The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis, in with Romer v. Evans

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I. INTRODUCTION

While few would have predicted Colorado to become the battleground over the divisive issue of homosexuality, the conflict in Colorado was not unexpected. Colorado is home to many conservative religious denominations and organizations. At the same time, however, Colorado was one of the first states to repeal its antisodomy laws and enact laws prohibiting discrimination on the basis of homosexuality.

In 1992 ideologies clashed when the Colorado electorate was asked to decide the fate of homosexuals through a referendum measure designed to amend the Colorado Constitution. This amendment, known as Amendment 2, would have prohibited homosexual orientation or relationships from forming the basis of antidiscrimination laws and would have repealed all antidiscrimination laws in effect for homosexuals. At the polls on November 1.

1. For the purpose of this Note, the terms "homosexuality" and "homosexual" denote individuals of homosexual, lesbian, or bisexual orientation and conduct.
3. See id. (stating that Colorado Springs, Colorado, has become the new capital for America's Christian right and that more than 70 Christian organizations have their headquarters in Colorado Springs); see also John Patrick Michael Murphy, Amendment Would Balance Tax Burden, Rocky Mountain News, Sept. 23, 1996, at 36A (citing the fact that "churches and religious organizations now own more than 80% of the value of privately-owned untaxed property in Colorado").
5. See discussion infra Part II.

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3, 1992, the majority of Colorado voters approved Amendment 2.  

After the election the battleground shifted from the voting booths to the courts. In Romer v. Evans the United States Supreme Court ruled on the constitutionality of the amendment. Few expected the case to be amenable to simple judicial analysis because Amendment 2, by the Court’s own admission, was “unprecedented in our jurisprudence.” Thus, it presented an important issue of equal protection law warranting careful and precise review by the Court. However, when the Court rendered its decision, the only clear aspect of its opinion was the conclusion that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment. The Court’s rationale and analytical approach were both unclear. While the Court claimed to apply the traditional framework of equal protection analysis, the result it reached was inconsistent with the method it purported to employ. This resulting inconsistency prompted some commentators to suggest that the Court was disingenuous or at least shallow in its legal reasoning.

Despite the Court’s problematic legal reasoning, Romer is a decision with precedential value that will inevitably affect future equal protection cases. Already some look upon the decision as “the Court’s most significant protection of gay rights ever,” while others read it as sending “a clear message that legislative gay

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6. Amendment 2 gained 53.4% of the popular vote. See discussion infra Part II.
8. Id. at 1628.
10. See discussion infra Part V.
11. See David Frum, Suspect Jurisprudence, WKLY. STANDARD, June 3, 1996, at 11, 12 (“In the end, Romer v. Evans is a bad judgment because it is a dishonest one.”).
bashing will not be tolerated.”\textsuperscript{14} There are yet others who believe that the decision will eventually be limited to its facts.\textsuperscript{15} Nevertheless, no reliable prediction of the decision’s impact can be made without first articulating the legal theory upon which it is founded. Therein, however, lies the challenge, for the Court left a void in its legal reasoning that must be filled.

The need to explain the meaning of \textit{Romer} has become urgent in light of the new equal protection battlefield California voters created by approving the anti-affirmative action initiative, Proposition 209.\textsuperscript{16} Opponents of Proposition 209 have already filed suits in federal court attacking its constitutionality.\textsuperscript{17} Their equal protection challenges rest, in part, on \textit{Romer}.\textsuperscript{18} At the same time, supporters of Proposition 209, who feel the initiative will not be plagued by the difficulties encountered by Amendment 2, filed suit in California state court to ensure implementation of the initiative.\textsuperscript{19}

The Proposition 209 battle is bound to be impassioned and protracted, and \textit{Romer}’s meaning will be crucial to resolving this equal protection conflict.\textsuperscript{20} Scholarship will play an important part in deciphering \textit{Romer}’s meaning and its subsequent application to Proposition 209 because superficial or sloppy judicial reasoning

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\textsuperscript{15} See Reuben, \textit{supra} note 13, at 30.
\textsuperscript{16} Proposition 209, the affirmative action initiative, amends the California Constitution and prohibits the state, including cities, counties, public schools, and colleges, from discriminating or granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin in the areas of employment, public education, or public contracting. \textit{See} CAL. CONST. art. I, § 31(a) (amended 1996).
\textsuperscript{17} Their brief draws key phrases from \textit{Romer}. Brief for Plaintiffs at 1, Coalition for Economic Equity v. Wilson, No. C 96 4024 TEH (N.D. Cal. 1996) (“Proposition 209 is ‘a denial of equal protection of the laws in the most literal sense’; the proposition places special burdens on minorities and women and cuts off their ability to seek assistance and protection from the government.
\textsuperscript{18} See Howard Mintz, \textit{209 Opponents Want Henderson to Hear Challenge}, \textit{THE RECORDER}, Nov. 7, 1996, at 11 (“Plaintiffs' lawyers in the Prop 209 challenge are pinning at least part of their hopes on ... \textit{Romer v. Evans}.”).
\textsuperscript{19} See id.
\textsuperscript{20} Although Proposition 209 is an amendment to the California Constitution, \textit{Romer} is binding precedent since the state cannot provide less protection than the Federal Constitution. Arguably, Proposition 209 will be assailed by challengers as providing less protection than mandated under the Equal Protection Clause of the Fourteenth Amendment.
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often invites academic discussion. This Note accepts the invitation extended by the *Romer* decision, and will ascertain the reasoning that allowed the Court to find Amendment 2 violative of the Equal Protection Clause.

Part II of this Note presents the background of *Romer v. Evans* and its disposition in the Colorado courts. Part III provides an overview of the equal protection standards of review under the Fourteenth Amendment and establishes the framework against which the Supreme Court’s decision is later compared. Part IV discusses the Court’s holding and articulated reasoning. Part V analyzes Amendment 2 and argues that the Court did not apply the equal protection standard it purported to use. Part VI presents three alternative theories to explain *Romer*. Part VII synthesizes the holding and argues that the Court is moving away from current equal protection standards of review as evinced by its implicit use of a six-factor approach in reviewing Amendment 2. Finally, Part VIII concludes that the Court has destabilized the current equal protection framework in its attempt to transition toward a multi-factor, sliding-scale approach in equal protection cases.

II. FACTUAL BACKGROUND

In May 1992 the Colorado Secretary of State received the requisite number of qualified voter petitions necessary to present the electorate with a new section to the Colorado Constitution. This proposed constitutional amendment was Amendment 2, and on November 3, 1992, they approved it by a margin of 813,966 to 710,151—53.4% to 46.6%. The amendment rescinded laws prohibiting discrimination on the basis of sexual orientation, conduct, and practice at both state and local levels. Amendment 2 provided:

**No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or

bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.\textsuperscript{23}

Individual and governmental plaintiffs\textsuperscript{24} swiftly filed suit in Colorado state district court to enjoin the enforcement of Amendment 2.\textsuperscript{25} These plaintiffs filed a motion for a preliminary injunction to forestall the scheduled January 15, 1993, implementation of the amendment,\textsuperscript{26} claiming that Amendment 2 denied them equal protection of the laws guaranteed by the Fourteenth Amendment.\textsuperscript{27}

In order to obtain a preliminary injunction in the district court, the plaintiffs had to show a reasonable probability that Amendment 2 would be held unconstitutional in a full hearing on the merits.\textsuperscript{28} The district court found that Amendment 2 would probably trigger strict scrutiny during a trial on the merits because it implicated the fundamental right of an identifiable group "not to have the State endorse and give effect to private biases."\textsuperscript{29} Moreo-

\textsuperscript{23} Evans, 854 P.2d at 1272.

\textsuperscript{24} Richard Evans and eight other persons comprised the group of individual plaintiffs, while the County of Boulder, the Boulder Valley School District RE-2, the City Council of Aspen, and the Cities of Denver, Boulder, and Aspen comprised the group of governmental plaintiffs (collectively "plaintiffs"). See id. at 1270.


\textsuperscript{26} See Evans, 854 P.2d at 1273. The Colorado Constitution provides that amendments passed through the initiative process "shall take effect from and after the date of the official declaration of the vote... but not later than thirty days after the vote has been canvassed." COLO. CONST. art. V, § 1. Since the Secretary of State certified the results on December 16, 1992, Amendment 2 would have gone into effect on January 15, 1993. See Evans, 854 P.2d at 1272.

\textsuperscript{27} See Evans, 854 P.2d at 1273.

\textsuperscript{28} The district court relied on Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982), which sets out the six-part test for the issuance of an injunction. See Evans, 60 Empl. Prac. Dec. (CCH) at 73,835. Under this test the moving party must establish:

(1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits.

\textsuperscript{29} Evans, 60 Empl. Prac. Dec. (CCH) at 73,841.
ver, the court found that the plaintiffs had a reasonable probability of proving that Amendment 2 was unconstitutional beyond a reasonable doubt. It therefore granted the preliminary injunction.

On appeal the Colorado Supreme Court affirmed the issuance of the preliminary injunction. The court, however, disagreed as to the fundamental right implicated. The fundamental right identified by the Colorado Supreme Court was the right to "participate equally in the political process" and not whether the state was giving effect to private biases as the district court concluded. Nevertheless, since a fundamental right was implicated, the court concluded that the appropriate standard of review was strict scrutiny.

At trial on the merits, the district court applied strict scrutiny and found that only two of the six interests proffered by the state in support of Amendment 2 were compelling. Nevertheless, the court rejected the amendment because it was not narrowly tailored to further the two compelling interests of religious privacy and familial privacy. Therefore, it ordered that the preliminary injunction be made permanent.

Reviewing the issuance of the permanent injunction, the Colorado Supreme Court found that Amendment 2 was not narrowly tailored to serve any of the state's compelling interests and affirmed the lower court's judgment. Failing strict scrutiny, Amendment 2 was found to violate the Fourteenth Amendment's Equal Protection Clause.

30. See id.
31. See id.
32. See Evans, 854 P.2d at 1286.
33. Id. at 1282.
34. See id. at 1286.
35. The compelling state interests asserted at the district court were:
1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of . . . [the state's] children.
36. See Evans, 63 Fair Empl. Prac. Cas. (BNA) at 753, 755 (Colo. Dist. Ct. 1993). In addition, the defendants argued that the people should be allowed to establish society's public and moral norms and that the separate claims taken in the aggregate presented a compelling state interest. See Evans, 882 P.2d at 1346 & n.11.
37. See Evans, at 759.
38. See id. at 762.
39. See Evans, 882 P.2d at 1350.
III. MODERN EQUAL PROTECTION ANALYSIS

A general understanding of the equal protection standards of review is essential to fully appreciate the *Romer* holding and its impact on the equal protection framework. The Equal Protection Clause of the Fourteenth Amendment embodies a firm command: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has interpreted this to mean that the law must treat similarly situated persons similarly. However, the Equal Protection Clause does not prohibit state or federal governments from classifying persons or drawing lines in the creation and application of laws. Rather, the Equal Protection Clause forbids classifications that arbitrarily burden a group of individuals.

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the equal protection mandate. However, in the absence of controlling congressional direction, the United States Supreme Court has formulated standards to assess the validity of state legislation or other official action challenged as violative of the Equal Protection Clause. These judicially created standards used to examine the constitutionality of governmental legislation are called "equal protection 'standards of review,'" and they entail an inquiry into the purpose of the suspect legislation.

Presently, there are three traditional standards of review a court uses in evaluating equal protection challenges: rational basis, strict scrutiny, and intermediate scrutiny—collectively called

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42. See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2, at 7 (2d ed. 1992) [hereinafter ROTUNDA & NOWAK].
43. See Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (Under the Equal Protection Clause the courts have no duty to intervene "[u]nless a statute employs a classification that is inherently invidious."); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) ("The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.").
44. Section 5 reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.
48. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3,
the three-tier framework. In addition, there are newly-forming nontraditional standards that warrant discussion. A meaningful assessment of Romer and its impact on the traditional and novel standards of equal protection review requires a thorough understanding of the current three-tier framework and especially a comprehensive understanding of rational basis review.

A. The Rational Basis Standard of Review

The most deferential standard, used most often to review legislation, is the rational basis standard of review. It is the paradigmatic standard of judicial restraint, as it attempts "to preserve to the legislative branch its rightful independence and its ability to function." The United States Supreme Court has often stated that rational basis analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" nor an opportunity for the judiciary to sit as a "superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." The Court's rationale for this deferential standard is that democratic processes can capably rectify improvident decisions. As the Court stated in Williamson v. Lee Optical, "the people must resort to the polls, not to the courts," for protection against legislative abuses.

