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ROMER v. EVANS AND THE CONSTITUTIONALITY OF HIGHER LAWMAKING

Anthony M. Dillof*

I. INTRODUCTION: WHEN CONSTITUTIONS COLLIDE

State constitutions are rarely of interest to the United States Supreme Court. The reason follows from the nature of constitutions. Constitutions, most fundamentally, do two things: (1) establish structures and procedures for the enactment of substantive legislation; and (2) recognize rights which may limit such substantive legislation. With respect to a constitution's empowering aspect, it is the enacted legislation, not the underlying empowering provisions, that is the usual subject of judicial review.¹ With respect to a constitution's rights-recognizing provisions, these provisions restrain legislation and the failure to enact is generally not subject to judicial review. Accordingly, when the rare case arises in which the Supreme Court turns its attention to a state's constitution, those interested in how the federal constitution interacts with its state counterparts should attend closely.

In *Romer v. Evans*,² the Supreme Court declared unconstitutional a recently adopted provision of Colorado's Constitution.³ Under the provision, no governmental entity in Colorado could prohibit discrimination based on homosexuality.⁴ The Court's decision, however, focused neither on the fact that homosexuals were the group burdened, nor that the burden at issue was exposure to discrimination. Rather, the Court noted that the challenged provision denied a group recourse to ordinary legislative political processes and had other problematic features frequently associated

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¹ See generally ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1054-60 (1986) (discussing judicial review and the role the courts play in evaluating the constitutionality of government acts).

² 116 S. Ct. 1620 (1996).

³ See *id.* at 1629.

⁴ See COLO. CONST. art. II, § 30(b).

with constitutional provisions.⁵ *Evans* thus is potentially relevant to the judicial review of much of state constitutional law.

The purpose of this Article is to review *Evans* to see what significance it may have for the constitutionality of higher-lawmaking generally and state constitutional law specifically.⁶ As will be shown, *Evans* offered the Court the opportunity to clarify an ambiguous line of cases concerning the structuring of state political processes. Of commensurate importance, it offered the Court the opportunity to subject homophobia and anti-gay prejudice to the scrutiny of the Equal Protection Clause.⁷ In light of these opportunities, it is unfortunate that the Court in *Evans* chose a route to its conclusion that appears more a product of expediency than reasoned elaboration. Nevertheless, in driving to its conclusion, the Supreme Court left a trail of remarks suggesting aspects of a doctrine for analyzing state constitutional law. While ultimately unfulfilling, these remarks add to the stock of analytic concepts that must be the basis of a more complete understanding of the constitutionality of higher lawmaking.

II. BACKGROUND: A CASE OF GREAT EXPECTATIONS

A. *Contending Perspectives*

When *Evans* reached the United States Supreme Court, many had great expectations for its outcome.⁸ *Evans* was a high-profile case concerning an intrinsically controversial matter with a potentially wide impact.⁹ The decision below¹⁰ was groundbreaking. The case

⁵ See *Evans*, 116 S. Ct. at 1628.

⁶ For a discussion of "higher lawmaking," see *infra* text accompanying notes 128-33 (discussing the broad impact of higher lawmaking by virtue of its restraint on subordinate political institutions).

⁷ The sodomy statute upheld in *Bowers v. Hardwick*, 478 U.S. 186 (1986), was not challenged on equal protection grounds. See *id.* at 196 n.8.

⁸ See Jeffrey A. Roberts, *Gays Equate Court Battle to Brown vs. Board of Ed.*, DENV. POST, Feb. 22, 1995, at A4 (quoting one of the *Evans* plaintiffs declaring, "This is our *Brown*."); see also 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, 979 (1995) (expressing the hope that the Supreme Court "will welcome members of the gay community as equal participants in the American political process").

⁹ See Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1060-61 (1994) (describing the "[n]ational [r]esponse to Amendment 2"); see also Michael J. Gallagher, *Amendment 2*, 4 LAW & SEXUALITY 123, 187-89 (1994) (discussing the possible effects of Amendment 2 throughout the nation).

had generated extensive scholarly commentary available to the Court.¹¹ Furthermore, in its factual simplicity, *Evans* presented the Court with constitutional issues of rare depth and difficulty. In particular, *Evans* presented contending perspectives on the institution of higher lawmaking.¹² For these reasons, *Evans* had all the makings of a landmark constitutional case.

Evans arose out of a single section of the Colorado Constitution. On November 3, 1992, the citizens of Colorado had amended their state constitution by adding the following provision:

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.¹³

The amendment had two effects. First, it immediately nullified a variety of existing measures prohibiting discrimination based on sexual orientation.¹⁴ These measures included a handful of munic-

¹⁰ *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) [hereinafter *Evans I*].

¹¹ See, e.g., Pamela Coukos, *Civil Rights and Special Wrongs—The Amendment 2 Litigation*, 29 HARV. C.R.-C.L. L. REV. 581, 588-95 (1994) (noting the difficulties underlying the formalist fundamental rights evaluation of *Evans*); Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Constitutional?* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 107-16 (1995) (discussing the court's application of precedent in *Evans* as a means of finding a basis of Amendment 2's abridgment of fundamental rights); Gallagher, *supra* note 9, at 171-87 (arguing for heightened scrutiny on the basis of suspect class, fundamental rights and suspicion of popular initiatives); Goldberg, *supra* note 9, at 1063-79 (detailing the arguments presented supporting and opposing Amendment 2); Sue Chrisman, Commentary, *Evans v. Romer: An "Old" Right Comes Out*; 72 DENV. U. L. REV. 519, 523-48 (1995) (analyzing the *Evans* decision against the intent of the Framers and precedent protecting the fundamental right to participate in the political process); Batterman, *supra* note 8, at 927-32, 959-78 (evaluating the difficulties and potential abuses of Amendment 2's homosexual class identification); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 167-77 (1993) (discussing the positive and negative ramifications of recognizing homosexuality as a suspect class); Stephen Zamansky, Note, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. REV. 221, 241-57 (1993) (describing societal views of homosexuality and advocating for treating homosexuals as a suspect class).

¹² See *Evans I*, 854 P.2d at 1273-74.

¹³ COLO. CONST. art. II, § 30(b).

¹⁴ See *Evans I*, 854 P.2d at 1284-85 (noting the various statutes affected by Amendment 2); Zamansky, *supra* note 11, at 221 n.3 (discussing the statutes repealed by Amendment 2).

pal ordinances prohibiting discrimination based on sexual orientation in housing, employment and other contexts, as well as certain statewide protections concerning health insurance and civil service employment.¹⁵ Second, the amendment raised an absolute barrier to the future enactment of such measures or any others that would protect gays¹⁶ from discrimination based on their sexual orientation.¹⁷ Although further consequences of Amendment 2 were alleged, the Supreme Court of Colorado either rejected these allegations or did not reach them.¹⁸

Colorado's Amendment 2 immediately suggests powerful arguments both for and against its constitutionality. The argument for its constitutionality turns on the constitutionally weak nature of the interests burdened.¹⁹ Within the context of existing jurisprudence, gays have no right to be protected from private discrimination based on their sexual orientation.²⁰ The Constitution provides no explicit guarantee of such protection.²¹ Regarding judicially developed rights, these may be divided into unconditional and conditional ones.²² The rights emanating from the Due Process Clause are negative: for example, the right to obtain a privately-funded abortion under certain circumstances or the right to be free of impediments

¹⁵ See *Evans I*, 854 P.2d at 1284-85 & n.26.

¹⁶ For ease of exposition, I shall generally use the terms "gay" and "homosexual" to describe male homosexuals, lesbians, bisexuals and others who might fall within the group burdened by Amendment 2.

