But, I digress.

Regardless of where the premise comes from, it is the central premise of constitutional equality: you treat people equally even though you treat them differently, if it can be said that by treating them differently, you will achieve some legitimate purpose for everyone. There really is one core premise and, in a sense, one "test" for equal protection, a test the application of which varies with the Court's ideas about how aggressively it ought to play its role as an institutional watchdog, depending on the circumstances (but again, I digress).

Now, if this is the central premise of constitutional equality, it follows immediately that there is one explanation that can never be used to justify any classification, one that must be completely off limits. A classification can never be justified by saying that it was used to obtain the very discrimination that the classification provides. Put another way, the government is not permitted to say that the legitimate aim it is trying to achieve by treating people differently is to treat these two different
groups of people differently. If the government could do that, the central premise would collapse in a tautology. If a classification could be its own justification, it would always fit its purpose perfectly. But this is more than simply insisting that we throw out one possible explanation because our test will not work if we do not. By denying government the goal of treating two groups unequally, we simply say that as an irreducible minimum, our constitutional command of equality does not allow the government to act for no reason other than a desire to treat people unequally. That seems almost self-evident.

It might even seem that this is one of those propositions that is so obvious it never comes up, but in fact there is a small line of cases which address just this topic. This line of cases begins (at least, in its modern form) with U.S. Department of Agriculture v. Moreno\(^2\) in 1973, and is followed by Palmore v. Sidoti\(^2\) in 1982, and City of Cleburne v. Cleburne Living Center\(^2\) in 1985. In all three of these cases, the government attempted to justify a classification with what proved after a bit of reflection to be nothing more than a purpose to treat one group of citizens differently. In Moreno, the aim was a simple purpose to discriminate against “hippies” because members of Congress did not like them.\(^2\) In Palmore, the discrimination was the result of a state court’s accommodation of the public’s disapproval of interracial relationships.\(^3\) And in Cleburne, the city denied a zoning permit to a home for the mentally disabled because the neighbors did not want them around.\(^4\) In all three cases, the Court said that classifications cannot be justified by fear or dislike of the group discriminated against; or as the Court later put the proposition most clearly in Romer, the government cannot adopt a classification for its own sake.\(^5\)

I don’t mean to make these cases seem simpler than they are. In all three cases, the Court clearly did not help the government by seeing if it could think up a legitimate explanation for the classification. Palmore involved a racial classification, and with “strict scrutiny,” the government is held to the purposes it offers for a classification, so it

\(^2\) Moreno, 413 U.S. 528 (1973).
made sense that once the only justification the government offered was tossed aside as improper, that was the end of the case.\textsuperscript{33} But \textit{Moreno} and \textit{Cleburne} are more complicated. They were both "rational basis" cases, and the Court ordinarily is willing to create explanations for the government's purpose when rational basis review applies.\textsuperscript{34} To make things even more complicated, in \textit{Cleburne}, the government offered some purposes that were not obviously improper.\textsuperscript{35} But acknowledging that \textit{Moreno} and \textit{Cleburne} were complex is not the same thing as saying they are dishonest. It seems to me that it is neither dishonest nor unprincipled to say that once the government offers an illegitimate purpose as a justification for discrimination, the Court should not try to help the government out of its jam by making up proper purposes for it. Indeed, I think the Court may have a duty at this point to stop helping the government out. To give the critics their due, though, it is just a bit dishonest for the Court to insist that it is doing nothing different at all with its rational basis analysis when it decides not to help the government out of this kind of scrape.\textsuperscript{36}

Moreover, the Court's handling of the possibly legitimate explanations offered by the state in these cases was not necessarily unprincipled. In \textit{Cleburne}, as I'll explain in more detail later,\textsuperscript{37} the government's other explanations were rejected because they failed the most central requirement of equal protection; they did not explain the different treatment at all. In \textit{Moreno}, the Court, a bit unconvincingly, finds the classification so removed from the purpose of preventing fraud that fraud is not a credible explanation for the classification at all.\textsuperscript{38} The Court suggests, but at the last minute backs away from holding, that it ought to be deeply suspicious of any justification that postulates that the group discriminated against has a serious character flaw in some greater proportion than the rest of us.\textsuperscript{39} This seems to be right, and a most