Under the rational basis standard, legislation is presumed valid if the "classification drawn by the statute is rationally related to a legitimate state interest." There are three major elements to this standard: (1) the legitimate state interest; (2) the classification; and (3) the rational relationship between the two.

1. The legitimate state interest

With respect to legitimate state interests, courts generally

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at 601-02 (5th ed. 1995).
49. See discussion infra Part III.D.
50. See City of Cleburne, 473 U.S. at 440.
52. Id. at 315 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1973)).
53. Id. at 313.
55. See City of Cleburne, 473 U.S. at 440.
57. Id. at 488 (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).
58. City of Cleburne, 473 U.S. at 440 (emphasis added).
afford state legislatures wide latitude and impute a strong presumption of validity to their enactments, particularly when they are social or economic in nature. For example, in *City of New Orleans v. Dukes* a New Orleans ordinance prohibited pushcart vendors from operating in the French Quarter of the city. The ordinance, however, exempted pushcart vendors who had operated in the city for eight continuous years. Nonexempt vendors argued that the ordinance impermissibly discriminated between vendors with more than eight years of experience and those with less. The Court found that the ordinance was "aimed at enhancing the vital role of the French Quarter’s tourist-oriented charm in the economy of New Orleans." The Court reaffirmed its deferential review of economic legislation and upheld the ordinance.

Although the judiciary affords legislatures wide latitude in the creation of economic and social legislation, there still remain certain legislative goals that do not constitute legitimate governmental interests. For instance, in *Shapiro v. Thompson* Connecticut, Pennsylvania, and the District of Columbia had enacted legislation conditioning the receipt of welfare assistance upon an applicant’s residency in the state for at least one year prior to filing for assistance. In defense of the residency requirement, the states argued that the Court should sustain the classification between one-year-or-more residents and other residents because of the difference in tax payments each group made to the states. Rejecting this contention, the Court held that a state’s objective of rewarding its citizens for past contributions was not a legitimate state purpose. The Court noted that such reasoning would permit states

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59. See id.; see also Schweiker v. Wilson, 450 U.S. 221, 234 (1981) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause . . . merely because the classifications made by its laws are imperfect." (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970))); Dukes, 427 U.S. at 303 ("When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations.").

60. 427 U.S. 297 (1976).
61. See id. at 298.
62. See id.
63. See id. at 305.
64. Id. at 303.
65. See id. at 305.
67. Id. at 622-27.
68. See id. at 632.
69. See id. at 632-33
“to bar new residents from schools, parks, and libraries, or deprive them of police and fire protection . . . . The Equal Protection Clause prohibits such an apportionment of state services.”

The Court in *USDA v. Moreno* 71 invalidated another proffered legitimate state interest. In *Moreno* households that were denied financial aid brought an equal protection challenge against the Food Stamp Act of 1964. 72 The Act denied federal assistance to any household containing an individual unrelated to any other member of the household. 73 Finding that Congress intended to prevent “hippies” from receiving food stamp aid, the Court held that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” 74

In contrast to the general socioeconomic enactments enunciated above is the question of whether morality may constitute a legitimate state interest. The Court addressed this issue in *Bowers v. Hardwick*, 75 which examined whether a Georgia statute criminalizing consensual sodomy violated the Due Process Clause. 76 The defendant challenged the state’s antisodomy statute arguing that the United States Constitution confers the right to autonomy in consensual sexual activity between adults, or in the alternative, that no rational basis existed for the statute. 77 The Court applied the rational basis standard of review since the Georgia statute did not impinge a fundamental right. 78 In upholding the statute, the Court rejected the defendant’s argument that “the presumed belief

70. *Id.*
71. 413 U.S. 528 (1973).
73. *See Moreno*, 413 U.S. at 529.
74. *Id.* at 534.
75. 478 U.S. 186 (1986).
76. *See id.* at 186-89. Though technically not an equal protection case, challenges under due process are analyzed in a substantially similar fashion as fundamental rights under the Equal Protection Clause. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989) (acknowledging that lower federal courts have used principles embodied in the Due Process Clause in assessing the constitutionality of state and local enactments under the Equal Protection Clause of the Fourteenth Amendment); *see also* Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: “Old Formulations” or “New Articulations”?*, 20 WM. MITCHELL L. REV. 337, 378 n.211 (1994) (similar analysis is applied to both due process and equal protection claims).
77. *See Bowers*, 478 U.S. at 191.
78. *See id.* at 191-96.
of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was not a legitimate state interest.\textsuperscript{79} Instead, the Court stated that the law is "constantly based on notions of morality" and that the sodomy laws of some twenty-five states should not be invalidated because they are predicated on such notions of morality.\textsuperscript{80}

2. The classification

If a court identifies a legitimate state interest, the next step under rational basis review is an examination of the employed classification. Although the Equal Protection Clause mandates similar treatment for similar persons,\textsuperscript{81} this does not require the similar treatment of things that are different in fact or opinion.\textsuperscript{82} Instead, courts determine whether the classification is itself arbitrary or irrational since such a classification is inconsistent with the Fourteenth Amendment.\textsuperscript{83}

This determination begins by looking at the individuals affected by the classification.\textsuperscript{84} When the classification excludes similar persons who should be grouped together, the classification is considered underinclusive.\textsuperscript{85} On the other hand, when a classification includes persons who are in fact disparate, the classification is considered overinclusive.\textsuperscript{86} Finally, classifications may be both overinclusive and underinclusive.\textsuperscript{87} While the scope of the classification is helpful for analysis, it does not singularly determine whether the classification is arbitrary and thereby invalid.

\textsuperscript{79} Id. at 196.
\textsuperscript{80} Id.
\textsuperscript{82} See id.
\textsuperscript{84} See \textsc{Rotunda & Nowak}, supra note 42, § 18.2, at 9-10.
\textsuperscript{85} See id. at 10. The Court's decision in \textit{Louisville Gas & Electric Co. v. Coleman}, 277 U.S. 32 (1928), provides an example of an arbitrary, underinclusive classification. In \textit{Louisville} a Kentucky statute levied a tax of twenty cents per hundred dollars on any form of indebtedness secured by a mortgage in the state not maturing within five years. See id. at 35. The Court held that the classification was arbitrary, reasoning that since those with indebtedness securities maturing within five years were not taxed, they received a gratuity. See id. at 38-39. Although the state could have exacted less tax from this group, the statute violated the equal protection guarantee by not charging them any tax at all. See id. at 39.
\textsuperscript{86} See \textsc{Rotunda & Nowak}, supra note 42, § 18.2, at 10.
\textsuperscript{87} See id. at 11-12.
3. The rational relationship between the classification and the legitimate state interest

If the court finds both a nonarbitrary classification and a legitimate state interest, it then determines whether there is a rational relationship between the two. This element of the rational basis standard is the most flexible, often highly susceptible to subtle recasting or recharacterization. The Supreme Court itself admitted that it has not been altogether consistent in its pronouncements in this area. To better understand the Court's inconsistency in this area, it is helpful to view its decisions as falling along a spectrum. At one end the Court is highly inclined to find a rational basis, and at the other end it exhibits an aversion to the same.

In decisions where a finding of rational basis is most likely, the Court has said that a classification is rationally related to a legitimate state interest if "any state of facts reasonably can be conceived that would sustain it." For example, in Railway Express Agency, Inc. v. New York the Court upheld a New York traffic regulation prohibiting advertising vehicles while allowing advertisements on business delivery vehicles, reasoning that "[t]he local authorities may well have concluded that [advertisements on business trucks] do not present the same traffic problem in view of the nature or extent of the advertising which they use." The Court recently reiterated this deferential approach when it stated that a law withstands an equal protection challenge if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification."

In decisions where a finding of rational basis is less likely, the Court has stated that "for a classification to be valid under the Equal Protection Clause . . . it 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'" For example, in F.S. Royster Guano Co. v. Virginia, Virginia assessed a tax on income generated by Virginia

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91. Id. at 110.
92. Beach Communications, 508 U.S. at 313 (emphasis added).
94. 253 U.S. 412 (1920).
corporations doing business both within and outside the state. However, corporations that were merely incorporated under state law but conducted no business within the state were exempt. The Court held that the tax laws were not fairly or substantially related to the state's objective of providing governmental protection to corporations. The exempt Virginia corporations, conducting no business within the state, were accorded the same protection as other Virginia corporations that were taxed on all income generated within and outside the state. Thus, the Court held that the differentiation between the two types of corporations was arbitrary and irrational. It is important to note that while the Court sometimes discusses the fair or substantial object of the legislation, the Court does not require the conceived reason for the challenged distinction to have actually motivated the legislature.

There are also decisions that fall closer to the middle of the spectrum, finding "plausible reasons" for disparate treatment rather than any conceivable explanation. For example, in United States Railroad Retirement Board v. Fritz railroad employees challenged the Railroad Retirement Act of 1974, which sought to eliminate a loophole in the retirement system whereby certain employees received a windfall in benefits. Congress devised an elaborate scheme to determine which employees would receive the railroad pension in addition to social security benefits. It decided that only those employees demonstrating a continued relationship with the railroad as of the switch-over date, January 1, 1974, would receive benefits.

The plaintiffs argued that Congress's distinction between rail-

95. See id. at 413.
96. See id. at 414.
97. See id. at 416.
98. See id. at 415-16.
99. See id. at 417.
100. See Beach Communications, 508 U.S. at 315. In Beach Communications Congress provided for regulation of cable television facilities by drawing a distinction between facilities serving separately-owned buildings and those serving one or more buildings under common ownership. See id. at 309. The Court upheld the common-ownership distinction because it was rationally related to the governmental purpose of preventing the cost of regulation from outweighing the benefits to consumers although this was not the stated purpose of the legislation. See id. at 317.
101. See Fritz, 449 U.S. at 179.
102. 449 U.S. 166 (1980).
104. See id. at 166-67.
105. See id. at 171.
road employees on the basis of whether they had a "current connection" with the railroad industry as of the switch-over date was irrational.\(^{106}\) The Court disagreed, reasoning that employees having a current connection with the industry were probably among the class of career railroad operators for whom Congress designed the Railroad Retirement Act.\(^{107}\)

Despite the divergent decisions along this rational basis spectrum, a few principles remain constant. First, neither Congress nor the states have an "obligation to produce evidence to sustain the rationality of a statutory classification."\(^{108}\) Second, those challenging legislation on equal protection grounds have the burden to "negative every conceivable basis which might support [the classification]."\(^{109}\) Third, legislatures are not required to articulate their reasons for enacting a statute.\(^{110}\) Lastly, under rational basis review a classification does not fail merely because it "is not made with mathematical nicety or because in practice it results in some inequality."\(^{111}\) These enduring principles demonstrate just how easily an enactment can survive rational basis review.

**B. The Strict Scrutiny Standard of Review**

Strict scrutiny stands in stark contrast to rational basis review. It is a heightened level of scrutiny that differs from rational basis review because the judiciary does not defer to the decision of the legislature.\(^{112}\) Rather, courts conduct an independent review of the challenged classification and employ a more exacting test.\(^{113}\) For a challenged enactment to withstand strict scrutiny, it must be narrowly tailored "to serve a compelling state interest."\(^{114}\) Because strict scrutiny is a form of independent review by the courts, even if the government can demonstrate a compelling end, a court will not uphold the legislation unless it concludes that the classification

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106. Id. at 173-74.
107. See id. at 178.
108. Heller v. Doe, 509 U.S. 312, 320 (1993); see also Beach Communications, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.").
110. See Beach Communications, 508 U.S. at 315.
111. Lindsley, 220 U.S. at 78.
112. See Rotunda & Nowak, supra note 42, § 18.3, at 15.
113. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985) (stating that rational basis review gives way to heightened review when a classification involves race, alienage, or national origin).
114. Id. (1985) (emphasis added).
is narrowly tailored to promote that compelling interest. The assumption underlying rational basis—that the democratic process will rectify improvident legislative enactments—does not apply to strict scrutiny because the enactments that trigger strict scrutiny reflect a form of antipathy and prejudice the democratic process cannot correct. Therefore, judicial intervention—in the form of strict scrutiny—is the last bastion for the equal protection guarantee.

Classifications in socioeconomic legislation generally do not trigger strict scrutiny. Instead, strict scrutiny is triggered when a classification implicates a fundamental right or involves some suspect basis.