¹⁷ See *Romer v. Evans*, 116 S. Ct. 1620 (1996); Gallagher, *supra* note 9, at 124; Goldberg, *supra* note 9, at 1058 n.3; Zamansky *supra* note 11, at 221. *But see* Duncan & Young, *supra* note 11, at 96 n.6 (listing other communities that have "recently voted to reject special rights for homosexuals").

¹⁸ One area of contention was whether Amendment 2 would nullify policies of general application to the extent they applied to homosexuality. Under such an interpretation, if a government agency had generally prohibited its supervisors from discriminating against employees based on their off-duty conduct, the supervisors would now be free to discriminate based on homosexual off-duty conduct. The Colorado Supreme Court apparently rejected such an interpretation. See *Evans v. Romer*, 882 P.2d 1335, 1346 n.9 (Colo. 1994) [hereinafter *Evans II*].

¹⁹ See *infra* text accompanying notes 25-29.

²⁰ See *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1575-84 (1989) (discussing the lack of legal protection from discrimination based on sexual orientation in private employment).

²¹ See *id.* at 1576 (stating that the constitutional protections which limit public employers' ability of hire and fire at will are not extended to private employers).

²² See Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L. J. 1615, 1624-26 (discussing fundamental rights generally and explaining the difference between conditional and unconditional rights in the context of the right to travel and the right to an abortion).

on interstate travel.²³ Protection from private discrimination thus would not be an aspect of substantive due process.²⁴ The Equal Protection Clause can generate affirmative rights conditionally: where the government offers a benefit to some, it may be required to offer it to others.²⁵ Protection from anti-gay discrimination, however, is generally not a potential affirmative right. If a state prohibits discrimination based on race, color, national origin, religion and sex, for example, it need not prohibit discrimination based on sexual orientation.²⁶ The Civil Rights Act of 1964²⁷ prohibits discrimination based on some characteristics, but not sexual orientation.²⁸ It seems indisputable that this limitation does not render the Civil Rights Act unconstitutional. Therefore (so the argument goes), because Colorado was free never to enact gay antidiscrimination legislation, it should be free to adopt a constitutional amendment precluding the enactment of such legislation. The failure to enact gay discrimination legislation has the same effect whether the failure is caused by a lack of legislative will or the action of a prohibitory constitutional amendment. Furthermore, a failure to enact antidiscrimination legislation and the adoption of a constitutional amendment prohibiting such discrimination may both

²³ See Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 734-37 (1981) (explaining the difference between positive and negative rights); see also *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (holding that the right to interstate travel may not be infringed by denying welfare benefits to individuals who had resided in a jurisdiction for less than one year).

²⁴ See Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 448 (1994) (stating that the holding of the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), "has led to extreme extrapolations").

²⁵ See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 880-81 (1986) (discussing the purpose of the Equal Protection Clause). Professor Currie indicates that "tying the rights of the minority to those of the dominant group seems the practical equivalent of creating an affirmative duty of protection . . ." *Id.* at 881.

²⁶ See Joel W. Friedman, *Fair Employment Legislation in Louisiana: A Critique of the 1983 Act and a Proposed Substitute Statute*, 58 TUL. L. REV. 444, 444-47 (1983) (discussing Title VII of the Civil Rights Act and "explaining the scope of protection offered under federal laws" from discrimination in employment). Cf. Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 537-38 (1993) (indicating that "Title VII leaves state and local governments free to adopt prohibitions on sexual orientation discrimination" because "Title VII erects no bar to state regulation in areas untouched by federal law").

²⁷ 42 U.S.C. § 2000e (1994).

²⁸ See generally Michael W. Combs, *The Supreme Court and African Americans: Personnel and Policy Transformations*, 36 HOW. L. J. 139, 154 (1993) (discussing the constitutionality of various provisions of the Civil Rights Act of 1964).

be the result of the belief that discrimination based on homosexuality is not sufficiently wrongful to warrant prohibition.²⁹ Where the effects and underlying motives are the same, why should there be a constitutionally significant distinction between simply failing to enact antidiscrimination legislation (undoubtedly permitted) and not enacting such legislation due to a provision of the state constitution (allegedly impermissible)?

Indeed, there is an even stronger argument for the constitutionality of Amendment 2. Imagine that in State X the authority of localities to enact antidiscrimination legislation is in doubt. A constitutional amendment is then adopted permitting such local legislation on behalf of minorities, women, veterans, the aged and the disabled. Then a second amendment is adopted adding homosexuality as a new classification that localities may include in antidiscrimination legislation. The second amendment appears to be no more constitutionally mandated than the expansion of antidiscrimination legislation, such as the Civil Rights Act of 1964, to include sexual orientation. Furthermore, it seems to follow that such an amendment, if adopted, could be freely repealed. The Constitution, it may be argued, does not establish "trap doors" which allow states to pass in one direction but not back out. If such a hypothetical repeal is possible, how does it differ from the adoption of Amendment 2 which also removes from localities the power to adopt legislation prohibiting discrimination based on homosexuality?

These arguments, however, are at odds with an equally attractive, but opposite, perspective on Amendment 2. In any democracy, the right to vote is fundamental.³⁰ The Constitution has been interpreted as providing stringent protections for this right.³¹ The right to vote, however, is only as good as the set of options to vote on.³² Precluding a candidate from being on the ballot effectively nullifies the voting rights of her supporters as much as allowing the candidate on the ballot and precluding her supporters from voting for her.

²⁹ See Duncan & Young, *supra* note 11, at 94 n.7 (arguing that "homosexuals already have the same rights everyone else has" and that "homosexuality is merely one of countless activities left unprotected by antidiscrimination laws").

³⁰ See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").

³¹ See *South Carolina v. Katzenbach*, 383 U.S. 301, 307-09 (1966) (discussing the constitutionality of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965), and the "stringent new remedies for voting discrimination" created by the Act).

³² See Blair T. O'Connor, Note, *Want to Limit Congressional Terms? Vote for "None of the Above"*, 29 VAL. U. L. REV. 361, 367 (1994) (indicating that Americans are "[t]ired of entering the polling booths and having to choose between the lesser of two evils").

Similarly, if a group is precluded from obtaining legislation it supports, its right to seek such legislation through voting or other participation in the political process is worthless. Legislation explicitly disenfranchising gays would undoubtedly be unconstitutional in Colorado.³³ Amendment 2 (so the argument goes), by precluding legislation favorable to gays, functionally disenfranchises gays.³⁴

B. *The Decision Below*

Between these two perspectives on the constitutionality of Amendment 2, the Colorado Supreme Court found the latter more persuasive. In striking down Amendment 2, the Colorado Supreme Court seized on the fact that it rendered gays alone unable to secure protections from the ordinary political processes.³⁵ In order to obtain antidiscrimination legislation, gays alone would have to amend the constitution or use other extraordinary measures.³⁶ According to the court, Amendment 2 was unconstitutional because it “expressly fences out [from the political process] an independently identifiable group.”³⁷ The decision’s core was the statement “that the Equal Protection Clause . . . protects the fundamental right to participate equally in the political process” and any attempt to infringe on an independently identifiable group’s right is “subject to strict judicial scrutiny.”³⁸ In a subsequent decision, the court, not surprisingly, found that Amendment 2 could not survive such scrutiny.³⁹

The Colorado Supreme Court’s reasoning was doctrinally innovative. No court had ever invalidated a statute or constitutional

³³ An argument that homosexuals could constitutionally be denied the right to vote might be premised on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which permits homosexual sodomy to be made a felony, and *Richardson v. Ramirez*, 418 U.S. 24 (1974), which permits convicted felons to be disenfranchised. *Richardson*, however, only applies to convicted felons, and Colorado has repealed its criminal prohibition of sodomy. Thus, Colorado could not constitutionally apply the lesser burden of disenfranchisement because it did not establish the greater burden of a felony-level criminal sanction.