\textsuperscript{33} \textit{Palmore}, 466 U.S. at 434.
\textsuperscript{34} \textit{See} Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 563-64 (1947). Note that the government purposes approved by the U.S. Supreme Court were not provided by counsel in the case, \textit{id.} at 563, nor were they provided in the lower court opinion of the Louisiana Supreme Court, \textit{Kotch v. Board of River Port Pilot Comm'rs}, 25 So. 2d 527 (La. 1946).
\textsuperscript{35} \textit{Cleburne}, 473 U.S. at 448-50.
\textsuperscript{36} \textit{See} Heller v. Doe, 509 U.S. 312 (1993).
\textsuperscript{37} \textit{See infra} text accompanying notes 48-50.
\textsuperscript{38} \textit{See Moreno}, 413 U.S. at 536-37. This is a preview of the much more convincing point about "fit" that the Court makes in \textit{Romer}. \textit{See infra} text accompanying notes 48-50.
\textsuperscript{39} \textit{See Moreno}, 413 U.S. at 535-38.
satisfying way of explaining the last piece of Moreno (but I'm digressing yet again). The point here is simply that there is nothing unprincipled or dishonest about the notion that the government cannot justify a classification by saying that it or its constituents disapprove of or do not like the group disadvantaged by the classification. This makes sense as a matter of basic equal protection, and has support in the case law. It is this principle that the Court invokes as the second justification for its decision in Romer.\textsuperscript{40}

Although it needn't have, the Court put in an additional wrinkle that gave its critics room for another complaint. In Cleburne, Moreno, and Palmore, the state offered an illegitimate explanation as at least one of its justifications for the classification. There is little doubt in my mind that several of the purposes that the state of Colorado offered in the Amendment 2 case were grossly improper as well. But the Court did not talk about them in Romer. Indeed, unlike Cleburne and Moreno, the Court does not discuss all of the purposes offered by the state, but instead just talks about a couple which it hints are the most credible of those that the state offered. One was cast as an accommodation of religion. The constitution was amended, the argument went, to accommodate those who, for religious reasons, did not want to be associated with lesbians, gay men, and bisexuals as tenants or employees.\textsuperscript{41} The other argument was based on privacy (always be wary when the government says it is going out of its way to protect your privacy or autonomy). According to this explanation, the Colorado Constitution was amended to forbid protecting lesbians, gay men, and bisexuals from discrimination in housing or on the job in order to protect the privacy of those who did not want to associate with lesbians, gay men, and bisexuals.\textsuperscript{42}

This second justification is clearly improper; this is simply saying the state decided to discriminate because some people don't like being around the group discriminated against. The religion explanation is a tad (but just a tad) trickier. The state could have put up a better fight if it had said it was accommodating the moral disapproval of some Coloradans (actually, it did say that at one point in the case, but that was one of the explanations the Court did not deal with). There plainly is nothing wrong with legislating to achieve a moral end; to say that the state has decided to achieve a goal because it thinks the goal is moral is to

\textsuperscript{40} 116 S. Ct. at 1629.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
say that it thinks the results it wants to achieve are good, which really is
the only legitimate reason to be legislating at all. But at the same time,
saying that the state has acted on the basis of morality is not an answer to
the constitutional question about what legitimate aim a classification will
serve. The state may describe its goal as moral, aesthetic, or life
enhancing. However, the Constitution requires that the government
describe not the reason why it thought pursuing the goal was a good idea,
but rather just what it is the government hopes to achieve by using the
classification. The problem for Colorado was that the answer to that
question kept turning out to be that the state wanted to accommodate
people who did not want to be around lesbians and gay men. Saying that
the dislike of a group is based in morality or religion does not transform
disliking the group into a legitimate explanation for discrimination. Most
serious group dislike is said to be based in religion and morality.43