The courts determine which rights are fundamental by looking at whether the right at issue has its source explicitly or implicitly in the Constitution. Under this approach the Court has identified, among others, the fundamental right to an appeal in criminal cases and the right to interstate travel. Yet, despite the Constitution's guidance, the Court sometimes recognizes rights not explicitly protected by the Constitution. For example, in Dunn v. Blumstein, the Court recognized the right to participate equally in state elections even though the right to vote is not expressly protected by the Constitution.

Classifications grounded in suspect bases also receive strict scrutiny. Unlike fundamental rights that generally have their source in the Constitution, the suspect basis delineation is a judicial construction that stems from Justice Stone's famous footnote in United States v. Carolene Products Co., which stated that "prejudice against discrete and insular minorities" should trigger independent review. Footnote four has become the paradigm for

115. See ROTUNDA & NOWAK, supra note 42, § 18.3, at 15.
116. See City of Cleburne, 473 U.S. at 440.
118. See ROTUNDA & NOWAK, supra note 42, § 18.3, at 15.
122. 405 U.S. 330 (1972).
124. 304 U.S. 144 (1938).
125. See id. at 153 n.4 ("[P]rejudice against discrete and insular minorities may be
heightened equal protection scrutiny. Currently, classifications based on race, alienage, and nationality are considered suspect and subjected to strict scrutiny.

C. The Intermediate Standard of Review

The two-tier standard detailed above was expanded in the late 1960s with the introduction of intermediate review. As a form of heightened review, it involves far less deference to the legislature than does rational basis but requires a less compelling interest than strict scrutiny. Under intermediate scrutiny a classification will only be upheld if it is substantially related to a sufficiently important governmental interest. Unfortunately, the Court does not always articulate this standard consistently, for it has sometimes held that the proper test is whether there is an “exceedingly persuasive justification” for the classification, rather than merely a substantial government interest.

Classifications involving quasi-suspect groups trigger intermediate scrutiny. Quasi-suspect groups are groups that share some characteristic of a suspect group; yet, because they do not qualify as “discrete and insular minorit[ies],” they only receive intermediate review instead of strict scrutiny. Currently, only two

127. See McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (“Classification[s] based upon . . . race . . . must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications ‘constitutionally suspect,’ and subject to the ‘most rigid scrutiny.’” (citations omitted)).
128. See Graham v. Richardson, 403 U.S. 365, 372 (1971) (“[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”).
130. See City of Cleburne, 473 U.S. at 440.
132. See id. at 17.
133. See City of Cleburne, 473 U.S. at 441.
classifications have been accorded intermediate scrutiny: those based on gender\(^{136}\) and those based on the legitimacy of children.\(^{137}\)

**D. Novel and Emerging Standards of Equal Protection Review**

Novel standards have emerged in recent times that resist easy classification within the three-tier framework of equal protection review. In general, they tend to be independent forms of judicial review that accord heightened scrutiny. The three novel standards that impact the *Romer* decision are: (1) the per se standard; (2) the rational basis with teeth standard; and (3) the multifactor, sliding-scale theory.\(^{138}\)

**IV. THE UNITED STATES SUPREME COURT’S REVIEW OF *ROMER V. EVANS***

Justice Kennedy, delivering the opinion of the Court, affirmed the Colorado Supreme Court’s judgment and struck down Amendment 2 as violative of the Equal Protection Clause of the Fourteenth Amendment.\(^{139}\) The Court, however, did not rely upon the rationale of the state court for its affirmance.\(^{140}\) In a three-part opinion the Court described the antecedent events giving rise to Amendment 2, evaluated its far-reaching effect on the status of homosexuals, and determined the amendment’s unconstitutionality.

**A. The Supreme Court’s Version of the Conflict in Colorado**

The Court began by discussing the statewide controversy that was the impetus for Amendment 2.\(^{141}\) Various municipalities had passed ordinances prohibiting discrimination on the basis of sexual orientation in the areas of housing, employment, education, public accommodation, and health and welfare services.\(^{142}\) The electorate responded with Amendment 2, which attempted to repeal these ordinances to the extent they prohibited “discrimination on the

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136. See *City of Cleburne*, 473 U.S. at 440-41.
138. Part VI of this Note presents these theories, discusses the application of each to *Romer*, and then comments on their desirability as standards of equal protection review.
140. See *id.* at 1624.
141. See *id.* at 1623.
142. See *id.*
basis of 'homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.' However, the Court felt that Amendment 2 worked more than a mere repeal of these existing provisions for homosexuals. The Court found that Amendment 2 prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons." Having reached this conclusion, the Court devoted the rest of its opinion to a discussion of the impact this broad enactment would have on homosexuals' legal status and equal protection under the laws of Colorado.

B. The Change in Legal Status Created by Amendment 2

In Part II of its opinion, the Court examined Amendment 2's impact on the legal status of homosexuals. The Court explained that under common law those who served the public, like innkeepers and smiths, could not refuse service to a customer without good reason. However, this common law duty proved to be insufficient. Congress could not remedy the common law's shortcomings because the Fourteenth Amendment did not give Congress the general power to prohibit public accommodation discrimination. As a result of the deficiencies, many states enacted statutes to counter discrimination. These statutes differed from the common law in that they enumerated the persons who were under a duty not to discriminate as well as the groups or persons within the ambit of statutory protection.

143. Id. (citing COLO. CONST., art. II, § 30(b)).
144. Id.
145. Although this Note presents the Court's discussion of legal status, the analysis of this issue is beyond the scope of this Note.
146. See Romer, 116 S. Ct. at 1625.
147. See id.
148. See id. (citing The Civil Rights Cases, 109 U.S. 3, 25 (1883)).
149. See Romer, 116 S. Ct. at 1625.
150. See id. The Court stated that under current Colorado law those persons or entities subject to a duty not to discriminate include "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind." Id.
151. See id. According to the Court, Colorado antidiscrimination laws set forth a catalogue of traits including "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability . . . [and] sexual orientation." Id. at 1626.
types of discrimination. The Court found that Amendment 2 radically altered common law and statutory protections. The amendment effectuated a "[s]weeping and comprehensive" change in the legal status of homosexuals. It precluded homosexuals from statutory protection, placed them into a "solitary class," and denied them legal protection from discrimination with respect to transactions and relations in both private and governmental spheres. In so holding, the majority explicitly rejected the state’s principal argument that Amendment 2 merely placed homosexuals in the same position as all other persons and that the amendment did no more than deny homosexuals "special rights."

To the contrary, the majority cited the Colorado Supreme Court’s finding that at a minimum, Amendment 2 repealed "existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation." The amendment’s “ultimate effect” was to “prohibit any governmental entity from adopting similar, or more protective” measures designed to protect homosexuals “unless the state constitution [was] first amended to permit such measures.”

The Court’s greatest concern with Amendment 2 was its extensive reach. The amendment was so broad that it not only deprived homosexuals of the specific laws passed for their protection, but also dispossessed them of protection from the general laws and policies designed to prohibit any form of arbitrary discrimination in either the private or governmental sectors. “At some point,” Justice Kennedy stated, “in the systematic administration of

152. See id. at 1624-25.
153. See id. at 1626.
154. Id. at 1625.
155. Amendment 2 “nullifies specific legal protections . . . for homosexuals] in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.” Id. at 1626.
156. See id. at 1625.
157. See id. at 1624.
158. Id.
159. Id. at 1625 (emphasis added) (citing Evans v. Romer, 854 P.2d 1270, 1284-85 & n.26 (Colo. 1993)).
160. During oral argument the Court repeatedly asked the parties if homosexuals would receive protection from police and other social services and whether homosexuals would have recourse for “gay bashing.” Transcript of Oral Argument at *27, Romer v. Evans, 116 S. Ct. 1620 (1996) (No. 94-1039), 1995 WL 605822 [hereinafter Oral Argument].
161. See Romer, 116 S. Ct. at 1626.
[general applicability laws], an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality." To Justice Kennedy this course of action would appear to be invalid under Amendment 2.

Even assuming that homosexuals could find protection in the general laws of Colorado, the Court found that Amendment 2 not only "compound[ed] the constitutional difficulties" present in the law, but imposed a special disability upon homosexual persons by denying them the "safeguards that others enjoy[ed] . . . without constraint."

C. Amendment 2's Failure to Satisfy Rational Basis Review

The majority concluded the opinion by analyzing Amendment 2 under the equal protection guarantee. The majority began by saying that the Fourteenth Amendment's mandate of equal protection of the laws does not mean that laws can never classify or disadvantage a certain group of people. Such legislative classifications will not violate the Equal Protection Clause if they bear a "rational relation to some legitimate end."

While the Court evoked the traditional rational basis test, it held that the amendment failed—even defied—this conventional test. The two reasons given for this failure marked the Court's departure from the traditional equal protection framework. The Court's first reason was that the amendment constituted an invalid form of legislation because it imposed a "broad and undifferentiated disability on a single named group"; and second, the amendment seemed "inexplicable by anything but animus" toward the class affected.

1. Amendment 2: an invalid form of legislation

The Court's first reason for rejecting Amendment 2 was that it

162. Id. (emphasis added).
163. See id.
164. Id.
165. Id. at 1627.
166. See id. at 1627-29.
167. See id. at 1627.
168. Id; see also discussion supra Part III.A.
169. See Romer, 116 S. Ct. at 1627.
170. Id.
constituted an invalid form of legislation. The Court noted that the link between the classification and the legitimate state objective gives substance to the equal protection guarantee.\textsuperscript{171} The search for this link provides "guidance and discipline for the legislature" and also marks the limits of the judiciary's authority.\textsuperscript{172} Even unwise or disadvantageous laws can ordinarily be sustained on tenuous rationale if the classification bears a rational relationship to an independent and legitimate legislative end.\textsuperscript{173} This relationship ensures that the "classifications are not drawn for the purpose of disadvantaging the group burdened by the law."\textsuperscript{174} Laws that are "narrow enough in scope and grounded in a sufficient factual context" aid the Court in ascertaining the existence of some rational relationship between the classification and the purpose served.\textsuperscript{175}

This method of equal protection review set out by the Court does not conform to the traditional framework. The Court deviated in two significant ways. First, the Court has not traditionally required both an independent and legitimate state end; generally, only some legitimate state interest is required.\textsuperscript{176} The Court's added requirement of an independent interest seems to imply that

\begin{itemize}
\item \textsuperscript{171} See id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} See id. It is important to note that the Court's phrasing of the rational basis standard as requiring both a legitimate and independent state interest for the classification is a departure from the traditional rational basis test, which requires only a legitimate state interest. See id. However, the Court's phrasing is not without some support. In United States Department of Agriculture \textit{v. Moreno} the Court held that a "purpose to discriminate against [a politically unpopular group] cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify [the enactment.]" United States Dept' of Agric. \textit{v. Moreno}, 413 U.S. 528, 534-35 (1973) (second alteration in original). For a discussion of the Court's reference to the unpopular status of homosexuals, see infra Part VI.C.2.b.
\item \textsuperscript{174} \textit{Romer}, 116 S. Ct. at 1627.
\item \textsuperscript{175} Id. (emphasis added). The Court cited four cases: \textit{New Orleans v. Dukes}, 427 U.S. 297 (1976) (classification favoring pushcart vendors of certain longevity justified because of tourism benefits); \textit{Williamson v. Lee Optical, Inc.}, 348 U.S. 483 (1955) (favoring of optometrists over opticians justified based on assumed hypothetical grounds); \textit{Railway Express Agency, Inc. v. New York}, 336 U.S. 106 (1949) (exemption from general advertising ban justified based on the lower potentiality of traffic hazards); and \textit{Kotch v. Board of River Port Pilot Commissioners}, 330 U.S. 552 (1947) (possible efficiency and safety benefits of a closely knit pilotage system justified licensing scheme disfavoring persons unrelated to current river boat pilots). See id. In these cases the factual context and scope of the enactments were sufficient to uphold the challenged legislation. The Court's position in \textit{Romer} marks a departure from the traditional rational basis test.
\item \textsuperscript{176} See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).
\end{itemize}
the regulation of a particular classification itself could not consti-
tute the state's legitimate interest; rather, the state's interest must
stand apart from the classification itself and can only indirectly
burden the affected classification. 177 Second, the Court's need to
know the factual context represents a deviation from the tradi-
tional rational basis test, which does not require an actual set of
facts. 178 Instead, traditional rational basis allows the Court to
imagine hypothetical reasons and situations. 179

Nevertheless, the Court viewed Amendment 2 as an invalid
form of legislation because it compounded the "normal process of
judicial review" by simultaneously being "too narrow and too
broad." 180 By identifying persons by a single trait—
homosexuality—the amendment denied them "protection across
the board" and resulted in a "disqualification of a class of persons
from the right to seek specific protection from the law." 181 This
was found to be the "broad and undifferentiated disability" placed
upon homosexuals by Amendment 2. 182 It was for this reason that
the Court viewed Amendment 2's classification as
"unprecedented" in American jurisprudence, calling for special
consideration. 183

The majority of the Court felt that Amendment 2 was not
within our constitutional tradition because it impugned a central
idea of the equal protection guarantee that "government and each
of its parts remain open on impartial terms to all who seek its assis-
tance." 184 The Court explained that respect for this principle is
why "laws singling out a certain class of citizens for disfavored
legal status or general hardships are rare." 185 The majority deter-
mined that a law which makes it harder for one group of citizens to

177. However the Court's new analysis would appear to invalidate some impor-
tant legislation. For example, if a characteristic causing a person to be classified a
certain way can never form the state's legitimate interest, states are barred from pro-
tecting the physically or mentally disabled since laws relating to their protection de-
rive from the fact that certain traits set such people apart or into separate categories.
See infra text accompanying notes 382-85.
179. For example, in Railway Express Agency, Inc. v. New York, 336 U.S. 106,
109-10 (1949), the Court used hypothetical traffic concerns in its rational basis
analysis.
180. Romer, 116 S. Ct. at 1628.
181. Id.
182. Id. at 1627.
183. See id. at 1628.
184. Id.
185. Id.
seek aid from the government is "a denial of equal protection of the laws in the most literal sense" because the promise of equal protection is "a pledge of the protection of equal laws." 