³⁴ See Lori J. Rankin, Comment, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right’s Campaign Against Lesbians and Gay Men*, 62 U. CIN. L. REV. 1055, 1092 (1994) (discussing Amendment 2’s disenfranchisement of gays and commenting on the *Evans I* decision).

³⁵ See *Evans I*, 854 P.2d 1270, 1285 (Colo. 1993).

³⁶ See COLO. CONST. art. V, § 1.

³⁷ *Evans I*, 854 P.2d at 1285.

³⁸ *Id.* at 1282.

³⁹ See *Evans II*, 882 P.2d 1335 (Colo. 1994).

provision like Amendment 2 explicitly based on a right so framed.⁴⁰ The Colorado Supreme Court's decision, however, was not an instance of the exercise of unconstrained judicial power. Rather, the Colorado Supreme Court rested its action on a synthesis of two established lines of cases: those involving voting rights and those involving government structuring.⁴¹ First, the court reviewed a disparate set of voting rights cases such as *Kramer v. Union Free School District, No. 15*,⁴² *Reynolds v. Sims*,⁴³ *Williams v. Rhodes*,⁴⁴ and *Illinois State Board of Elections v. Socialist Workers Party*.⁴⁵ These cases, the court found, rested on a general principle that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest."⁴⁶ In order to determine whether this principle extended to *Evans*, the Colorado Supreme Court next reviewed a set of cases it recognized as bearing "a much closer resemblance" to the one before it.⁴⁷ These cases included *Hunter v. Erickson*,⁴⁸ which invalidated an Akron, Ohio charter amendment requiring only fair housing ordinances to be approved by the electorate; *Washington v. Seattle School District No. 1*,⁴⁹ which invalidated an initiative prohibiting local school districts from using busing to desegregate; and *Gordon v. Lance*,⁵⁰ which upheld a statute establishing a supermajority requirement for increasing state bond indebtedness or tax rates.

The meaning of these three cases may be fairly disputed. In *Hunter* and *Washington*, the Supreme Court found that the Equal Protection Clause required that strict scrutiny be applied to the measures at issue.⁵¹ Strict scrutiny review is triggered by legislation that infringes upon fundamental constitutional rights or imposes

⁴⁰ Cf. 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, 911 (1995) (stating that the *Evans* Court expanded the list of fundamental rights).

⁴¹ See *Evans I*, 854 P.2d at 1276-77.

⁴² 395 U.S. 621 (1969) (restriction of election to residents with children or property within the school districts).

⁴³ 377 U.S. 533 (1964) (malapportionment of the state legislature).

⁴⁴ 393 U.S. 23 (1968) (limitations on ballot access).

⁴⁵ 440 U.S. 173 (1979) (discrimination against minority parties).

⁴⁶ *Evans I*, 854 P.2d at 1279.

⁴⁷ *Id.*

⁴⁸ 393 U.S. 385 (1969).

⁴⁹ 458 U.S. 457 (1982).

⁵⁰ 403 U.S. 1 (1971).

⁵¹ See *Hunter*, 393 U.S. at 391-92; *Washington*, 458 U.S. at 484-87 (applying the *Hunter* doctrine).

burdens based on a suspect classification.⁵² As the Colorado Supreme Court noted, *Hunter* and *Washington* contain language suggesting the existence of a fundamental right to seek legislative results unencumbered by restrictions from higher sources of law.⁵³ Such a right would subject Amendment 2 to strict scrutiny under the theory that by prohibiting a category of legislation, Amendment 2 denied those favoring such legislation the right to equal participation in the political process.⁵⁴ *Hunter* and *Washington*, however, also contain language suggesting that strict scrutiny was applied in each case because a minority group's rights were being disproportionately burdened.⁵⁵

Ambiguous language, however, was not the primary objection to reading *Hunter* and *Washington* as resting on a fundamental right to participate in the political process. Rather, the responsible cabining of this right was the challenge. Charter amendments and statutes, such as those in *Hunter* and *Washington*, which limit the power of political institutions to respond to the interests of those within their jurisdiction, arguably distort the normal political processes in a manner offending "[t]he Equal Protection Clause[s] guarantee[] [of] the fundamental right to participate equally in the political process."⁵⁶ This feature, however, is not uncommon. Instances of higher lawmaking frequently regulate and restrain subordinate political institutions.⁵⁷ The Bill of Rights, for example, restrains the federal government from enacting a wide variety of legislation and thus partially excludes those who would seek such

⁵² See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

⁵³ For example, the Colorado Supreme Court relied on the statement in *Hunter* that Akron could "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." *Evans I*, 854 P.2d 1270, 1279 (Colo. 1993) (quoting *Hunter*, 393 U.S. at 393). It also relied on the statement in *Washington* where the Court adopted Justice Harlan's position in *Hunter* that governmental power must be allocated based on a "general principle." *Id.* at 1281 (quoting *Washington*, 458 U.S. at 470).

⁵⁴ See *id.* at 1279.

⁵⁵ See *Hunter*, 393 U.S. at 391 ("[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority."); *Washington*, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on' distinctions based on race."⁵⁶) (citations omitted).

⁵⁶ *Evans I*, 854 P.2d at 1279.

⁵⁷ See JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, *MODERN CONSTITUTIONAL THEORY: A READER* 224-25 (3d ed. 1994) (describing the expansion of the federal government's authority over the states).

legislation from the political process.⁵⁸ If unqualified, the right to equal participation in the political process would nullify the rights-establishing provisions of state constitutions generally.⁵⁹

The Colorado Supreme Court found the needed qualification of the right to equal participation in *Gordon v. Lance*.⁶⁰ In *Gordon*, the United States Supreme Court held that the Equal Protection Clause was not violated by a West Virginia constitutional amendment requiring that political subdivisions obtain 60% voter approval before incurring greater indebtedness or raising taxes.⁶¹ The Court distinguished *Hunter* on the ground that "we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote."⁶² The Court continued, stating that "so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause."⁶³ On the basis of these statements, the Colorado Supreme Court was able to arrive at its holding that the fundamental right to participate equally in the political process is abridged only when an "independently identifiable class of persons" is "fenc[ed] out."⁶⁴

The Colorado Supreme Court made little effort to clarify the scope of the critical "independently identifiable class" limitation.⁶⁵ However, three facts about the scope of an "independently identifiable class" were clear. First, by "independently identifiable," the court meant identifiable independent of the legislation allegedly denying the group's right of equal political participation.⁶⁶ Second, the set of independently identifiable classes was broader than the set of "suspect classes," as that term is used in the equal protection

⁵⁸ Cf. *Gordon v. Lance*, 403 U.S. 1, 6 (1971) ("[T]he Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy."); RONALD DWORKIN, CONSTITUTIONAL CASES (1977), reprinted in GARVEY & ALEINIKOFF, *supra* note 57, at 23 (explaining that the Bill of Rights protects individuals from the majority).

⁵⁹ Cf. *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 535 (1982) (holding that the Equal Protection Clause of the Fourteenth Amendment was not violated by a rights-establishing amendment to the California Constitution dealing with desegregation).

⁶⁰ 403 U.S. 1 (1971).

⁶¹ See *id.* at 7.

⁶² *Id.* at 5.

⁶³ *Id.* at 7.

⁶⁴ *Evans I*, 854 P.2d 1270, 1282 (Colo. 1993).