So the Court could have said—maybe should have said—that these
explanations, like those proffered in Moreno and Cleburne, were as
improper as they clearly were. But it did not do that. Perhaps a bit
buffaloed by Justice Scalia’s outrage that anyone should suggest that the
voters of Colorado were motivated by something improper,44 the Court
found the evidence of an improper purpose not in the explanation the
state afforded, but in the very device that Amendment 2 employed.45 The
sweeping disability that Amendment 2 imposed on one group, the Court
said, so outside American legal tradition in its attempt to keep a group of
citizens from being protected against discrimination (maybe not as far out
as most of us would like), strongly suggests that Amendment 2 was
motivated by antipathy.46 This seems fair. If the state truly has adopted
a classification out of a mere desire to harm the group disadvantaged, it
shouldn’t be able to escape the consequences simply by being clever
enough to not admit it (and Colorado was either not that clever or not that
dishonest here). Courts ought to be able to infer an improper explanation
for legislation from circumstantial evidence that strongly suggests it, and

43. See Loving v. Virginia, 338 U.S. 1 (1967) (striking down a Virginia anti-
miscegenation statute); see generally JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF
44. Romer, 116 S. Ct. at 1633 (Scalia, J., dissenting).
45. Has our respect for the states gone so far now that we are unwilling to say that
sometimes voters act out of irrational passion and prejudice. Madison, whose vision of
federalism is invoked so often these days, would have found that laughable. See THE
FEDERALIST No. 10 (James Madison).
46. Romer, 116 S. Ct. at 1628.
the Court makes a good case for the notion that the very structure of Amendment 2 suggests just such an improper purpose.\(^47\)

But that is not quite the end of it. Having inferred an improper explanation for Amendment 2, the Court still had to deal with the explanations that the state offered, those that it had not labeled improper. The Court said they were not credible. The aims the state offered, the Court said, were so ill-served by the classification that the Court could not credit the idea that this classification could rationally have been employed to achieve them.

Here is more grist for the critics' mill. For at first blush, this idea seems to violate one of the cardinal rules of rational basis equal protection: there is no requirement that the state act with any degree of precision. If the classification could be thought to be a means to a legitimate end, it matters not how blunt and unsupple an instrument it is.\(^48\) If rational basis review makes sense—and for institutional reasons, it does, although there again we have a topic for another day—this is a rule which cannot be cast aside. Truly deferential review has to leave judgments about how much precision is worth the cost to the legislature. But like most useful rules, if pushed to its logical extreme it destroys the principle it is supposed to be aiding. If no amount of imprecision makes a difference—if the state can say that a classification was adopted to get at one incident, even though thousands of others of no moment to the government's purpose are impacted—the explanation is not an explanation for the classification at all. It does not explain why the line was drawn where it was. If no amount of imprecision matters, all equal protection analysis would require is that the government be able to explain that in at least some circumstances, the device it has chosen will bring about a legitimate end. But this is what due process requires—that the means be at least conceivably related to a legitimate end.

Equal protection demands an explanation (at some level) not of the device, but of the lines the state has drawn in deploying it.\(^49\) A goal attenuated enough from a classification fails, simply as a matter of common sense, to be an explanation for it at all. In \textit{Romer}, the proffered goal does not tell us why the state left out all the other groups that some


\(^{49}\) \textit{See Romer}, 116 S. Ct. at 1625. The distinction between the two was pointed out by Justice Souter during the oral argument in \textit{Romer}. 

Coloradans would prefer not to be around for religious or privacy reasons (like members of other religious groups for example), or why in the supposed pursuit of a nondiscriminatory workplace, the state legalized discrimination in education, real estate sales, insurance, retail, public accommodations, etc. It is this same idea—that an equal protection rationale must explain the classification, not the device which uses it—which the Court used to strike the "legitimate" rationales offered in *Cleburne.* The difference there was that the city failed to explain the connection between the classification and the purposes it offered. In *Romer,* the Court said the connection was too tenuous to be believed.