2. Amendment 2's animus

The majority rejected Amendment 2 for a second reason: no legitimate purpose or discrete objective could be identified for its enactment. The Court found that the amendment raised the "inevitable inference" that the imposed disadvantage was born of animosity towards homosexuals. The Court stated that "a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Although incidental disadvantages stemming from broad and ambitious laws can be justified if they are tied to legitimate public policy, this could not be said for Amendment 2 because it inflicted an actual and continuing injury without any legitimate justification. In short, the Court concluded that Amendment 2's classification was not based on a legitimate state interest from which it could discern a rational relationship.

The Court's conclusion called for the rejection of two of the state's rationales for Amendment 2: first, that the amendment protected the freedom of association, particularly for landlords or employers who might have religious or personal objections to homosexuality; and second, that it conserved resources to fight discrimination against other groups. Both justifications were so far removed from the breadth of Amendment 2 that the Court found them implausible. Because the Court could not identify any legitimate purpose or discrete objective for Amendment 2, it considered the amendment a "status-based enactment divorced from any factual context from which [it] could discern a relationship to

186. Id.
187. Id. (quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942)).
188. See Romer, 116 S. Ct. at 1628-29.
189. See id. at 1628.
190. Id. (quoting Moreno, 413 U.S. at 534).
191. See id.
192. See id. at 1628-29.
193. See id. at 1629.
194. See id.
195. See id.
196. See id.
legitimate state interests”, in essence, it was “a classification of persons undertaken for its own sake.” The Court ultimately concluded that Amendment 2 intended to make homosexuals unequal to all other citizens. The Court struck down the amendment because “[a] State cannot so deem a class of persons a stranger to its laws” without violating the Equal Protection Clause.

V. THE COURT'S PROBLEMATIC EQUAL PROTECTION ANALYSIS

Many commentators have labeled the Court's opinion conclusory, incoherent, and superficial. That the Court did not explain why the amendment failed to satisfy rational basis review may have fueled much of this criticism. With one sentence the Court dismissed the proffered state interests and with another concluded that the amendment lacked a rational relationship to a legitimate state purpose. In light of the Court's vagueness, it is appropriate to conduct a systematic analysis of Amendment 2 to determine whether the Court was correct in holding that the amendment fails traditional rational basis review.

A. Does Amendment 2 Truly Fail Rational Basis Review?

Romer's most problematic section, Part III, contains the Court's equal protection analysis of Amendment 2. Under current equal protection law, if an enactment does not implicate a suspect basis or a fundamental right, the reviewing court evaluates it to determine whether the classification bears a rational relation to some legitimate state purpose. The Romer Court applied this rational basis standard to Amendment 2 and concluded that the amend-

197. Id. at 1629.
198. Id.
199. See id.
200. Id.
201. See Chai Feldblum, Based on a Moral Vision, LEGAL TIMES, July 29, 1996, at S31.
202. See Reuben, supra note 13, at 30 (quoting Michael McConnell, a legal scholar at the University of Chicago Law School).
203. See Taylor, Twisting and Turning, supra note 12.
204. "The breadth of the Amendment is so far removed from these particular [state] justifications that we find it impossible to credit them." Romer, 116 S. Ct. at 1629.
205. "[A] law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not." Id. (citation omitted).
206. See id. at 1627 (citing Heller v. Doe, 509 U.S. 312, 319-20 (1993)).
ment failed to satisfy the standard. Unfortunately, the three basic components of its analysis—the legitimate state interest, the classification, and the rational relation between the two—were only partially addressed and spread throughout the section in a disorganized fashion. Moreover, the Court employed novel elements in its analysis not traditionally part of rational basis review.207

1. The legitimate state interest

Under rational basis review, the state merely needs to establish a legitimate interest that is rationally related to its classification.208 One of Colorado's asserted interests was the protection of its citizens' freedom of association.209 It argued that without Amendment 2, freedom of association would be compromised because landlords or employers would be forced to accommodate homosexuality even though they harbored religious or personal objections to that lifestyle.210 Although the state presented freedom of association as its legitimate interest, the reference to religious beliefs suggests an implicit underlying moral basis.211 Lending credence to this is that, at the lower court level, the state argued it had a compelling governmental interest in "allowing the people themselves to establish public social and moral norms."212 In short, securing majoritarian morality emerges as the state's true interest for Amendment 2.

However, the majority makes no mention of morality nor does it acknowledge the concept of traditional societal mores in its opinion.213 It skirts this issue entirely by saying, "[t]he breadth of the Amendment is so far removed from [the freedom of association] that we find it impossible to credit [it]."214 The Court avoids discussing morality because it cannot identify morality as the basis of the amendment and then fail to find it a legitimate state interest

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207. See supra note 173 and accompanying text.
209. See Romer, 116 S. Ct. at 1629.
210. See id.
211. See Feldblum, supra note 201, at S32 ("The Court's reticence may have derived from the fact that any deeper analysis would have required it to engage more directly with the question of the people's right to legislate based on private morality.").
213. See Feldblum, supra note 201, at S31 (The Court was "deficient in its refusal to meet the dissent's central point regarding the role of government in legislatively on the basis of popular morality.").
because this would contradict its holding in *Bowers v. Hardwick.*\textsuperscript{215} Ten years earlier in *Bowers,* the Court found that morality constituted a legitimate interest and that the state could, on that basis, criminalize consensual sodomy.\textsuperscript{216} In upholding the Georgia anti-sodomy law, the *Bowers* Court explained that the "law . . . is constantly based on notions of morality."\textsuperscript{217}

The conspicuous absence of any mention of *Bowers* has become a source of frustration for many commentators.\textsuperscript{218} Moreover, the Court's failure to address *Bowers* motivated the dissent to criticize the majority. In his dissent Justice Scalia used *Bowers* to argue that if a state could constitutionally criminalize homosexual sodomy, a fortiori a state could constitutionally prohibit all levels of its government from "bestowing special protections upon homosexual[s]."\textsuperscript{219} Unfortunately the majority chose not to engage the dissent on this point and has left the value of *Bowers* uncertain.\textsuperscript{220}

Yet, even if morality were not the underlying basis of Amendment 2, the Court still should have concluded that a legitimate state interest existed. In its strict scrutiny analysis of Amendment 2, the Colorado Supreme Court held that the state may have a compelling interest in securing the associational freedom of its citizens.\textsuperscript{221} The state supreme court found, however, that Amendment 2 was not narrowly tailored to further the interest in associational privacy.\textsuperscript{222} Because the standard of review changed under the *Romer* Court's analysis, the shift from strict scrutiny to rational basis review should have made it easier for the state to meet its burden of showing a legitimate interest. Under rational basis a state need not show that its interest be compelling or its means narrowly tailored.\textsuperscript{223} Since the United States Supreme Court did not manifest a contrary belief, the compelling interest the Colorado Supreme Court found in associational freedom at a

\begin{itemize}
\item\textsuperscript{215} 478 U.S. 186 (1986).
\item\textsuperscript{216} See id. at 196.
\item\textsuperscript{217} Id.
\item\textsuperscript{218} See Tom Stoddard, *The High Court Erases a Stigma,* NAT'L L.J., June 3, 1996, at A19.
\item\textsuperscript{219} Romer, 116 S. Ct. at 1631-32 (Scalia, J., dissenting).
\item\textsuperscript{220} But see Reuben, supra note 13, at 30 ("[T]he majority has overruled *Bowers* sub silentio" (quoting Notre Dame Law School professor Doug Kmiec)); id. ("[Laurence] Tribe agrees. *Bowers* is 'not long for this world.'" (quoting Harvard University School of Law professor Laurence Tribe)).
\item\textsuperscript{221} See Evans, 882 P.2d at 1344.
\item\textsuperscript{222} See id. at 1345.
\item\textsuperscript{223} See discussion supra Part III.A.
\end{itemize}
minimum constitutes a legitimate interest. Logic dictates that all compelling interests are at the very least legitimate interests.

2. The classification

Since either morality or associational freedom constitutes a legitimate state interest, the next element of the test is whether the classification used to accomplish the state’s interest is valid. Under rational basis only an arbitrary or irrational classification offends the Equal Protection Clause.224 A court makes this determination by evaluating the scope of the classification in terms of its inclusiveness or exclusiveness.225

In Romer the Court makes only a few references to this element. The Court stated that Amendment 2 imposed a “broad and undifferentiated disability on a single named group.”226 By modifying “disability” with the adjectives “broad” and “undifferentiated,” the Court seems to suggest that Amendment 2 is overinclusive. A dialogue during oral argument between the Court and the defendants’ attorney exemplifies the Court’s concern for the amendment’s potential overinclusiveness.227 The Court asked whether the amendment classified on the basis of homosexual conduct or mere proclivity.228 The attorney answered that it was not entirely clear but that conduct was perhaps the best indicator of the group being classified.229 The Court’s very next question was whether conduct was the sole indication of homosexuality.230

This colloquy demonstrates the Court’s uneasiness with the potential overinclusiveness of the amendment. The Court might have been concerned that Amendment 2 would burden persons of homosexual disposition as well as those engaging in homosexual conduct. This was important to the Court because if Amendment 2 affected individuals who never engage in homosexual acts, then it would be more difficult for the state to assert successfully that

224. See Vance v. Bradley, 440 U.S. 93, 97 (1979) (stating that the Court will not overturn an enactment unless the legislature’s actions were irrational); City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (finding that a wholly arbitrary act cannot stand consistent with the Fourteenth Amendment).
225. See discussion supra Part III.A.2.
226. Romer, 116 S. Ct. at 1627.
228. See id. at *8-*9.
229. See id. at *9-*10.
230. See id. at *10.
associational freedom or morality was the basis of the amendment. In essence, individuals of homosexual disposition would not damage the state’s interests as greatly as those who engage in homosexual acts. The Court probably concluded that the classification was overinclusive. This explanation most likely accounts for the Court’s other reference to the classification as “at once too narrow and too broad.” Although the majority did not explain how this might be true, the dissent addressed the point and thoroughly rejected it.

In his dissent Justice Scalia referred to the plaintiffs’ argument that there is a distinction between those who engage in homosexual acts and those who are merely of homosexual orientation. This, the dissent held, was a “distinction without a difference,” and cited to the state supreme court as endorsing this view. The Colorado Supreme Court stated that Amendment 2 targeted a class on the basis of four characteristics—sexual orientation, conduct, practices, and relationships—but that these characteristics were “nothing more than a different way of identifying the same class of persons.” The Romer dissent also cited a Sixth Circuit Court of Appeals case which stated that it was “virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct.”