⁶⁵ See *id.*

⁶⁶ See *id.*

doctrine.⁶⁷ If not, the right to equal participation would never be needed for it would only apply where the burdening of a suspect class had already justified the application of strict scrutiny.⁶⁸ Third, “gay men, lesbians and bisexuals”⁶⁹—the group burdened by Amendment 2—are an independently identifiable class.⁷⁰ Although the court presented no argument for this proposition, it is implicit in its decision.⁷¹

The effectiveness of independent identifiability as a limit on the fundamental right of equal participation is questionable. It is not at all clear what classes are not independently identifiable and exist only as a result of being the object of legislation. *Gordon* provides the example of those who favor bonded indebtedness over other forms of financing.⁷² Yet doctors, lawyers, the poor, the divorced, pet owners, high school dropouts, veterans, those who have inherited more than a million dollars, those with hunting licenses, and an unlimited number of other classes, all seem to be independently identifiable classes, and yet seem potential targets of constitutional amendments. The class of independently identifiable classes seems itself fatally difficult to identify and delimit. Furthermore, the criterion of independent identification appears easily circumventable. If Amendment 2 had prohibited the enactment of legislation merely banning discrimination “on the basis of homosexual conduct,” would the class fail to be independently identifiable on the ground that a widely varied class of persons beyond “homosexuals” may have engaged in at least isolated instances of homosexual conduct?⁷³ In this manner, the Colorado Supreme Court extended the *Reitman-Hunter-Washington-Gordon* line of cases to the point of instability.

⁶⁷ See *id.* at 1283-84.

⁶⁸ See *id.* at 1283.

⁶⁹ *Id.* at 1285.

⁷⁰ See *id.*

⁷¹ See *id.* at 1284-86 (discussing the effect of Amendment 2 on gay men, lesbians and bisexuals, and the necessity for strict scrutiny review).

⁷² See *Gordon v. Lance*, 403 U.S. 1, 3 (1971).

⁷³ Cf. *Watkins v. Unites States Army*, 837 F.2d 1428, 1434-38 (9th Cir. 1988) (discussing the scope of the Army's ban against homosexuals, defined in part as “person[s], regardless of sex, who engage[] in, desire[] to engage in, or intend[] to engage in homosexual acts. . . . A homosexual act means bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction.” (citation omitted)).

III. READING *ROMER V. EVANS*

On May 20, 1996, the Supreme Court issued its decision in *Romer v. Evans*. The Supreme Court affirmed the decision of the Colorado Supreme Court, splitting six-to-three along ideological lines.⁷⁴ Representing the Court's less conservative wing, Justice Kennedy authored the majority opinion.⁷⁵ The more conservative wing, lead by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas, dissented.⁷⁶

Perhaps the most immediately striking feature of the majority's opinion is its brevity. The opinion is approximately one-sixth as long as the writings of the Colorado Supreme Court⁷⁷ and one-fourth as long as Justice Scalia's dissent. Indeed, less the introduction, factual background, summary of the decision appealed from, and rhetorical closing,⁷⁸ the opinion runs but seventeen paragraphs. Many of these read as padding: a boiler plate exposition of equal protection law, a general survey of modern discrimination statutes, and *dicta* discussing the potential reach of Amendment 2.⁷⁹ If an uncontested detailing of the legal effects of Amendment 2 and a reply to a case cited by the dissent are also put aside,⁸⁰ there are only approximately six remaining paragraphs of argument and analysis.

The second striking feature of the majority opinion is that it contains no discussion of the two points generally thought to provide the most promising foundation for striking down Amendment 2. First, the majority's analysis makes no reference to the *Reitman-Hunter-Washington-Gordon* line of "equal political participation" cases. Because these cases also involved the review of measures restraining the legislative process, they had been viewed by the Colorado Supreme Court as providing the closest analogies to the challenge to Amendment 2.⁸¹ Nevertheless, except to note that they

⁷⁴ See *Romer v. Evans*, 116 S. Ct 1620, 1623 (1996).

⁷⁵ See *id.*

⁷⁶ See *id.* at 1629 (Scalia, J., dissenting).

⁷⁷ The Colorado Supreme Court's analysis of Amendment 2 comprised two opinions. The first, *Evans I*, 854 P.2d 1270 (Colo. 1993), concerned the level of scrutiny that was to be applied to Amendment 2; the second, *Evans II*, 882 P.2d 1335 (Colo. 1994), concerned whether Amendment 2 survived that level of scrutiny.

⁷⁸ See *Evans*, 116 U.S. at 1623-24, 1629.

⁷⁹ See *id.* at 1625-27.

⁸⁰ See *id.* at 1626, 1628.

⁸¹ See *Evans I*, 854 P.2d at 1279-86 (discussing the *Reitman-Hunter-Washington-Gordon* line of cases).

had been relied on by the court below, they are ignored.⁸² Second, in the crucial analytic sections of the opinion, the Court attaches no significance to the fact that gays were the group targeted by Amendment 2.⁸³ Gays are a group defined by a characteristic which they have little, if any, control over and which is generally irrelevant to their capabilities. They are stigmatized, stereotyped, hold disproportionately few political offices and have historically been subject to discrimination.⁸⁴ Many have thus argued that homosexuality should be a suspect or quasi-suspect classification.⁸⁵ Although lower courts have consistently rejected this position,⁸⁶ the question was ripe for the Court. Furthermore, even if the Court was not inclined to grant homosexuals such status, the above facts about homosexuality and its place within our society could have been given some significance in the course of the Court's reasoning. The closest the Court came was its observation that most people other than gays are either protected from discrimination or do not need this protection.⁸⁷ Although this observation might support an argument that Amendment 2 irrationally targets the group that is most in need of antidiscrimination legislation, the Court did not employ the observation in the part of its opinion that argues for Amendment 2's unconstitutionality.⁸⁸ In that part of the opinion, the Court merely noted that the group affected by Amendment 2 is one whose members are defined by their "status"⁸⁹ or a "single trait."⁹⁰ No

⁸² See *Evans*, 116 S. Ct. at 1624.

⁸³ See *id.* at 1627-29.

⁸⁴ See *Zamansky*, *supra* note 11, at 244-45.

⁸⁵ See, e.g., *id.* at 249-54 (arguing that homosexuals should be deemed a suspect class); Rankin, *supra* note 34, at 1073-79 (arguing that homosexuals meet all of the criteria of a suspect class); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297-309 (1985) (proposing that courts recognize homosexuality as a suspect classification under the Equal Protection Clause of the Fourteenth Amendment).

⁸⁶ See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 266-67 (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *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, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *National Gay Task Force v. Board of Educ. of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984) (2-1 decision), *aff'd by an equally divided Court*, 470 U.S. 903 (1985).

⁸⁷ See *Evans*, 116 S. Ct. at 1627.

⁸⁸ See *id.* at 1628-29.

⁸⁹ See *id.* at 1629.

⁹⁰ See *id.* at 1628.

mention was made, however, of what this status or single trait is or what its significance might be.⁹¹

Declining to pursue the analyses most closely at hand, the Court advanced an argument that was simultaneously novel and pedestrian. Throughout the *Evans* litigation, the central question had been whether Amendment 2 should be subject to heightened judicial scrutiny under equal protection doctrine.⁹² The majority in *Evans*, however, did not need to reach this question because it found that Amendment 2 failed even the rational relation test.⁹³ The Court rested this finding on two "related" grounds.⁹⁴

The first ground discussed by the Court is the more obscure one. According to the Court, Amendment 2 is "peculiar," "unprecedented" and "not within our constitutional tradition."⁹⁵ Hence it "defies" and "confounds" normal rational basis means-end review.⁹⁶ The Court apparently found that Amendment 2 had some unusual feature which rendered the rational basis test inapplicable or inappropriate. At this point, it is useful to conceptualize Amendment 2 as having horizontal and vertical components.⁹⁷ The horizontal component concerns the consequences that Amendment 2 has on the substantive, or first-order, interests of Colorado citizens. For example, gays will likely find it more difficult to obtain employment, and those resident landlords who oppose homosexuality will be able to live in an environment without the presence of those who are openly gay. The vertical component of Amendment 2 concerns the consequences it has on the political, or second-order, rights of Colorado's citizens. For example, citizens will no longer have the legal power to enact gay anti-discrimination legislation to make it easier for gays to obtain employment or to prevent landlords from

⁹¹ See *id.* at 1628-29.