I'll give my straw critic one last throw—there is another basic rule of rational basis equal protection that perhaps ought to have saved the state here. That is the so called "one step at a time" doctrine, a rule that says that the state can explain why it included one group but not others that seem to implicate the same purpose in the same way by saying that it decided to act on the most immediate problem it had—in other words, that it decided to move "one step at a time." It is far from clear that "one step at a time" would have helped with the purposes the Court dealt with; the doctrine may be an excuse for underinclusion (failure to cover people who implicate the same interest), but it doesn't help with overinclusion (covering people who don't implicate the interest). And the "discontinuity" between classification and purpose that the Court said made the state's purposes incredible in *Romer* was much more a matter, at least in the Court's view, of overinclusion. But "one step at a time" might have helped with the state's silver bullet—an explanation it relied on somewhat inconsistently, but which seemed from the first to be the only explanation that really had the ring of a neutral rational basis. The state amended the constitution, so this claim went, to limit the civil rights laws to the characteristics they already covered.

Now at first take, that claim had two problems. First, it still really does not say anything other than "we want to cut it off here because we want to cut it off here"—no hostility, but the classic improper explanation

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50. 473 U.S. at 448-50.
52. *Romer,* 116 S. Ct. at 1628-29. In describing the discontinuity between the classification and its asserted goals, the Court only discussed the fact that the disability imposed on lesbians, gay men, and bisexuals was "general," not that others who seemed to implicate similar concerns were left out of Amendment 2. It seems to me that the underinclusion is really more compelling; but that just means this rationale ought to fail for the same reason the "silver bullet" rationale described in the text fails.
for a law. The state got past that by saying that it had limited resources for enforcement, and that it wanted to guard them closely. That at least has the ring of reason about it, although it seems legitimate to ask, both from a due process and an equal protection standpoint, if a constitutional amendment taking away the government's power ever to do something can be justified as a matter of today's resource allocation.

The second problem with the silver bullet was that it failed to explain the classification Amendment 2 used; if the idea was to limit civil rights laws to those characteristics already protected, why allow the passage of unlimited new civil rights laws at every level of government except for laws that protected lesbians, gay men, and bisexuals. Here's where "one step at a time" comes in. Only laws protecting lesbians, gay men and bisexuals were banned, so the argument goes, because they were the only group gaining protections through new proposals that expanded the characteristics covered by traditional civil rights laws: lesbians, gay men, and bisexuals were the immediate problem with which the state had to deal. The difficulty for the state here was that the proposals that supposedly triggered Amendment 2 did not fit the argument. Other "nontraditional" characteristics such as marital status, "familial status," and age had been added to the state's civil rights laws before there was any statewide ban on any form of sexual orientation discrimination. By 1992, the year when Amendment 2 was enacted, these other "nontraditional" characteristics were covered by laws far more comprehensive than the few laws that applied to sexual orientation discrimination.53 "Sexual orientation," in other words, was not the only characteristic to which the laws were being expanded, and it was far from the most potent threat to expand discrimination laws beyond "traditional"

characteristics. That pretty much killed "one step at a time" as an explanation.\textsuperscript{54}

So Romer v. Evans, as I see it, is the latest in a small, intellectually respectable line of cases which simply says that you cannot justify a classification by saying that you want to disadvantage the group hurt by it. The state may not, as the Romer opinion puts it so aptly, adopt a classification for its own sake.\textsuperscript{55}

Well, even if I have convinced you, all I've done so far is to make two modest points: first, that it is intellectually respectable to say that equal protection does not allow classifications to be justified by a simple desire to disadvantage the group disadvantaged, and second that Romer simply holds that this rule applies to classifications which disadvantage lesbians, gay men, and bisexuals. Will such a modest decision be of any real significance in the future? It will. It will be significant in a purely legal sense because there is still a good deal of fairly crude, fairly obvious discrimination based on sexual orientation going on in the United States these days. For example, we've got laws which say that no matter what a person may have done in the past, eligibility to adopt should be made on a case by case basis depending on the best interest of the child, unless, that is, the potential parent is lesbian or gay in which case there's a blanket prohibition on adoption.\textsuperscript{56} We have laws that say that private, consensual sexual activity is no business of the state, unless the members of the couple are of the same sex, in which case it is a crime.\textsuperscript{57} We have courts which say that children may not live with their own parents—parents the very same courts have found fit—because the parents are gay and other people will disapprove.\textsuperscript{58}