Yet, assuming that there is a distinction between persons engaging in homosexual acts and persons merely of homosexual orientation, Amendment 2 could still be found to be nonarbitrary. A

231. The state does not have a legitimate interest in regulating thoughts or convictions. However, the state may restrict certain conduct. This is analogous to situations arising under the Free Exercise Clause of the First Amendment in which the state may regulate certain religious conduct but not religious beliefs. See, e.g., Employment Div., Dep’t of Human Resources v. Smith, 494 U.S. 872 (1990) (upholding the denial of state unemployment benefits for persons convicted of consuming a controlled substance during a religious ritual).
233. See id. at 1631-32 (Scalia, J., dissenting).
234. See id. at 1632 (Scalia, J., dissenting).
235. Id. (Scalia, J., dissenting).
236. Evans, 882 P.2d at 1350.
237. Equality Found., Inc. v. Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995) (upholding a city charter identical to Amendment 2, which prohibited the city from providing preferential treatment on the basis of homosexuality).
238. Romer, 116 S. Ct. at 1632 (Scalia, J., dissenting) (quoting Equality Found., 54 F.3d at 267).
basic tenet of equal protection law is that a law's classification
does not fail "merely because it is not made with mathematical ni-
cety or because in practice it results in some inequality."239 Perhaps the true discomfort the majority felt about Amendment 2's classification is that it too perfectly targeted a specific group. Admitting this, however, would mean that the classification is not overinclusive and that there is no constitutional objection regarding Amendment 2's scope. In short, despite the majority's remon-
strations against the unprecedented nature of the amendment, Amendment 2's classification of homosexuals is constitutionally permissible under rational basis.

3. The rational relationship between the classification and the legitimate state interest

Lastly, to uphold an enactment against an equal protection challenge the legitimate state interest must bear a rational relation to the classification used to advance that interest.241 This is perhaps the easiest element to satisfy. Generally an enactment survives challenge if any reason, real or imagined, supports the classification.242 A rational legislator could have reasonably expected Amendment 2 to prevent the deterioration of the moral fabric of society by denying homosexuals special protection that would otherwise amount to an implicit acceptance of homosexuality. The Court could have also accepted the state's argument at the district court hearing on the merits that Amendment 2 was necessary to prevent the "homosexual agenda"243 from overrunning the political functions of the state and gaining protected status for homosexu-

240. See Romer, 116 S. Ct. at 1628.
243. See Evans v. Romer, 63 Fair Empl. Prac. Cas. (BNA) 753, 756 (Colo. Dist. Ct. 1993). The district court rejected this reason as being opinion testimony without sufficient foundation in fact. See id. at 757. However, under rational basis the state has "no obligation to produce evidence to sustain the rationality of a statutory classification." Heller, 509 U.S. at 320. In addition, "[t]he State is not compelled to verify logical assumptions with statistical evidence." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812 (1976). Thus, the state's concern over the homosexual agenda would be rationally related to the classification under Amendment 2.
B. The Significance of Amendment 2's Sufficiency Under Rational Basis

In light of the apparent rational relation between the state's legitimate interest in morality and the permissible classification of homosexuals by Amendment 2, it becomes convincingly clear that Amendment 2 should have survived traditional rational basis review. The Court's contrary conclusion is not significant in and of itself; rather, it merely indicates a need for alternate explanations for the Court's conclusion. The most obvious of these is that the majority did not use rational basis review as claimed. Thus, the Court has left a fatal inconsistency or void in its legal analysis that must be explained. The remaining challenge is to evaluate the possible explanations for the Court's holding in Romer.

VI. ALTERNATIVE THEORIES

The Court created a legal void by failing to articulate its reasoning clearly. While there may be many possible explanations for the opinion, the per se theory, the rational basis with teeth theory, and the sliding scale theory find enough support in the Court's opinion to represent probable explanations. The remainder of this Note presents these alternative theories, assesses the sufficiency of each in accounting for the Court's holding, and then comments on the desirability of each as a possible framework for equal protection review.

A. The Per Se Explanation

1. Laurence H. Tribe's theory

An amicus curiae brief submitted by Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan urged the Court to affirm the state judgment on a per se theory violation of the Equal Protection Clause. The brief ar-

244. See Evans, 63 Fair Empl. Prac. Cas. (BNA) at 756.
245. Another explanation for Romer's result is the "Rule of Five" Theory. See Taylor, Judicial Restraint, supra note 12, at S27. This cynical theory holds that the law is whatever five Justices agree on, and that the individual Justices are governed by their own political will. See id. This theory is more a comment than an alternative approach, and as such, is not a viable explanation for Romer.
246. See Amicus Brief for Respondents at 1, Romer v. Evans, 116 S. Ct. 1620
gued that Amendment 2 was a rare example of a per se violation of the Equal Protection Clause, which did not trigger the traditional bases of equal protection analysis—rational basis, strict scrutiny, and intermediate scrutiny. Instead, Amendment 2 involved a “prior and more basic question” not hinging on the nature of the rights implicated nor the class it targeted. This “more basic question” was whether a state could “set some persons apart by declaring that a personal characteristic that they share may not be made the basis for any protection pursuant to the state’s laws from any instance of discrimination.” The postulated answer was in the negative. The brief argued that Amendment 2’s “facial unconstitutionality flows directly from the plain meaning of the Fourteenth Amendment’s text. For Amendment 2 renders a ‘class of persons’ in Colorado completely ineligible for the protection of its laws from an entire category of mistreatment.”

The brief advanced another argument: Amendment 2 worked a complete denial of protection because Colorado “used its constitution affirmatively to disable all lawmaking and law-enforcing processes within its borders.” Amendment 2 put homosexuals beyond the reach of the state’s system for making and enforcing laws. Thus, the brief hypothesized:

[I]f a law, policy, or common-law rule forbidding, for example, arbitrary job dismissal . . . were to be enforced by a branch, department, agency, court or subdivision of the state in a manner that treated homosexuality as an ‘arbitrary’ basis for dismissal . . . that enforcement decision would . . . be barred by Amendment 2.

This is because the amendment prohibited homosexual orientation, conduct, or relationships from forming the basis of any claim of discrimination. The brief argued that even if the Colorado Supreme Court authoritatively construed Amendment 2 as limited to statutes, ordinances, and regulations, thereby excluding policy or common law protection, the amendment would still violate the

(1996) (No. 94-1039) [hereinafter Amicus Brief].
247. See id. at 3.
248. Id.
249. Id.
250. See id.
251. Id. at 4 (emphasis added).
252. Id. at 6.
253. See id. at 7.
254. Id. at 7 n.3.
Equal Protection Clause because "some persons would have access only to common-law-based legal protections from discrimination, and never to any anti-discrimination protections under the state’s positive laws."

Finally, the brief pointed out the unprecedented nature of Amendment 2 and argued that the Amendment was currently and historically incompatible with the Equal Protection Clause. The brief noted that "[b]etween the adoption of the Fourteenth Amendment and the enactment of Amendment 2, [the Supreme Court had] never been presented with a decision by any state explicitly to deny selected persons access to the protection of its laws from a whole category of wrongful conduct." In short, Amendment 2 was "literally unprecedented."

2. The per se theory’s influence on the Court

That the Court was influenced by Tribe’s per se theory can be shown from the many ideas incorporated into the final opinion. Just as the amicus brief articulated Amendment 2’s complete denial of protection at any level of state or local government, the Court similarly found that Amendment 2 prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect the named class” and that the amendment withdrew protection from no others but homosexuals. In discussing the reach of Amendment 2, Justice Kennedy hypothesized that an official in charge of general laws prohibiting arbitrary discrimination who found that homosexuality was an arbitrary basis of discrimination would be violating the amendment’s prohibition on homosexuality as being the basis of any decision. In substance, this hypothetical was the same one used by Tribe to

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255. Id.
256. See id. at 13.
257. Id.
258. Id.
259. See id. at 6. Tribe, in discussing the amendment, stated that the denial of protection is complete, for Colorado has used its constitution affirmatively to disable all lawmaking and law-enforcing processes within its borders—whether involving state legislation, a local ordinance, or the adoption or enforcement of a “policy” by state executives, administrators, or judges—that might otherwise provide legal protection from discrimination.

Id.
261. See id. at 1625.
262. See id. at 1626.
illustrate the amendment’s prohibition on homosexuality as the basis of any enforcement decision. The Court also echoed the brief’s declaration that Amendment 2 was an “unprecedented” enactment in our jurisprudence, and went even further in holding that the absence of precedent was “instructive.” Finally, the repeated references to common law protection found as illustrations in the amicus brief may have significantly influenced Part II of the Court’s opinion dealing with the radical change in common law protection for homosexuals.

3. The desirability of a per se standard

While Tribe contends the Court relied on the per se theory when it found that Amendment 2 confounded the normal process of judicial review, there is no explicit reference in the opinion to a per se standard of equal protection review. The Court was arguably influenced by the theory but refused to formally adopt it. The Court rightfully refrained from formally recognizing such a theory for a number of reasons.

First, if the Court accepted Tribe’s per se theory, it would have complicated the equal protection standards of review. It would be the most severe form of judicial review since its application results in automatic invalidation. At the same time, the per se standard would be the most easily applied standard because it involves a “more basic question” of whether there has been a violation of the literal meaning of the Equal Protection Clause. On an intuitive level this theory has some allure, for it seems reasonable to find a literal violation of the Equal Protection Clause when an enactment’s classification results in grossly unequal treatment of a certain group of people. But apart from its theoretical allure, there is great difficulty in the theory’s practical application.

The difficulty in deciding when this standard is triggered may have been the Court’s second reason for avoiding a per se test. The factors that trigger this standard of review are not clear. Possible factors include a lack of precedent, as argued by Tribe, or a

263. See supra text accompanying note 254.
264. Romer, 116 S. Ct. at 1628.
265. See Amicus Brief, supra note 246, at 4-7 & n.3 (referring to common law robbery, blackmail, and antidiscrimination laws).
266. See Reuben, supra note 13, at 30.
267. See Amicus Brief, supra note 246, at 3.
268. See id. at 13.
single group's complete disqualification of protection from an entire category of mistreatment as argued by the brief.\textsuperscript{269} However, aside from these possible factors, the triggering mechanism for the per se theory would be an arbitrary one fraught with difficulties.

Lastly, the Court's failure to accept this theory may have been tied to the theory's inherent harshness. If an enactment qualifies for per se review, there will be no review at all because it will be found irrefutably unconstitutional. In short, while the Court undeniably drew some of its analysis from the amicus brief filed by the constitutional law scholars, the per se theory they advanced does not sufficiently explain the holding in \textit{Romer}. It also does not provide a satisfactory framework for equal protection review.

\textbf{B. The Rational Basis with Teeth Explanation}

The discussion of the per se theory's influence on the Court demonstrates that there was more at work than a traditional rational basis review of Amendment 2. The language of the opinion was that of rational basis, but the substance was not. In recent years commentators have identified a hybrid form of rational basis whereby the Court, "under the guise of 'mere rationality,'" actually applies a heightened and more demanding level of review.\textsuperscript{270} This type of review, while not acknowledged by the Court itself, has been called "rational basis with teeth."\textsuperscript{271}

\begin{enumerate}
\item The rational basis with teeth model

The 1985 Supreme Court case \textit{City of Cleburne v. Cleburne Living Center, Inc.}\textsuperscript{272} best illustrates this model of review. In \textit{City of Cleburne} a group home for the mentally disabled used the Equal Protection Clause to challenge a city zoning ordinance requiring special permits for such homes.\textsuperscript{273} The city denied the issuance of plaintiffs' special permit even though the zoning ordinance allowed apartment houses, multiple dwellings, dormitories, and even hospitals to be built.\textsuperscript{274} The court of appeals found that men-

\begin{footnotesize}
\begin{enumerate}
\item See id. at 5.
\item Pond, \textit{supra} note 135, at 195 (citation omitted).
\item 473 U.S. 432 (1985).
\item See id. at 435.
\item See id. at 436-37 & n.3.
\end{enumerate}
\end{footnotesize}
tally disabled persons constituted a quasi-suspect class and applied intermediate review. The Supreme Court affirmed the lower court's judgment but rejected the finding that mentally disabled persons should be considered a quasi-suspect class. Instead, the Court deemed rational basis the proper equal protection standard of review.

One of the reasons offered to justify the rejection of a quasi-suspect classification for the mentally disabled was public policy: "if the large and amorphous class of the mentally [disabled] were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who . . . can claim some degree of prejudice from at least part of the public at large." The Court may have been concerned with homosexuals or other groups who might analogize themselves to the mentally disabled, in terms of discrimination, in order to gain quasi-suspect status, and accordingly, a heightened level of review.