⁹² *Evans II*, 882 P.2d 1335, 1341 (Colo. 1994) (reaffirming the court's previous holding that the strict scrutiny standard of review is applicable); *Evans I*, 854 P.2d 1270, 1276-82 (Colo. 1993) (concluding that strict judicial scrutiny is applicable when the "right to participate equally in the political process" is at issue).

⁹³ See *Evans*, 116 S. Ct. at 1627.

⁹⁴ See *id.* at 1628.

⁹⁵ *Id.* at 1627-28.

⁹⁶ See *id.*

⁹⁷ Cf. Craig Cassin Burke, Note, *Fencing Out Politically Unpopular Groups from the Normal Political Processes: The Equal Protection Concerns of Colorado Amendment Two*, 69 IND. L. J. 275, 287-88 (1993) ("[T]he arm of equal protection . . . has essentially two axes of application: a horizontal axis, which mandates equality in state action in all branches of government, and a vertical axis, which governs the method by which decision-making power may be allocated along the governmental hierarchy." (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-17 (2d ed. 1988))).

excluding openly gay tenants. It is not clear, however, which component is more relevant to the Court's view that Amendment 2 was so unusual as to defy conventional analysis.

In explaining its response to Amendment 2, the Court remarked, "[Amendment 2] is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."⁹⁸ The Court thus likens Amendment 2 to a statute containing ill-matched elements.⁹⁹ Such ill-matched elements create first-order burdens that are not rationally connected to the goals sought to be achieved.¹⁰⁰ In particular, the discrimination against gays that Amendment 2 permits may be too broad to serve a rational end.¹⁰¹ This characterization of the horizontal aspect of Amendment 2, however, suggests that it will be particularly vulnerable to rational basis review, not that it will "confound[]" or "defly[]" it.¹⁰²

The Court's next remark is perhaps more telling: "The resulting disqualification of a class of persons from the *right to seek* specific protection from the law is unprecedented in our jurisprudence."¹⁰³ Here the Court appears to emphasize the vertical aspect of Amendment 2, i.e., its effects on the political, as opposed to substantive, rights of gays. This emphasis continues in the Court's subsequent remarks:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . 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.¹⁰⁴

If the Court was indeed focusing on Amendment 2's vertical component, its claim that Amendment 2 is "unprecedented" remains

⁹⁸ *Evans*, 116 S. Ct. at 1628.

⁹⁹ See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-2, 16-4 (2d ed. 1988) (discussing rationality, underinclusiveness and overinclusiveness in the context of equal protection).

¹⁰⁰ See *id.* (identifying equality as the original goal of equal protection, but recognizing that practical considerations have modified that goal to a reasonable purpose standard).

¹⁰¹ See *Evans*, 116 S. Ct. at 1628-29.

¹⁰² See *supra* text accompanying note 97.

¹⁰³ *Evans*, 116 S. Ct. at 1628 (emphasis added).

¹⁰⁴ *Id.*

obscure. The obvious precedent for improper tampering with the right to seek aid from the government was the legislation considered in the *Reitman-Hunter-Washington-Gordon* line of equal protection cases.¹⁰⁵ These cases at least begin to give content to the proposition that the government must "remain open on impartial terms to all who seek its assistance."¹⁰⁶ Without such elaboration, the Court's reliance on the principle that the government must remain open on impartial terms is empty. Every power-limiting provision of a state constitution limits the ability of a legislature to respond to those who seek its assistance in a particular area. Furthermore, the Court's appeal to the "most literal sense" of the denial of equality is also puzzling.¹⁰⁷ The Court has often stressed that because all laws create categories and hence inequalities, the Equal Protection Clause cannot be applied literally.¹⁰⁸ It would seem to make no difference that political rights are involved. In even the extreme case of a law prohibiting those of group X from voting, the law would not be invalidated on the ground that it was a literal denial of equal protection. Rather, the justification for singling out that group would have to be assessed. For some groups, e.g., resident aliens, convicted felons or minors, such a justification might exist.¹⁰⁹ The Court's

¹⁰⁵ See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Gordon v. Lance*, 403 U.S. 1 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

¹⁰⁶ *Evans*, 116 S. Ct. at 1628.

¹⁰⁷ See *id.*

¹⁰⁸ See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications." (quoting U.S. CONST. amend. XIV, § 1)).

¹⁰⁹ The Court's argument that Amendment 2 violates the literal sense of the Equal Protection Clause echoes arguments advanced by Professor Tribe and others in their amicus brief in *Evans*. See Richard C. Reuben, *Gay Rights Watershed?*, A.B.A.J., July 1996, at 30 ("Tribe contends that the Court relied on [a per se violation] when it found the Colorado amendment 'confounds the normal process of judicial review'. . . ." (citation omitted)). According to the brief, "Amendment 2 is a rare example of a per se violation of the Equal Protection Clause. . . . Its facial unconstitutionality flows directly from the plain meaning of the Fourteenth Amendment's text." Brief for the United States as Amicus Curiae at 3-4, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039), available at 1995 WL 862021. Tribe attempts to analogize Amendment 2 to a law that removes a group from the protections of the criminal law. See *id.* at 4. Yet even such a law would not be treated as a per se violation of the Equal Protection Clause. For example, the exclusion of children from the protection of criminal assault laws would not be treated as a per se violation of the Equal Protection Clause. Rather the state's justification for such an exception—perhaps involving the claim that the existing laws improperly deter the use of corporal punishment by parents—would have to be evaluated. Indeed, a state's justification for excluding a group from the protection of criminal homicide

first ground for striking down Amendment 2 thus offers the reader little of substance.

The Court's second ground for striking down Amendment 2 appears to return the focus to the "horizontal" consequences of Amendment 2. The Court described its objection to Amendment 2 as "conventional" and "venerable."¹¹⁰ According to the Court, Amendment 2 is constitutionally flawed because it fails to "bear a rational relationship to a legitimate governmental purpose."¹¹¹ Among the justifications Colorado offered for Amendment 2 were: (1) it protects the "freedom of association [of] landlords [and] employers who have personal or religious objections to homosexuality;"¹¹² and (2) it allows Colorado to redeploy its resources from preventing anti-gay discrimination to preventing other forms of discrimination that are more pernicious.¹¹³ The Court rejected these justifications, however, on the following grounds:

The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.¹¹⁴

The Court's analysis must be described as entirely conclusory. Under the rational relation test, "a law will be sustained if it can be said to advance a legitimate government interest"¹¹⁵ Accordingly, a law may be struck down if: (1) its purpose is an illegitimate one; or (2) it is not sufficiently likely that the law can achieve its purpose.¹¹⁶ With respect to the question of the legitimacy of Amendment 2's alleged purposes, the Court does not appear to take the position that protecting freedom of association or redeploying

laws would have to be evaluated at least. See *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995) (evaluating law removing certain terminally-ill patients from protection of law prohibiting assisted suicide).

¹¹⁰ *Evans*, 116 S. Ct. at 1629.

¹¹¹ *Id.* (citing *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462 (1988)).

¹¹² See *id.* at 1622.

¹¹³ See *id.*

¹¹⁴ *Id.* at 1629.