\textsuperscript{54} Williamson v. Lee Optical, 348 U.S. 483 (1955), the leading "one-step-at-a-time case," does not suggest, as those who invoke it often imply that it does, that the state need not have a rational explanation for moving first against one problem. Indeed, the Williamson Court recited just that kind of rationale, which should be essential if it is the classification which must be explained. \textit{Id.} at 488-89.

\textsuperscript{55} Romer, 116 S. Ct. at 1629.


\textsuperscript{57} For a few examples of state sodomy laws, see ARK. CODE §§5-14-122 (1987); MO. STAT. §§666.090.1; KS. STAT. §§21-3505(a)(i); TEX PEN. CODE §21.06. \textit{See also} Schochet v. State, 320 Md. 714 (1990) (construing Maryland sodomy law to apply to oral sex involving lesbians and gay men, but not to heterosexuals); Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986) (holding that the Oklahoma sodomy law is unconstitutional as applied to heterosexuals, but leaving open the question of its constitutionality as applied to lesbians and gay men).

\textsuperscript{58} \textit{See} Jacobsen v. Jacobsen, 314 N.W.2d 78 (N.D. 1981); S. v. S., 608 S.W.2d 64 (Ky. Ct. App. 1980).
In all of these cases, the state is hard put to find any justification for what it has done other than simple disapproval of lesbians and gay men. Up until now, that has been all the state needed. *Romer* should change that. Provided courts are willing to press the state on neutral sounding rationales which are not really neutral at all, *Romer* should invalidate a significant number of laws and policies that can not be justified in any other way. This probably will not be the end of litigation about policies which discriminate on the basis of sexual orientation, but it will be a very helpful step forward in the legal and political effort to eliminate them.

However, even in the law, the real importance of *Romer v. Evans* lies not in what it does to equal protection doctrine, but in the message it sends to the rest of the nation’s courts. To understand why, you need to understand the impact of *Bowers v. Hardwick*.\(^5^9\) If you think only about its result, *Bowers* it is not all that startling. *Bowers* starts with the premise that only those interests which have historically been regarded as off-limits to government regulation receive close scrutiny under the Due Process Clause.\(^6^0\) The conclusion that private sexual behavior was not historically considered off-limits, right or wrong, is hardly shocking. What was shocking about *Bowers* was the tone of it; the opinion drips with contempt for lesbians and gay men. The disdain and scorn was as raw and as uninhibited as it is on the most dangerous American street after dark.\(^6^1\) That tone was not lost on lower federal and state courts. To the lower courts, *Bowers v. Hardwick* was not a case about the implied constitutional right to privacy but a case about lesbians and gay men.\(^6^2\) It became the five hundred pound gorilla of constitutional law and sexual orientation, the answer to every constitutional question that involved lesbians and gay men. A case about strict scrutiny due process with a holding based in tradition, it became the governing law on whether classifications which disadvantage lesbians and gay men are suspect under equal protection,\(^6^3\) not simply an unrelated area of law, but one in

\(^{59}\) 478 U.S. 186 (1986).

\(^{60}\) *Id.* at 191-92 (noting that protection of rights under the Fourteenth Amendment’s Due Process Clause is limited to those rights “implicit in the concept of ordered liberty” or “deeply rooted in this Nation’s history and tradition”).

\(^{61}\) Chief Justice Burger’s concurrence was especially harsh. See *id.* at 197 (Burger, C.J., concurring).