The City of Cleburne Court analyzed the ordinance under rational basis, but found the ordinance unconstitutional as applied to the mentally disabled because no rational justification for the denial of a special permit to this group could be found. While rational basis requires nothing more than a rational relation to some legitimate state purpose, the Court found each proffered state interest insufficient because the interests did not actually further the state's alleged purpose. Many commentators saw the Court's review as more exacting than required under traditional rational basis. It seems the Court was motivated to reach this conclusion because of the perceived prejudice against the mentally disabled. However, the Court was equally compelled to avoid the unforeseen ramifications that would flow from labeling the mentally dis-

275. See id. at 437-38.
276. See id. at 450.
277. See id. at 446.
278. See id.
279. Id. at 445.
280. Homosexual groups could make the following argument: Mental disability is a manifestation of a genetic difference. In City of Cleburne a genetic difference was the basis for extra judicial protection against discrimination. Therefore, since science seems to indicate that homosexuality is the manifestation of a genetic difference, homosexuals should also receive heightened protection against discrimination.
281. See id. at 448.
282. See id. at 448-50.
283. See Pond, supra note 135, at 196; Pettinga, supra note 271, at 794.
284. See Pond, supra note 135, at 196.
abled a quasi-suspect class.

2. Is Romer another instance of rational basis with teeth?

The rational basis with teeth model illustrated by City of Cleburne is a situation in which the court does not formally adopt a higher standard of review but reaches a result consistent with a higher standard of review. The Court's decision in Romer might represent another instance of rational basis with teeth review for two reasons. First, the Court refused to review Amendment 2 under strict scrutiny as the state courts did. Second, the Court reached the result it would have under strict scrutiny although it purported to apply the less stringent rational basis standard.

The Romer Court refused to adopt the reasoning of the Colorado courts. The district court and the Colorado Supreme Court held that Amendment 2 required a strict scrutiny analysis because it infringed upon a fundamental right. The district court held that Amendment 2 violated the fundamental right not to have the State endorse and give effect to private biases. However, this fundamental right was broader than the Colorado Supreme Court was willing to accept. Thus, the state supreme court identified a different fundamental right by extrapolating ideas from four lines of United States Supreme Court cases dealing with preconditions, reapportionment, candidate eligibility, and obstruc-

288. See Evans, 854 P.2d at 1277 (finding that the United States Supreme Court has “consistently struck down legislation which establishes preconditions on the exercise of the franchise”); see, e.g., Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 630-33 (1969) (holding unconstitutional the requirement that voters have property or children before they can exercise the right to vote in school district elections); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666-67 (1966) (holding unconstitutional a requirement that voters pay a poll tax); Carrington v. Rash, 380 U.S. 89, 94 (1965) (“fencing out” a certain class of voters).
289. See Evans, 854 P.2d at 1278 (finding that the value of equal participation emerges from reapportionment cases and that “equal protection requires that voters are able to exercise the right of franchise on an even footing with others”); see, e.g., Board of Estimate v. Morris, 489 U.S. 688, 693 (1989) (“[E]ach and every citizen has an inalienable right to full and effective participation in the political processes.”) (quoting Reynolds v. Sims, 377 U.S. 533, 565 (1964)); Gray v. Sanders, 372 U.S. 368, 379-80 (1963) (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”).
290. See Evans, 854 P.2d at 1278 (finding that the right to political participation
and obstructions in the normal political processes. Combining these lines of cases, the court found that Amendment 2 infringed on the fundamental right of homosexuals to "participate equally in the political process [because the amendment] 'fenc[ed] out' an independently identifiable class of persons." But just as in City of Cleburne, the Romer majority did not accept either of the broad fundamental right formulations of the Colorado courts.\textsuperscript{293} The Court tersely stated that it would "affirm the judgment, but on a rationale different from that adopted by the State Supreme Court."\textsuperscript{294}

One of the reasons for rejecting the Colorado Supreme Court's strict scrutiny analysis might have been the need to avoid the unforeseen ramifications that the new fundamental right of equal political participation might have.\textsuperscript{295} The consequences of a fundamental right to participate equally in the political process may have been too profound and far-reaching. At the same time it seems that Justice Kennedy was not willing to declare sexual orientation a suspect category. Having rejected any fundamental right or suspect classification, the majority was not formally able to subject Amendment 2 to rigorous and exacting judicial review under strict scrutiny.

Nevertheless, the dissent accused the majority of implicitly

\textsuperscript{291} See Evans, 854 P.2d at 1282 (finding that the United States Supreme Court's invalidation of a "broad spectrum of discriminatory legislation" was not limited to those based on race); see, e.g., Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (invalidating a school district's mandatory busing scheme as a way of achieving desegregation); Gordon v. Lance, 403 U.S. 1 (1971) (upholding a statute requiring the approval of 60% of the voters for bond indebtedness or tax rate increases); Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating a city charter placing special burdens on minorities within the governmental process).

\textsuperscript{292} See Evans, 854 P.2d at 1282.


\textsuperscript{294} Romer, 116 S. Ct. at 1624.

\textsuperscript{295} See Frum, supra note 11, at 11 ("What Justice Kennedy wanted to do in Romer v. Evans was void Proposition 2 without declaring sexual orientation a 'suspect category' under the Fourteenth Amendment. Such a declaration would have ignited a political firestorm . . .").
adopting the equal political participation theory it purported to reject. Justice Scalia, in his dissent stated, “[t]he central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others.” The dissent stated that no multilevel democracy could function under such a standard, “[f]or whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking ... the affected group has (under this theory) been denied equal protection.” The dissent illustrated its criticism with an example: to curb the effects of despotism, a state passes a law prohibiting the award of municipal contracts to the relatives of mayors or city council persons. The group composed of relatives now must appeal to the state legislature in order to get the benefit of city contracts, while all other citizens only need to persuade the municipality. For the dissent, it is “ridiculous to consider this a denial of equal protection” because nearly all laws require certain groups to appeal to a higher decision-making level.

The foregoing discussion strongly suggests that the Romer majority utilized rational basis with teeth. At the very least, this explains how Amendment 2 was held unconstitutional without considering homosexuals a suspect or quasi-suspect class.

3. The desirability of the rational basis with teeth review

While this theory is a plausible explanation for the Court's decision, the desirability of this type of heightened review is still in question. Romer raises some critical constitutional concerns, which merit discussion.

The first concern with the rational basis with teeth analysis is its disingenuousness. The Court holds out the semblance of mere rational basis review but actually applies a form of heightened review. By doing so, the Court undermines its own credibility. In addition, the Romer majority stated that equal protection

296. See Romer, 116 S. Ct. at 1631 & n.1 (Scalia, J., dissenting).
297. Id. at 1630 (Scalia, J., dissenting).
298. Id. at 1630-31 (Scalia, J., dissenting).
299. See id. at 1631 (Scalia, J., dissenting).
300. See id. (Scalia, J., dissenting).
301. Id. (Scalia, J., dissenting).
302. See Frum, supra note 11, at 12 (“In the end, Romer v. Evans is a bad judgment because it is a dishonest one.”).
standards provide "guidance and discipline for the legislature" with respect to what sorts of laws it can enact. Yet, the use of rational basis with teeth subverts this goal and makes it more difficult for the legislature to know the limits of its power. The legislature is left bewildered as to whether a certain enactment actually failed rational review or if the Court found something intuitively unfair about the legislature's classification. Moreover, inasmuch as the equal protection standards lend guidance to the legislature, they equally restrain the judiciary from overstepping its limits. It is often asserted that the Court does not sit as a superlegislature and judge the wisdom of legislative enactments. It seems that rational basis with teeth undermines this principle.

The second concern regarding rational basis with teeth is that it is not clear which enactments will be subject to this higher level of review. It might be argued that when the Court characterized Amendment 2 as imposing a "broad and undifferentiated disability on a single named group," it was actually formulating a test that would trigger rational basis with teeth review. This reading of Romer would be consistent with City of Cleburne because there the ordinance placed a broad burden only on the mentally disabled.

Nevertheless, it is questionable whether this standard will yield principled and consistent decisions. For instance, will the Court apply rational basis with teeth when a law places a broad and undifferentiated burden on any "single named group" or only certain groups the Court feels are in need of protection? Arguably, the Court is very conscious of which groups it chooses for this standard of review and that thus far it has decided to protect the mentally disabled and homosexuals. One wonders what result the Court would reach if an enactment placed a broad disability on smokers. Would the Court be as willing to subject that law to harsher review?

Rational basis with teeth may hamper legislatures in their attempts to discern the demarcation line between permissible and impermissible enactments, and may result in unprincipled application. Additionally, it may blur the limits of the judiciary's own power and allow for unconstitutional interference with a coordinate branch. Thus, there are substantial reasons for the Court to

303. Romer, 116 S. Ct. at 1627.
305. See Romer, 116 S. Ct. at 1627.
move slowly and carefully in this arena as well as a need for the Court to enunciate and explain its actions.

C. The Sliding-Scale Explanation

1. The sliding-scale model

The sufficiency of the three-tiered equal protection standard of review has been questioned by not only legal commentators but by individual justices of the Supreme Court. However, it was Justice Thurgood Marshall who, in addition to voicing his dissatisfaction with the existing equal protection framework, actually suggested a complete break with the traditional standards of equal protection review.

Justice Marshall's dissent in Dandridge v. Williams suggested a balancing test that would take into consideration the "facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification." Through a progeny of dissents, Justice Marshall articulated three prongs to this balancing test: (1) the "importance of the governmental benefits denied"; (2) the "character of the class"; and (3) the "asserted state interests." Legal scholars have come to call Justice Marshall's three-prong balancing approach the "multifactor, sliding-scale"

306. Justice Stevens stated, "I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases." Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring). Similarly, Justice Powell found that there existed "valid reasons for dissatisfaction with the 'two-tiered' approach." Id. at 210 (Powell, J., concurring). The Court refers to a two-tiered standard because in 1976 the Court had not formally accepted intermediate scrutiny as a separate level of review.


309. Id. at 521 (Marshall, J., dissenting).


312. Id. (Marshall, J. dissenting) (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)).

313. Id. (Marshall, J., dissenting) (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)).
method of equal protection review.\textsuperscript{314}

The sliding-scale method differs conceptually from the current three-tier standard of review. The three-tier method attempts to pigeonhole rights as either fundamental or nonfundamental.\textsuperscript{315} This rigid system does not take into account the relative importance of the rights of those affected but only determines whether or not a right is fundamental.

A sliding-scale approach does not cast rights as either/or propositions, fundamental or nonfundamental. Instead, a sliding-scale approach weighs the right according to its relative importance.\textsuperscript{316} Fundamental rights are still recognized but in addition so are other non-fundamental rights. All nonfundamental rights are not automatically accorded the lowest standard of review. Instead, vital, crucial, substantial, or moderate rights are all given some varying form of heightened scrutiny depending on the relative importance of the right.

The term "multifactor" indicates that after a court determines the relative importance of the right, it will balance many factors in deciding whether a certain enactment actually infringes on that right, thereby violating the equal protection guarantee. Under the traditional equal protection framework, if a statute regulated a social or economic activity it would automatically receive rational basis review and would be accorded great deference.\textsuperscript{317} The same is not true under a balancing test, which balances the importance of the government benefits denied to the class of persons affected by the economic enactment against the state’s interest embodied in that economic enactment.\textsuperscript{318}

Justice Marshall’s dissent in \textit{Maher v. Roe}\textsuperscript{319} best illustrates this multifactor, sliding-scale approach. In \textit{Maher} indigent females of racial minorities claimed that the state violated the Equal Protection Clause by funding only medically necessary abortions.\textsuperscript{320} The majority found that the statutes at issue merited rational basis

\begin{itemize}
\item \textsuperscript{315} See \textit{Dandridge}, 397 U.S. 471, 520 (Marshall, J. dissenting).
\item \textsuperscript{316} See \textit{Beal}, 432 U.S. at 458 (Marshall, J. dissenting).
\item \textsuperscript{317} See \textit{City of New Orleans v. Dukes}, 427 U.S. 297, 303 (1976) (per curiam).
\item \textsuperscript{318} See \textit{Beal}, 432 U.S. at 458 (Marshall, J., dissenting).
\item \textsuperscript{319} 432 U.S. 446, (1977). Justice Marshall’s dissent is actually found in \textit{Beal v. Doe}, 432 U.S. 438, 454-62 (1977) but also applies to the companion case of \textit{Maher}.
\item \textsuperscript{320} See \textit{Beal}, 432 U.S. at 441-42.
\end{itemize}
review because the classifications neither involved a suspect class nor implicated a fundamental right. The majority then rejected the plaintiffs’ equal protection claim and held that the states were not obligated to fund nontherapeutic abortions under Title XIX of the Social Security Act.