¹¹⁵ *Id.* at 1627.

¹¹⁶ See *id.*

resources are illegitimate government purposes. One could imagine an argument that protecting the liberties of those who do not want to associate with gays for personal or religious reasons is tantamount to endorsing irrational animus. As the Court earlier stated, "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."¹¹⁷ The Court, however, never discussed unconstitutional animus or illegitimate purpose in the context of landlords' and employers' so-called liberty interests. Equating bias and aversion to homosexuality—a proclivity to conduct that the Court has held can be criminalized¹¹⁸—would be a significant doctrinal development. Based on the Court's general silence in this regard, it would be difficult to argue that such a development has yet occurred. The alleged purpose of reallocating resources toward combating other forms of discrimination seems on even surer ground. Even if it were granted that freedom from associating with gays is an interest unworthy of protection, it would not follow that preventing discrimination against gays is as worthy as preventing other forms of discrimination. Comparing the worth of legitimate legislative ends and determining what tradeoffs are rational are tasks particularly outside the competence of courts.¹¹⁹ Indeed, the Court does not appear to argue that eliminating protection against anti-gay discrimination in order to enhance protection from other forms of discrimination is illegitimate.

The Court is also silent as to whether Amendment 2 advances these ends. The Court simply makes no efforts to assess the effects, or lack thereof, that Amendment 2 will have relative to its alleged justifications. Even if the result of Amendment 2 would not be great savings of anti-discrimination resources, it seems difficult to deny that the liberty of employers and landlords who object to homosexuality and who do not want to associate with homosexuals would be directly enhanced.

Rather than criticizing Amendment 2 for failing to advance its purported ends, the Supreme Court appears to charge it with overbreadth. Regarding the purposes Colorado advanced, the Court stated "[t]he breadth of the Amendment is so far removed from these

¹¹⁷ *Id.* at 1638 (citing *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (rejecting justifications based on irrational fear of mentally retarded).

¹¹⁸ See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹¹⁹ See generally, Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation and the Supreme Court*, 95 HARV. L. REV. 892 (1982) (discussing the role the Court plays in construing statutory language).

particular justifications that we find it impossible to credit them."¹²⁰ In an earlier related passage, the Court stated of Amendment 2 that "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus . . ."¹²¹ Breadth might be thought to be a virtue in the context of the rational basis test. The broader the statute, the more far-reaching its effects, and the more likely that the statute will thereby have some effect that may be characterized as the advancement of a legitimate governmental end. It is rare that throwing in extra elements or expanding a statute's scope will backfire and negate its effectiveness. Thus, in criticizing Amendment 2 for its breadth, the Court may be adding a requirement that the legislation exhibit a degree of fit. The requirement of fit is more closely associated with intermediate level scrutiny.¹²² The canonical formulation of intermediate scrutiny is that, in order to survive, "a statutory classification must be substantially related to an important governmental objective."¹²³ The "substantially related" requirement seems different in kind from the narrower rational basis "advancement" requirement. Theoretically, a means may not be substantially related to an end which it advances if it advances that end in a manner sufficiently tangential, indirect or minor compared to its other effects. *Evans'* nudging of the rational relation test toward intermediate scrutiny, however, need not be viewed as collapsing the distinction. In *United States v. Virginia*,¹²⁴ decided the same term as *Evans*, the Court arguably nudged intermediate scrutiny toward strict scrutiny.¹²⁵

Even assuming the validity of importing a fit requirement into the rational relation test, the question remains in what respect the Court found Amendment 2 to be fatally overbroad. The difficulty in answering this question lies in specifying some aspect of Amendment

¹²⁰ *Evans*, 116 S. Ct. at 1629.

¹²¹ *Id.* at 1627. The Court also wrote that "Amendment 2, . . . in making a *general* announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.* at 1628-29 (emphasis added).

¹²² *See, e.g., Craig v. Boren*, 429 U.S. 190, 199 (1976) (requiring that the state prove that its statute allowing women over 18 and men over 21 to purchase beer was substantially related to the goal of reducing traffic accidents).

¹²³ *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see Craig*, 429 U.S. at 197 (indicating that classifications based on gender are subject to intermediate scrutiny).

¹²⁴ 116 S. Ct. 2264 (1996).

¹²⁵ *See id.* at 2294-95 (Scalia, J., dissenting) (analyzing the majority's use of its newly coined "exceedingly persuasive justification" standard).

2 that would not be present in the undeniably constitutional repeal of a law protecting gays from discrimination.¹²⁶ For example, Amendment 2 might be thought to be overbroad relative to its associational justification because it would permit landlords to discriminate against gay tenants even where, because of the size of the apartment building, the landlord's associational interests would not be significantly affected. Similarly, Amendment 2 might be thought to be overbroad relative to its resource-allocation justification because it would permit employers to discriminate against gay employees in jurisdictions where there was already excess capacity of resources to combat other forms of discrimination. Yet the identical overbreadth relative to these justifications would occur if a statute or ordinance prohibiting housing or employment discrimination based on homosexuality were repealed. The repeal of such ordinances has never been thought to be constitutionally barred. The objectionable overbreadth of Amendment 2, therefore, must flow from that fact that it is not merely a law repealing antidiscrimination legislation, but an instance of higher lawmaking.

Greater breadth is a feature commonly associated with higher lawmaking. As I use the term, "higher lawmaking" is not limited to constitutional provisions, but applies to all laws regulating the power of other institutions.¹²⁷ Higher lawmaking would thus include an ordinary state law regulating the powers of municipalities to enact local ordinances. Such higher lawmaking is characteristically "constitutional" not because it requires supermajority approval, but because it defines another institution's basic powers. Higher lawmaking so defined is different in kind from a higher authority's

¹²⁶ As a general matter, what is enacted should be repealable if the enactment was not constitutionally mandated. See *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 538 (1982) ("[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place."); *Hunter v. Erickson*, 393 U.S. 385, 390 n.5 (1969) ("Thus we do not hold that mere repeal of an existing [antidiscrimination] ordinance violates the Fourteenth Amendment."). Regarding Amendment 2, plaintiffs in *Evans* conceded that a simple repeal of the antidiscrimination ordinances nullified by Amendment 2, even if repealed by general referendum, would be constitutional. See *United States Oral Argument at 45, Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039); available in 1995 WL 605822.

¹²⁷ My use of the term "higher lawmaking" differs from Professor Ackerman's use of the term. For me, a law is an instance of higher lawmaking by virtue of its content; for Ackerman, various abstract features of a law's enactment render the law "higher." Cf. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991) (defining higher lawmaking by procedural rather than substantive characteristics); Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2159-66 (discussing and identifying the necessary components of higher lawmaking).

nullification of one or many specific laws established by a lower political institution. In the case of higher lawmaking, not only are the specific offending laws nullified, but so are an indefinitely extended set of similar potential laws which the lower institution previously had the power to enact. For example, if Amendment 2 were in force, there could be no legislation protecting gays from discrimination in any setting, in any part of Colorado, for any reason. Thus, no matter how severe or localized the problem, no matter what type or how extensive the resultant benefits, no matter to whom such benefits would accrue, no matter how narrowly tailored the legislation, the legislation would be prohibited. Such breadth may be qualitatively greater than that associated with ordinary legislation. While ordinary lawmaking concerns the range of conditions under which a single statute might apply, higher lawmaking concerns the range of conditions under which a range of possible statutes might apply.¹²⁸