\(^{62}\) There is a fascinating debate about just this in the panel decision in Watkins v. U.S. Army, 837 F.2d 1428 (9th Cir. 1988). Judge Reinhardt, in the minority there, certainly spoke for most U.S. courts.

which tradition plays a role almost opposed to that which it plays under due process.\textsuperscript{64} The \textit{Bowers} decision was also said to provide a rational basis for discrimination, thus making it the answer to all significant questions about equal protection and sexual orientation.\textsuperscript{65} I sometimes thought the day was not far distant when \textit{Bowers v. Hardwick} would be invoked as the reason why contracts with lesbians and gay men could be dishonored. And I had some doubt about the outcome if it was.

The judges who decided the many cases having nothing to do with due process in which \textit{Bowers} was invoked as the critical case were not unaware of its limited doctrinal meaning. They heard what the Court said, and heeded the language as well as the holding. As a doctrinal matter, the equal protection holding of \textit{Romer v. Evans} does not overrule the due process holding of \textit{Bowers v. Hardwick}. But the \textit{Bowers v. Hardwick} that decided all constitutional issues involving lesbians and gay men is dead. It is dead because of the tone of \textit{Romer}. \textit{Romer} treats lesbians and gay men with respect, and it treats our aspirations to equal treatment as legitimate.\textsuperscript{66} Those who wanted to end the political debate by taking equality for gay men, lesbians, and bisexuals off the table in \textit{Romer} were not treated with the same derision visited on lesbians and gay men in \textit{Bowers}. But there was no mistaking the Court’s belief that Amendment 2’s supporters were driven by the base passion of prejudice (Justice Scalia, for one, caught the tone squarely\textsuperscript{67}). One can almost hear the Court, more in sorrow than anger, echoing Adlai Stevenson’s belief in the forgiveness of sin and the redemption of ignorance.

There are signs already that lower courts are heeding the new tone just as they once heeded the tone of \textit{Bowers}.\textsuperscript{68} Some courts will doubtless resist the implication that lesbians and gay men are due the


\textsuperscript{65} See Jantz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992); see also Steffan v. Perry, 41 F.3d 677, 689-91 (D.C. Cir. 1994); Shahar v. Bowers, 114 F.3d 1097, 1105 n.17 (11th Cir. 1997) (en banc).

\textsuperscript{66} Both tonal points were previewed in the Court’s decision in \textit{Hurley v. Irish American Lesbian-Gay Organization}, 515 U.S. 557 (1995). But the tone change is a small point in \textit{Hurley}, and since the gay group lost, it is tonal dicta—respect is easy when you are telling someone he or she is going to lose anyway.

\textsuperscript{67} \textit{Romer}, 116 S. Ct. at 1629-37 (Scalia, J., dissenting).

\textsuperscript{68} See Nabozny v. Podlesney, 92 F.3d 446 (7th Cir. 1996); Able v. United States, 968 F. Supp 850 (E.D.N.Y. 1997).
same respect that all Americans are due. But the era in which Bowers as a kind of "attitude precedent" blocked the courthouse doors to lesbians and gay men is over.

However, even the change in legal attitude toward lesbians and gay men that the Romer opinion is sure to bring about is not the most important thing about the decision. The most important thing has to do with how we make change in America and how the American people view the Supreme Court.

As a lawyer who works inside the system, I am committed to the notion that litigation and legislation play an important role in the process of change. But sometimes we mistake that role in the process for change itself. We think that if the Court says we are going to end segregation or Congress says that we are going to end sex discrimination in the workplace, to pick two telling examples, then we've ended those things. All we've really done is take one more step in the process of ending them. Lawyering for change, whether through litigation, lobbying, or all the other things we do, is always a process of persuasion. But the final tribunal to which we address our arguments is not the Supreme Court or Congress; it's the people. Ultimately, you make real change in a republic only if you persuade the people that the change you want is the right thing. Nothing proves that more compellingly than the desegregation decision in 1954 and the passage of Title VII's ban on employment discrimination ten years later.