In his dissent Justice Marshall criticized the Court for its “insensitivity to the human dimension” in rendering the decision, and asserted the inadequacy of the three-tiered mode of analysis. He advocated the use of his three-pronged balancing test. Under the first prong, Justice Marshall began by evaluating the importance of the governmental benefits being denied. He conceded that the two hundred dollar cost of a first trimester abortion did not represent a large sum of money but nevertheless found the governmental funding “of absolutely vital importance in the lives of the recipients.” An absence of state funding would effectively deny these women the right to have an abortion.

Moving to the second prong, he found that the denial of governmental subsidies more heavily impacted the class of indigent minority women. Justice Marshall argued that “[w]hile poverty alone does not entitle a class to claim government benefits, it is surely a relevant factor in the present inquiry.” Statistical evidence indicated that forty percent of minority women—a figure five times greater for Caucasian women—depended on medical aid from the government for their health care. Justice Marshall believed this was an important consideration.

Finally, Justice Marshall balanced the first two interests against the asserted state interest in “protecting the potential life of the fetus.” He concluded that even if there were a state interest in the potential life of the fetus, it could not outweigh the “deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women.”

321. See Maher, 432 U.S. at 470.
322. See id. at 474.
323. See id. at 469-70.
324. See Beal, 432 U.S. at 457 (Marshall, J., dissenting).
325. See id. at 458 (Marshall, J., dissenting).
326. Id. (Marshall, J., dissenting).
327. See id. (Marshall, J., dissenting).
328. Id. at 459 (Marshall, J., dissenting).
329. See id. at 459-60 (Marshall, J., dissenting).
330. See id. (Marshall, J. dissenting).
331. Id. at 460 (Marshall, J., dissenting).
332. Id. at 461 (Marshall, J., dissenting).
It is significant to note how Justice Marshall characterized the right involved. He did not refer to the right as fundamental or nonfundamental; rather he spoke of the right as "vital" and of "especial importance." By avoiding the strict scrutiny label, Justice Marshall was demonstrating his sliding-scale approach.

2. The Romer majority's implicit use of a multifactor, sliding-scale standard of review

Despite Romer's ambiguity with respect to the standard of equal protection review, the majority arguably applied an implicit balancing standard. From the start the Court cited to one of the basic tenets of the balancing standard by stating that a law's factual context should be considered in ascertaining a classification's rational relationship to an independent and legitimate end. Justice Marshall in Dandridge expressly advocated looking to the "facts and circumstances behind the law." In addition to this reference, the Romer Court's opinion implicitly employed the three prongs of the balancing test as set forth by Justice Marshall. The Romer Court looked to the nature of the governmental benefit denied by Amendment 2, the character of the class from whom the benefits were withheld, and the asserted state interests for the classification.

a. the nature of the governmental benefit denied: basic protection

The prong that received the most discussion and weight was the nature of the governmental benefit denied by Amendment 2. The Court initially characterized the effects of Amendment 2 as a denial of certain protections but then concluded that the denial resulted in the imposition of a disability. The "special disability" placed on homosexuals was the denial of "all legislative, executive or judicial action at any level of state or local government designed to protect the named class." By denying homosexuals the safeguards others enjoyed without constraint, homosexuals as a class could only obtain specific protection against discrimination by either convincing the electorate to pass a constitutional amend-

333. Id. (Marshall, J., dissenting).
335. See Dandridge, 397 U.S. at 521 (Marshall, J., dissenting).
336. See Romer, 116 S. Ct. at 1627.
337. Id. at 1623.
338. See id. at 1627.
ment or by attempting to pass laws of general applicability that would accord them protection without specifically naming them.\textsuperscript{339} The Court explained that “[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” was a denial of equal protection.\textsuperscript{340}

The Court’s concern over the nature of the governmental benefit denied can also be seen through the questions posed during oral argument. The Court asked whether there would be recourse for homosexuals against a public hospital that singled out homosexuals for the denial of dialysis treatment.\textsuperscript{341} Receiving no definitive answer, the Court then asked whether a police department could promulgate a policy deploring gay-bashing and strive for its prevention; whether a library could enact a policy whereby homosexuals could no longer be prevented from entering the library; or if the health department or the insurance commissioner could pass a similar policy protecting homosexuals while still remaining true to Amendment 2’s proscription against using homosexuality as the basis for any enactment or policy.\textsuperscript{342} These questions highlight the Court’s concern regarding the nature and the extent of the governmental benefits that Amendment 2 would deny homosexuals.

The Court’s implicit analysis of the nature of the governmental benefit denied—or the nature of the governmental disability imposed—in both its opinion and questions during oral argument, evinces the special emphasis and weight the Court placed on this first prong of the balancing test. To the Court, the protections denied homosexuals were vital and significant as they concerned health, police protection, public access, and insurance.

\textit{b. the character of the class}

While references to homosexuals as a class are sparse, there are enough to find that the Court addressed the second prong of the balancing test regarding the character of the class. The Court spoke of Amendment 2 as raising the “inevitable inference . . . of animosity” toward homosexuals.\textsuperscript{343} Although the Court stated this while identifying the sphere of legitimate state interests,\textsuperscript{344} the

\begin{itemize}
  \item \textsuperscript{339} See id.
  \item \textsuperscript{340} Id. at 1628.
  \item \textsuperscript{341} See Oral Argument, supra note 160, at *26.
  \item \textsuperscript{342} See id. at *27.
  \item \textsuperscript{343} Romer, 116 S. Ct. at 1628.
  \item \textsuperscript{344} See id.
\end{itemize}
statement is nevertheless logically relevant for the purposes of describing the character of the class. For the Romer Court, the fact that the majority of the Colorado electorate approved Amendment 2\textsuperscript{345} indicated that homosexuals were strongly disfavored and that a large segment of society held them in contempt and fostered animus towards them. Such a view supported the assessment that homosexuals are a group discriminated against by the majority. This is why the Court stated ""that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.""\textsuperscript{346} Nevertheless, one could legitimately argue that this prong is weak because while homosexuals lost the vote on Amendment 2, they amassed forty-six percent of the vote.\textsuperscript{347} A group constituting only four percent of the population cannot be deemed politically unpopular when it rallied an additional forty-two percent of the voters to its side.\textsuperscript{348}

The fact that the Court discussed homosexuals as being politically unpopular and the object of hate strongly suggests that it based some of its analysis on the character of the class itself. While under traditional rational basis review the character of the class is not considered,\textsuperscript{349} it is clear that the Court considered Amendment 2's targeting of homosexuals in its analysis.

c. balancing prongs one and two against the state's interest in the classification

To counterbalance both the weight of the governmental benefit denied and the politically unpopular character of homosexuals, the state would have to offer a significant legitimate interest. Protecting the associational freedom of landlords holding religious convictions contrary to homosexuality was not sufficient in its own right nor was it sufficient when coupled with the state's secondary claimed interest in preserving resources to fight other forms of discrimination.\textsuperscript{350} The Court undoubtedly perceived the morality-based foundation for these proffered reasons because the

\textsuperscript{345} See Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) (stating that Amendment 2 passed by a margin of 53.4% to 46.6%).

\textsuperscript{346} Romer, 116 S. Ct. at 1628 (emphasis added) (quoting United States Dep't of Agric. v Moreno, 413 U.S. 528, 534 (1973)).

\textsuperscript{347} See id. at 1637 (Scalia, J., dissenting).

\textsuperscript{348} See id. (Scalia, J., dissenting).

\textsuperscript{349} Only the scope of the classification is evaluated, not the nature of the class itself. See discussion supra Part III.A.2.

\textsuperscript{350} See Romer, 116 S. Ct. at 1629.
state had explicitly advanced morality as a legitimate state interest. The Court also knew that under Bowers v. Hardwick, morality is a legitimate state interest sufficient to support rational basis. Therefore, the Court must have concluded that while these proffered state interests based on majoritarian moral belief were legitimate, they were insufficient when balanced against the severe governmental benefit denied to the class of homosexuals who constituted a politically unpopular group. Stated another way, while morality is still a legitimate state interest, it carries very little weight in the balancing method of analysis. This reading provides a plausible explanation resolving the apparent inconsistency between Romer and Bowers.

The Court's opinion supports this conclusion because the Court did not reject these state interests as illegitimate, but rather found that the "breadth of the Amendment [was] so far removed from these particular justifications that... [they were] impossible to credit." This is merely another way of saying that the negative effects of Amendment 2 significantly outweighed the state interests offered for it.

3. The balancing, sliding-scale approach is consistent with other recent cases

Recent cases from both the Supreme Court and the lower federal courts evince a trend toward balancing and sliding-scale approaches. These courts have explicitly made reference to balancing. For example, in Cruzan v. Director, Missouri Department of Health the Court was squarely presented with the issue of whether the Constitution granted the right to die. In resolving this

353. See id. at 196; see also discussion supra Part III.A.1.
354. See Francis Mancini, Dangerous Ruling on Gay Rights, PROVIDENCE J.-BULL., May 23, 1996, at B7 ("[I]t seems that, as far as Justice Kennedy is concerned, traditional moral strictures against homosexuality... should be discounted as constitutionally legitimate bases for public policy.").
356. 497 U.S. 261 (1990). In Cruzan the parents and coguardians sought a court order directing the termination of artificial life-saving equipment for their daughter, Nancy Cruzan, who was relegated to a persistent vegetative state as a result of an automobile accident. See id. at 265-66. The state supreme court held that Cruzan's parents lacked the authority to withdraw the life-saving treatment because there was no clear and convincing evidence of Cruzan's desire to have such treatment terminated under such circumstances. See id. at 265.
issue, the Court stated that to determine whether a constitutional right had been violated under the Due Process Clause, it would "'balance ... liberty interests against the relevant state interests.'"357 The *Cruzan* Court's holding is significant because of the application of this balancing test.

Similarly, in *Compassion in Dying v. Washington*358 the Ninth Circuit, dealing with the same issue, applied a balancing test and found that Washington's statute prohibiting physicians from prescribing life-ending medication for use by the terminally ill violated the Due Process Clause.359 Particularly significant was the observation the court made that,

[r]ecent cases, including *Cruzan*, suggest that the Court may be heading towards the formal adoption of the continuum approach, along with a balancing test, in substantive due process cases generally. If so, there would no longer be a two-tier or three-tier set of tests that depends on the classification of the right or interest as fundamental, important, or marginal. Instead, the more important the individual's right or interest, the more persuasive the justifications for infringement would have to be.360

So there seems to be merit in suggesting that the Court's most recent cases, including *Romer*, evince a judicial willingness to employ a balancing test instead of a rigid three-tiered analysis in both due process and equal protection cases.

At the same time, the federal courts appear to be moving toward a sliding-scale approach and seem reluctant to adhere to a rigid analytical framework under equal protection review. Even the Supreme Court is becoming increasingly willing to blur the boundaries between the different tiers. For instance, in a joint opinion in *Planned Parenthood v. Casey*,361 Justices O'Connor,

357. Id. at 279 (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).
358. 79 F.3d 790 (9th Cir. 1996) (en banc), cert. granted, 64 U.S.L.W. 2553 (U.S. Oct. 8, 1996) (No. 96-110). In *Compassion* plaintiff-doctors and plaintiff-patients brought suit to compel the state to allow terminally ill, competent adult patients to die with peace and dignity through the assistance of physician-administered, life-ending medication. See id. at 794.
359. Id. at 793-94.
360. Id. at 804.
361. 505 U.S. 833 (1992). Abortion clinics and physicians challenged Pennsylvania abortion statutes, which required: (1) that a woman give her informed consent prior to an abortion; (2) that she be provided with information regarding abortions twenty-four hours in advance of an abortion; and (3) that, if married, she notify her husband of her decision to have an abortion. See id. at 844. In the case of a minor,
Kennedy, and Souter expressed their dissatisfaction with the rigidity of the strict scrutiny standard, and in its place adopted the relativistic undue burden standard. They rejected the strict scrutiny standard as unreceptive to the existence of important state interests.

Most recently, the Court blurred the parameters of the intermediate standard of equal protection review in United States v. Virginia. There the Court reformulated the intermediate scrutiny test, which traditionally required a "sufficiently important governmental interest," to whether there existed an "exceedingly persuasive justification." When these changes are considered in conjunction with the emergence of a rational basis with teeth standard, the Court may be signalling its discomfort with the three-tiered standard of review and its desire to move toward the sliding-scale method of analysis.