All higher lawmaking has this open-ended quality, and the Court could not have intended to condemn all higher lawmaking. A prohibition on "all laws abridging speech" has a sweep as potentially as wide as one prohibiting "all laws protecting gays from discrimination based on their sexual orientation." Under *Evans*, the difference, if there is one, must be that the latter places a burden on a group defined by a "single trait"¹²⁹ or "status."¹³⁰ An individual's favoring of the abridgment of speech cannot reasonably be described as a status or a trait of an individual. In general, there will be a tighter fit between means and end when a statute is couched in functional

¹²⁸ It is doubtful that the Supreme Court was concerned with the breadth of Amendment 2 with respect to its vertical component, i.e., its effect on the rights of gays to participate in the political process. It may be asked why gays and only gays should be required to amend the state constitution in order to secure protection from discrimination. The answer is straightforward. The burden is not placed on groups such as blacks, jews, women and the disabled because Colorado might constitutionally conclude that these groups, unlike gays, should be protected from discrimination. Thus it is rational that they are not targeted by Amendment 2. Moreover, the burden is not placed on other groups like teenagers, ex-felons, or the poor, who the state might conclude should not be protected, because these groups have not been successful in obtaining "undeserved" protection in some localities. Thus, there is no reason for Amendment 2 to target them. This argument is, of course, premised on the proposition that Colorado may constitutionally conclude that gays do not deserve protection from discrimination, while other groups do deserve such protection. This proposition, however, seems unassailable. The failure of antidiscrimination laws to prohibit discrimination based on sexual orientation does not render them unconstitutional. See *supra* text accompanying notes 27-30.

¹²⁹ *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

¹³⁰ *Id.* at 1629.

or behavioral terms rather than in terms of the traits or status of an individual.¹³¹ For example, a constitutional provision that protects religious behavior from unfavorable treatment is preferable to one that protects religious individuals from unfavorable treatment. Nevertheless, a rule that instances of higher lawmaking may never constitutionally employ such devices seems too broad. Traits (e.g., health, honesty, age, gender, propensity for violence) or status (e.g., residency, military service, criminal record, wealth, birth place) are sometimes immediately relevant and sometimes are perfectly good proxies for other sorts of features. Nevertheless, under the stated reasoning in *Evans*, higher lawmaking that burdens groups identified by traits or status must be considered constitutionally defective.¹³² It is difficult to believe that the Court intends to apply such a sweeping rule consistently.

IV. IS NO LAW BETTER THAN BAD LAW?

"[H]ard cases, it is said, make bad law."¹³³ For a majority of the Court, *Evans* undoubtedly was a hard case. It was hard, first, because Amendment 2 could not have been an appealing law. Amendment 2 was a uniquely regressive step in our nation's battle against discrimination.¹³⁴ Even if the repeal of a civil rights statute is constitutional as a matter of law, such repeals are rare as a matter of practice.¹³⁵ It is even more rare that the permissibility of discrimination is enshrined in a document as fundamental to a community as a constitution.¹³⁶ At oral argument, Justice Kennedy, the author of *Evans*, twice exclaimed that he had never before

¹³¹ See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (determining that a regulation which prohibits camping in a national park was narrowly tailored to satisfy the government's interest in maintaining those parks). It is unlikely the regulation would have been upheld if it excluded "demonstrators" or "the homeless" from the park.

¹³² See *Romer*, 116 S. Ct. at 1628-29.

¹³³ *Ex parte Long*, 3 W.R. 19, 103 Rev. Rep. 850, 851 (1854).

¹³⁴ But see *Mary Anne Case, Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1646 n.11 (1993) (noting laws which prohibit discrimination in certain areas while simultaneously reserving to the states the right to discriminate in other areas).

¹³⁵ See Colleen G. Treml, Note, *Zambro v. Baltimore City Police Department: Pushing Plaintiffs Down the ADEA Path in Age Discrimination Suits*, 68 N.C. L. REV. 995, 1015 (1990) (noting the reluctance of the Supreme Court to repeal civil rights statutes).

¹³⁶ See Lisa M. Farabee, Note, *Marriage, Equal Protection, and New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237, 259 n.125 (1996) (noting the equal rights amendments of 16 state constitutions).

seen a statute like Amendment 2.¹³⁷ While novelty itself is no sin, it provides a tempting target for those who are already inclined to object in principle. *Evans* was a hard case, second, because striking down Amendment 2 on the basis of either the group burdened or the nature of the burden had the potential for far-reaching reverberations.¹³⁸ Finding that homosexuals were entitled to some special constitutional status would have destabilized large chunks of existing law—from the widespread criminalization of homosexual sodomy, to the military's hostile treatment of gays, to the limited rights of homosexual life partners.¹³⁹ Alternatively, finding that higher lawmaking restrictions on the ordinary political process denied equal protection would have cast a shadow over significant portions of states' constitutions.¹⁴⁰ *Evans* was hard, finally, because the lower court had found Amendment 2 unconstitutional.¹⁴¹ Thus, the Court did not have available to it the option that would have allowed it to most easily wash its hands of the matter. If the lower court had upheld Amendment 2, the Court could have denied certiorari¹⁴² or simply have affirmed and so left undisturbed both the positions of the parties and its own constitutional doctrine.

However, even if it was a hard case, *Evans* did not make bad law. Instead, it made no law. Although I have suggested a reading of *Evans* focusing on the higher lawmaking aspect of Amendment 2, this reading is at best a scholarly reconstruction, i.e., an effort at giving the best interpretation of a text. The best interpretation of an opinion, however, need not necessarily qualify as a holding. To be characterized as a holding, an interpretation must also fairly reflect

¹³⁷ See United States Oral Argument at 4-5, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039), available in 1995 WL 605822.

¹³⁸ See Goldberg, *supra* note 9, at 1060-61 (discussing the nationwide effect of Amendment 2).

¹³⁹ See generally, David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994) (analyzing the military's restrictions on homosexuals under the First Amendment); Arthur A. Murphy & John P. Ellington, *Homosexuality and the Law: Tolerance and Containment II*, 97 DICK. L. REV. 693 (1993) (discussing homosexuality as it interacts with sodomy and marriage statutes).

¹⁴⁰ See, e.g., Farabee, *supra* note 136, at 259 n.125 (discussing the equal rights provisions of 16 state constitutions).

¹⁴¹ See *Evans I*, 854 P.2d 1270, 1274 (Colo. 1993).

¹⁴² Cf. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1984) (mem.) (Brennan, J., dissenting) (certiorari denied where school discharge of openly gay teacher found not to violate fourteenth amendment); *Ratchford v. Gay Lib*, 434 U.S. 1080, (1977) (mem.) (Rehnquist, J., dissenting) (certiorari denied where university's denial of recognition of gay student group found to violate fourteenth amendment).

a court's commitment to it. Where as here, the evidence is slight and the interpretation attenuated, the requisite commitment should not be found. Taken at face value, the opinion reached its conclusion in a way that neither clarified old law nor provided a foundation for future doctrine. The Court did not identify the respect in which it found Amendment 2 unique, did not deny that Amendment 2 could rationally be thought to advance legitimate governmental purposes, and did not explain in what respect Amendment 2 was unconstitutionally broad. As a matter of constitutional jurisprudence, it is unclear what *Evans* stands for. This lack of clarity can be illustrated by the following questions: After *Evans*, would a law like Amendment 2 be upheld if (1) instead of gays, it applied to polygamists,¹⁴³ the disabled, nonpracticing pederasts, the homeless, those with moustaches, Nazis; (2) instead of legislation prohibiting discrimination based on homosexuality, it nullified legislation prohibiting discrimination based on sexual orientation generally; (3) instead of being a constitutional amendment, it were an ordinary statute enacted by the legislature;¹⁴⁴ (4) instead of precluding all types of antidiscrimination legislation, it merely prohibited employment, housing or some other specific form of antidiscrimination legislation; (5) instead of banning legislation on all levels, it merely precluded municipalities from enacting gay antidiscrimination legislation; (6) instead of completely banning gay antidiscrimination legislation, it merely required supermajorities to enact it? The problem, of course, is not that *Evans* fails to provide an answer to these questions. The problem is that *Evans* fails to provide even a framework for analyzing them.