I don't mean to minimize the role of legislatures and courts. The American people do not revere their government today (I doubt they ever did, and I'm not at all sure it would be a good thing if they did). But Americans do take their government seriously. Simply bringing our cases and proposing our bills gives us one important way to make our case to that ultimate arbiter. Courts and legislatures give us important fora, and they do much more than that. Skeptics though we may be about government, Americans (or most of us anyway) generally accept the idea that our laws embody our society's decisions about what ought to be right and what ought to be wrong. A declaration of rights from a court or a legislature is, in other words, a powerful tool in the process of persuading people that we are right, and that they should accept the change we urge.

We have had a few good court decisions in the movement to end
discrimination based on sexual orientation, and we've passed some good
laws. But we have never had anything which could remotely be called a
endorsement of our appeal for equality from any part of the federal
government. On the contrary, all we had managed to get from the
federal government by May of 1996 was a quiet—so quiet almost no none
knew it was going on—campaign to end discrimination by federal
agencies. That was nice, but quiet campaigns are not much help in a
national persuasion process. And that campaign was more than
counterbalanced by the terrible twins of modern federal law on lesbians
and gay men: "don't ask, don't tell," the first federal statute to explicitly
discriminate against gay men and lesbians,\(^{70}\) and \textit{Bowers v. Hardwick}.\(^{71}\)
Any favorable decision from the U.S. Supreme Court would have been a
great leap forward. But some decisions from the Supreme Court are
more than just favorable decisions. We do not have an institutional
conscience in our federal system, but the Supreme Court is as close as we
come, particularly on civil rights issues. When we as a society are
treating some group of our fellow citizens badly, we expect the Court to
tell us. \textit{Romer} is one of these decisions. To explain what I mean, I want
to tell you about the first time I read the \textit{Romer} opinion.

It was May 26, 1996, a date I suspect I will always remember. I
was sitting on my shabby little couch in my seedy little office on West
43\textsuperscript{rd} street in New York. After a preliminary introduction to the case,
Justice Kennedy began the Court's opinion by invoking Justice Harlan's
famous dissent in \textit{Plessy v. Ferguson}.\(^{72}\) Every lawyer in America knows
that opinion. Harlan was the lone prophet who refused to go along with
the decision which said that segregation did not violate the federal
constitution, the justice whose vision was vindicated when the Supreme
Court overruled \textit{Plessy} fifty-eight years later and condemned segregation
in \textit{Brown v. Board of Education}.\(^{73}\) The Court does not invoke that
dissent casually; it does so only when it wants to let those who are
reading know that it has something of rare importance to say.


\(^{71}\) The twins have now become triplets with the passage of Public Law No. 104-199
government to treat any same-sex couple married under state law as unmarried. I refuse to use
the name given to the bill—Orwell is not president yet.

\(^{72}\) 163 U.S. 537 (1896).

\(^{73}\) 347 U.S. 483 (1954).
And that paragraph made it clear that the Court was speaking not to lawyers, but to the country as a whole. The Court did not simply cite the Plessy dissent, it quoted one of its most glorious passages.\footnote{74} The Constitution, wrote Kennedy quoting Harlan, "neither knows nor tolerates classes among citizens."\footnote{75} Taking care that the importance of invoking this passage not be missed by anyone, Justice Kennedy spelled it out. "Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution."\footnote{76} I choked up when I read those words because I never really believed I would read them in a U.S. Supreme Court opinion. The message could not have been clearer. To the Court, sexual orientation discrimination is the moral (if not the legal) equivalent of race and sex discrimination. It is just plain wrong, and good people in a civilized society do not countenance it.

It would be hard to overstate the importance of that message from this Court to the nation right now. In the last twenty years, we have made real progress in the struggle to convince America that lesbians and gay men deserve equal treatment. In the last ten years, we have encountered virulent, organized opposition. This statement of astonishing moral force, at this central moment, is the most important single tool we have ever been given in the fight for equality. That is the real importance of Romer v. Evans.

\footnote{74}{Romer v. Evans, 116 S. Ct. 1620, 1623 (1996).}
\footnote{75}{Id.}
\footnote{76}{Id.}