4. The propriety of balancing and sliding-scale systems

There are certain advantages to a multifactor, sliding-scale approach—among them is the avoidance of shallow, formalistic analysis. Under the traditional equal protection framework, the Court is able to sidestep genuine and thoughtful legal analysis by merely invoking a label, "with the implication that from there the answer is obvious." With a sliding-scale analysis the Court's true basis for its decision is more likely to surface because judges will not be forced to explain their reasoning within the rigid three-tiered model.

the statutes required that she inform at least one parent. See id. In analyzing these statutes Justice O'Connor employed a new test called the "undue burden test" instead of the rigid trimester framework of Roe v. Wade, 410 U.S. 113 (1973). See Planned Parenthood, 505 U.S. at 876-78. An "undue burden" exists if the state places a substantial obstacle in the way of a woman seeking an elective abortion. See id. at 878.

362. See Planned Parenthood, 505 U.S. at 878.
363. See id. at 871.
364. 116 S. Ct. 2264 (1996). The Supreme Court upheld a challenge by the United States against the State of Virginia and the Virginia Military Institute (VMI) alleging that VMI's exclusively male admission policy violated the Fourteenth Amendment's Equal Protection Clause. See id. at 2276-82.
366. Dandridge, 397 U.S. at 520 (Marshall, J., dissenting) (criticizing the Court for characterizing social security as purely the regulation of business for the purposes of granting highly deferential review).
However, there are some inherent disadvantages to the adoption of a multifactor, sliding-scale analysis. The most serious concern is that it will lead to an increased potential for unbridled judicial interference with the legislative branch.\textsuperscript{368} The Court has often stated that it is neither the Court's position to judge the wisdom of the legislature nor to act as a superlegislature but only to invalidate enactments that violate the Constitution.\textsuperscript{369} Former Chief Justice Warren Burger articulated the dangers of failing to exercise self-restraint, stating that "unwarranted judicial action . . . tends to contribute to the weakening of our political processes."\textsuperscript{370} Not so long ago, the Court, by overstepping judicial restraint, brought about the evil known as Lochnerism.\textsuperscript{371} Although the judiciary is the final arbiter of disputes under the Constitution, it should be cautious of disrupting the checks and balances it is entrusted to uphold.

\section*{VII. SYNTHESIS OF THE HOLDING}

\textbf{A. The Analytical Underpinnings of Romer}

The alternative theories expounded in Part VI attempt to reconcile the Court's holding in \textit{Romer} with current notions of equal protection review. These alternative theories, however, presuppose that the \textit{Romer} Court was not attempting to create an entirely new doctrine of equal protection review. Yet there remains the possibility that the \textit{Romer} Court intended to formulate an entirely new doctrine of equal protection review. If so, the Court's ruling seems to be based on two fundamental, policy-based concepts.

The first concept is that courts should conduct more substantive, in-depth analyses and avoid superficial forms of review. Labels must not be used by courts in lieu of actual legal analysis.\textsuperscript{372} The multifactor, sliding-scale approach perhaps best personifies

\begin{footnotesize}
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\item[368.] \textit{See id.} at 381.
\item[372.] \textit{See, e.g., Dandridge v. Williams,} 397 U.S. 471, 520 (1970) (Marshall, J., dissenting) (criticizing the majority for labeling something as being "in 'the area of economics and social welfare,' with the implication that from there the answer [was] obvious").
\end{itemize}
\end{footnotesize}
this concept because it renounces labels entirely and instead systematically balances the actual interests of all the parties involved in the conflict.\textsuperscript{373} A rational basis with teeth standard is also indicative of this first concept because, under this approach the Court looks to see if the classification actually furthers the proffered state interests.\textsuperscript{374} The Court's review under rational basis with teeth is not based on some abstract notion of rationality but rather grounded in the facts and circumstances of the case.\textsuperscript{375}

The second concept is the notion of fairness. This is the belief that the Equal Protection Clause is, in essence, a doctrine of fairness: that there is something inherently unjust in treating individuals differently when no justifiable reasons exist for doing so. The per se theory falls within this second concept by finding a literal violation of the Equal Protection Clause—or a violation of fairness principles—when a single group is denied protection from discrimination.

\textbf{B. Romer: A New Doctrine?}

If the Court formulated a new doctrine, it was unable to craft a single rule that incorporated the dual concepts enunciated above. Instead, it discussed a set of factors that would have the effect of encouraging greater substantive review and fairness in judicial determinations under the Equal Protection Clause. Six factors may be deduced from the Court's discussion of Amendment 2 as relevant: (1) the importance of the state interest; (2) the scope of the classification; (3) the nature of those individuals affected; (4) the effect of the classification; (5) the underlying purpose of the classification; and (6) the ability of the burdened group to seek the assistance of the government. While it is not certain how much weight each factor deserves, it is clear that no one factor is dispositive.

The first factor is the importance of the state interest.\textsuperscript{376} The Court's holding in \textit{Romer} may stand for the proposition that societal interests in maintaining majoritarian morality do not constitute significant or important interests.\textsuperscript{377} At the same time, the Court may be less willing to quash equal protection challenges when the

\textsuperscript{373} See discussion \textit{supra} Part VI.C.
\textsuperscript{374} See discussion \textit{supra} Part VI.B.
\textsuperscript{375} See, \textit{e.g.}, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); see also discussion \textit{supra} Part VI.B.
\textsuperscript{377} See discussion \textit{supra} Part VI.C.2.c.
The second factor concerns the scope of the classification. Classifications that narrowly target a particular group are problematic. In *Romer* the amendment specifically targeted homosexuals—it "identified persons by a single trait." This "singling out [of] a certain class" was one of the reasons the Court found the amendment unconstitutional. The logical corollary to this factor is that classifications are less problematic when they classify persons generally or less specifically.

The third factor deals with the nature of the classified group. When an enactment classifies a politically unpopular group, the Court is more likely to find a violation of the equal protection guarantee. To the *Romer* Court, homosexuals constituted an unpopular group. However, if the amendment in Colorado had targeted smokers, the Court would have been less concerned because smokers do not constitute a politically unpopular group. Additionally, if the classified group is perceived to pose a social harm, then the Court is less likely to find the classification unconstitutional. For example, the Court has upheld laws that deny polygamists the right to vote. Evidently, for the Court, homosexuals do not pose the same social harm as polygamists.

The fourth factor is the practical effect of the classification. When an enactment denies basic protections such as police protection, hospital treatment, and access to public facilities, the Court is likely to find that the classification is unconstitutional. In *Romer* the Court stated that Amendment 2 prohibited the state or any subdivision from adopting laws to protect homosexuals. Homosexuals were deprived of the protection of the general laws.

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378. See *Romer*, 116 S. Ct. at 1629.
379. See id. at 1627-28.
380. Id. at 1628.
381. Id.
382. See id.
383. See id.
384. See id.
385. See id. at 1635-36 (Scalia, J., dissenting) (citing *Davis v. Beason*, 133 U.S. 333 (1890)).
386. See id. at 1636 (Scalia, J., dissenting) ("Has the Court concluded that the perceived social harm of polygamy is a ‘legitimate concern of government,’ and the perceived social harm of homosexuality is not?").
387. See id. at 1626.
388. See id. at 1625.
and policies that prohibited arbitrary discrimination. Following the logic of this fourth factor, if a classification only denies some general form of economic advantage or denies some nonessential protection, then it will probably not be problematic.

The fifth factor concerns the underlying purpose or motive for the classification. If the Court determines that the purpose of a certain classification is to disadvantage the burdened class or arises out of animosity towards that class, then the enactment will be questioned. But if the state can show some independent reasons for the classification resulting in incidental disadvantage to those classified, then the enactment would be unassailable.

The Court has stated that "[e]ven laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons."

The final factor concerns the ability of those burdened by the classification to seek the assistance of the government. The Court has stated, as a general principle, that laws which make it more difficult for one group to seek the assistance of the government are a literal violation of the Equal Protection Clause. A law may make it more difficult for a particular group to gain assistance from the government if it requires them to use a more burdensome method than is normally available to others. For instance, under the Court's theory, a city ordinance prohibiting the award of municipal contracts to relatives of councilpersons would make it more difficult for the group of relatives to get city contracts, and hence, would be a violation of the Equal Protection Clause. Persons related to members of the council would have to appeal to the state legislature to get the benefit of city contracts.

In Romer an evaluation of all six factors led the Court to conclude that Amendment 2 violated the Equal Protection Clause.
However, it is not clear if one of these six factors is more significant than another. Equally uncertain is whether any one factor may be used independently. Several reasons counsel against the independent use of these factors. First, the Court did not formally base its analysis of Amendment 2 on these factors. Instead, these factors have been deduced from the Court's opinion as implicitly forming the basis of the Court's holding. Second, the factors lack the degree of refinement necessary to be considered rules of constitutional law. They are based on subtleties and nuances warranting additional explanation by the Court.

C. Future Applications of the Romer Doctrine

Because the Court never formally spoke in terms of the six factors enunciated above, it is fair to conclude that they are not to be deemed independent and sufficient rules of constitutional law that can be freely imported into other factual situations. To the contrary, the interrelatedness of the six identified factors suggests that they should be employed in conjunction with each other. The Court would probably not find a violation of the Equal Protection Clause merely on the basis of one of the six factors. For instance, the Court would unlikely find an equal protection violation merely because the state has a weak interest or because the law makes it more difficult for one group to receive assistance from the government.

The Romer decision may well represent the Court's first attempt at reformulating the equal protection framework to reflect the dual goals of ensuring substantive analysis and fairness. As such, the Court seems to be moving toward a balancing approach very similar in substance to that of Justice Marshall's.

VIII. CONCLUSION

The criticism commentators have levied against the Romer opinion is well founded. The holding is incoherent and conclusory. Much of Romer's confusion stems from the fact that the Court was disingenuous in its purported analysis under rational basis review. Amendment 2 is constitutional under a true rational basis review. The amendment classified homosexuals in order to maintain traditional majoritarian morality. Prohibiting homosexuality from constituting the basis of preferential treatment is a rational way of preventing the deterioration of traditional values. The Court concluded otherwise.
Three alternative theories possibly account for the Court’s inconsistency within the existing structure of equal protection review. The per se,\textsuperscript{398} rational basis with teeth, and multifactor, sliding-scale theories strive to place the \textit{Romer} decision within the existing framework of equal protection review. Yet, not one of the three theories singularly and comprehensively accounts for the opinion. The difficulty in reconciling \textit{Romer} with current standards of review appears to indicate a change in the Court’s philosophy regarding the equal protection guarantee.

The \textit{Romer} decision evinces a move towards a balancing approach. Two basic concepts seem to motivate the Court to move in this direction: (1) the need for deeper and more substantive equal protection review and (2) the desire to achieve greater fairness under the Equal Protection Clause. The \textit{Romer} Court implicitly employed a set of six factors to effectuate these twin goals. However, these factors by no means constitute a workable standard, ready for application in other contexts. At best, they represent the Court’s first attempt at formulating a new standard.

Inevitably, there comes a time when the traditional shapes, forms, and tools of the past no longer fit the concepts of the future. Mounting tension marks the period leading up to the climactic moment when the old paradigm is replaced by the new. \textit{Romer} represents this period of flux. In effect, the Court is moving toward an expansion of the equal protection guarantee. But this is an arena in which the Court should move with forethought and deliberation.

The Equal Protection Clause is not a promise of absolute equality, and the need for equality must be balanced against the structures of our Constitution. The traditional, judicially created equal protection framework is built on deference and functions to prevent the overstepping of constitutional checks and balances. Thus, there is significant danger in expanding protection under the equal protection guarantee, for in doing so, the Court may impermissibly interfere with the power of the states and the will of the people.

The \textit{Romer} Court should have been more attuned to this danger or at a minimum should have allayed concerns of judicial abuse by explaining its movements. But the Court’s greatest shortcom-

\textsuperscript{398} Tribe’s abstract per se theory does not technically form a part of the current framework. However, the theory is relevant in that it attempts to show that historically his advocated approach was part of the equal protection notion.
ing was its unwillingness to articulate or explain the changes being made to the equal protection standards of review. In essence, in the process of reviewing Amendment 2, the Court not only failed to establish a new, principled standard but also destabilized and muddled the existing framework of equal protection review.

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