The Supreme Court's application of the rational basis test in *Evans* may be usefully contrasted to that in *City of Cleburne v. Cleburne Living Center, Inc.*¹⁴⁵ *Cleburne* was the last case before *Evans* in which the Supreme Court held that an instance of state action failed the rational basis test. In *Cleburne*, a Texas city had denied an application for a special use permit that would have allowed a group home for the mentally retarded to operate in a residential area.¹⁴⁶

¹⁴³ Cf. *Romer v. Evans*, 116 S. Ct. 1620, 1636 (1996) (Scalia, J., dissenting) (questioning whether the Court has "concluded that the perceived social harm of polygamy is a 'legitimate concern of government,' and the perceived social harm of homosexuality is not").

¹⁴⁴ Cf. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 621 (6th Cir. 1995) (upholding city charter amendment permitting discrimination against gays), *cert. granted and judgment vacated*, 116 S. Ct. 2519 (1996).

¹⁴⁵ 473 U.S. 432 (1985).

¹⁴⁶ See *id.* at 435.

The Court considered a variety of justifications for the denial. To the justification that those in the area harbored "negative attitudes" toward the residents of the home, the Court responded that such attitudes are "not permissible bases for treating a home for the mentally retarded differently from [other multiple dwellings]" and characterized such attitudes as "biases" and "irrational prejudice" that could not justify state action.¹⁴⁷ Such a rebuke contrasts starkly with the moral neutrality of the *Evans* Court with respect to "landlords or employers who have personal or religious objections to homosexuality."¹⁴⁸ Regarding the justifications that the home would be located in an area that was susceptible to floods, that it would cause congestion in the area, or that the city might be liable for actions of residents of the group home, the Court responded that those justifications were not being equally applied to other types of dwellings such as sanitariums, hospitals, and fraternities.¹⁴⁹ As to justifications concerning fire safety, density of occupants, and fire hazards, the Court cited the home's compliance with state and federal regulations and responded that there was no rationale for singling out homes for the mentally retarded in these respects.¹⁵⁰ Thus, the *Cleburne* Court provided a reasonably detailed presentation of the justifications advanced, as well as the irrational differentiation on which they rested. By likening group homes for the mentally retarded to other types of multiple dwellings, the Court indicates the overinclusiveness or underinclusiveness that is objectionable.¹⁵¹ In sum, the *Cleburne* Court was willing to stake out a position in support of the mentally retarded and how they should be treated relative to others. In *Evans*, the Court hides behind a conclusory invoking of the rational basis test.

The opinion in *Evans* thus represents the Court's solution to the problem of how to dispose of a distasteful statute while minimizing immediate and interim costs. By saying little or nothing of substance, the Court avoided the political costs that might have been associated with, for example, recognition of the suspect-class status

¹⁴⁷ *Id.* at 448, 450.

¹⁴⁸ *Evans*, 116 S. Ct. at 1629.

¹⁴⁹ *See Cleburne*, 473 U.S. at 449-50.

¹⁵⁰ *See id.* at 450.

¹⁵¹ *See id.* at 449-50 (indicating that if the residents of the home for the retarded were instead a fraternity, family, home for the elderly or a health-care facility, no restrictions would be placed on the building's occupancy).

for gays or the irrationality of the desire not to associate with gays.¹⁵² Similarly, the Court avoided the interim costs associated with the creation of a novel constitutional doctrine. Once created, such doctrines tend to expand in unpredictable ways.¹⁵³ Articulating a doctrine sufficient to explain the fault in Amendment 2 might have generated litigation in diverse areas including treatment of sex offenders, civil rights, municipal home rule, voting access, domestic law and the repeal of affirmative action plans. For every case decided advancing individual rights, a dozen must be decided defining the limits of the advance.¹⁵⁴ The Court correctly sensed that adopting the Colorado Supreme Court's "independent identifiability" test for unconstitutionality would have opened the door to a barrage of litigation. Such litigation would likely have resulted in wholesale abandonment of the criterion or identification of "independent identifiability" with suspect class status—a result the Court was not ready to endorse.

Opinions such as *Evans*, however, create long-term costs for the Court. Repeated decisions without sufficient doctrinal basis weaken the Court's ability to engage in judicial review. Commitment to principles expressed in legal doctrine constrains courts and makes them more than legislatures without constituencies.¹⁵⁵ Acting in the absence of articulated principle, the Court ceases to be perceived as a court.¹⁵⁶ In the long run, anarchy is loosed on the lower courts as they despair of predicting the course of future decisions or learn that they, too, need not articulate reasoning that could account

¹⁵² *But see Evans*, 116 S. Ct. at 1631 (Scalia, J., dissenting) (criticizing the majority for failing to address whether Colorado had a rational basis for denying homosexuals special protections).

¹⁵³ *See generally*, Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1763-64 (1991) (discussing the unpredictability of new law in general).

¹⁵⁴ *See* Rebecca C. Morgan et al., *The Issue of Personal Choice: The Competent Incurable Patient and the Right to Commit Suicide?*, 57 MO. L. REV. 1, 18-19 (1992) (discussing individual rights and indicating that "[f]undamental rights are not defined in the Constitution and have to be defined by the court, and the Supreme Court has indicated a hesitance to redefine both fundamental rights and what rights are considered to be fundamental" (citing *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986))).

¹⁵⁵ *See Bowers*, 478 U.S. at 194-95 (stating that when the Court acts without a commitment to principles expressed in legal doctrine, it is acting beyond the constitutional authority expressly delegated to the judiciary).

¹⁵⁶ *See id.* at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

for their decisions.¹⁵⁷ Cases like *Evans*, for example, may lead lower courts to believe that they may use lack of rationality as a basis for nullifying statutes when they are unable or unprepared to formulate a more cogent rationale. Equally problematic is the majority's failure to respond to the dissent's criticism. The dissent in *Evans* was particularly scornful.¹⁵⁸ A majority, of course, is never obliged to respond. Near total silence¹⁵⁹ in the face of direct challenge, however, suggests a lack of conviction, a shallowness of reasoning, or both.

V. CONCLUSION

When *Evans* reached the Supreme Court, a shadow lay over all state constitutional provisions that might be characterized as affecting an "independently identifiable group." After *Evans*, that shadow has been lifted. But it has not been lifted through the clarification of existing law or the dawning of a new doctrine. Rather than illuminating any generally problematic features of state constitutional provisions such as Amendment 2, the Supreme Court struck it down with a lightning bolt. In its brevity, suddenness, and unpredictability, there is no way of knowing where rational basis scrutiny of the *Evans*-type will strike again—if at all.

¹⁵⁷ See Jennifer Gerarda Brown, *Posner, Prisoners and Pragmatism*, 66 TUL. L. REV. 1117, 1165 (1992) ("When judges are candid about the grounds for their decisions, they not only give lawyers and lower court judges more information about 'what really moves them,' making the outcome of future cases more predictable, they also allow others to monitor their activities." (citation omitted)).

¹⁵⁸ See *Evans*, 116 S. Ct. at 1631 (Scalia, J., dissenting) (describing the majority's theory as "ridiculous" and "unheard-of").

¹⁵⁹ In *Evans*, the majority's only response to the dissent was its attempt to distinguish a case relied on by the dissent. See *id.* at 1628. Even here, however, the dissent is allowed the last word. See *id.* at 1636 n.3 (Scalia, J., dissenting).