

# THE MISSING PAGES OF THE MAJORITY OPINION IN *ROMER V. EVANS*

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My initial reaction last May to the Supreme Court's decision in *Romer v. Evans*<sup>1</sup> was deeply ambivalent. I wholeheartedly support the efforts of gay men, lesbians, and bisexuals to eradicate all forms of discrimination on the basis of sexual orientation. And, had I been a Colorado resident in 1992, I surely would have voted against Amendment 2.<sup>2</sup> I therefore found it easy to applaud the outcome in *Romer*.

At the same time, however, I was troubled by the Court's opinion. I have devoted a significant portion of my academic career to defending the institution of direct democracy through which Amendment 2 was adopted,<sup>3</sup> and to explaining the impor-

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1. 116 S. Ct. 1620 (1996).

2. Amendment 2 reads:

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

COLO. CONST. art. II, § 30b.

3. See, e.g., Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143 (1995) (Symposium, *Governing by Initiative*); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHL.-KENT L. REV. 707 (1991) (Symposium, *Law and Economics of Local Government*); Lynn A.

tance of preserving opportunities for interstate diversity in areas of significant moral disagreement within our society such as "gay rights" and "traditional family values."<sup>4</sup> I was not sure I could reconcile my carefully considered scholarly positions with the *Romer* Court's analysis.

Moreover, the majority's opinion was, by the current Court's standards, so brief as to lend disturbing credence to the dissent's claim that the majority was simply "imposing upon all Americans" its elite view that "'animosity' toward homosexuality . . . is evil."<sup>5</sup> After all, a majority of the current Court had needed fifteen pages in the *Supreme Court Reporter* to set forth its interpretation of the Eleventh Amendment in *Seminole Tribe v. Florida*,<sup>6</sup> and had taken fully twenty-seven pages to find state-imposed limits on congressional terms unconstitutional in *U.S. Term Limits, Inc. v. Thornton*.<sup>7</sup> The majority in *Romer*, in contrast, required only six-and-one-half pages to establish the unconstitutionality of a law that it acknowledged was "unprecedented in [American] jurisprudence."<sup>8</sup> In its brevity, *Romer* was eerily reminiscent of *Bowers v. Hardwick* one decade earlier, in which a majority of the Court had taken a similarly scant four-and-one-half pages in order to present the contrary view that "a majority of the electorate" may legitimately proclaim that "homosexual sodomy is immoral and unacceptable."<sup>9</sup>

In the months that have passed since the *Romer* Court issued its opinion, my initial ambivalence has dissipated. I am today of

Baker, "They the People": A Comment on *U.S. Term Limits, Inc. v. Thornton*, 38 ARIZ. L. REV. 859 (1996) (Symposium, *Major Issues in Federalism*).

4. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) [hereinafter Baker, *Conditional Federal Spending*]; Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. (forthcoming 1997).

5. 116 S. Ct. at 1629 (Scalia, J., dissenting).

6. 116 S. Ct. 1114, 1119-33 (1996).

7. 115 S. Ct. 1842, 1845-71 (1995).

8. 116 S. Ct. at 1628.

[Amendment 2's] disqualification of a class of persons from the right to seek specific protection from the law is *unprecedented in our jurisprudence*. The *absence of precedent* for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

*Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)) (emphasis added).

9. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The majority opinion in *Bowers* occupied pages 2842 to 2847 of the *Supreme Court Reporter*.

the view that the majority reached the right result, but for reasons that it articulated only partially or not at all. In the remainder of this essay, I will therefore undertake to provide what I believe to be important missing pages of the majority opinion in *Romer v. Evans*. Two gaps, in particular, require filling. The first is the majority's failure to acknowledge *Bowers* and to respond to the dissent's arguments that *Bowers* logically requires that Amendment 2 be sustained. The second is the failure of both the majority and the dissent to discuss the implications for the constitutionality of Amendment 2 of the state's near plenary power over its political subdivisions.

I. *BOWERS V. HARDWICK* AND THE ARGUMENT THAT "THE GREATER INCLUDES THE LESSER"

For many, the most surprising aspect of the majority opinion in *Romer* was surely the absence of any discussion of—or, indeed, citation to—the Court's 1986 decision in *Bowers v. Hardwick*.<sup>10</sup> In *Bowers*, the Court held that the U.S. Constitution does not include "a fundamental right to engage in [consensual] homosexual sodomy"<sup>11</sup> and, therefore, that the states are free to outlaw such conduct.<sup>12</sup> It thus seemed inevitable that the *Romer* Court would need to discuss *Bowers*—perhaps even explicitly to overrule it—if a majority of the Justices were to find Colorado's Amendment 2 unconstitutional. In the words of Justice Scalia, dissenting in *Romer*, "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."<sup>13</sup>

Such arguments that a "greater" governmental power includes a "lesser" one have been a part of American jurisprudence at least since the time of Justice Holmes.<sup>14</sup> And they are

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10. 478 U.S. 186 (1986).

11. *Id.* at 191-92.

12. *See id.* at 191-93.

13. *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting).

14. Justice Holmes' advocacy of such arguments began while he was a member of the Supreme Judicial Court of Massachusetts, *see, e.g.*, *Commonwealth v. Davis*, 39 N.E. 113, 113 (1895) ("[T]he legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less [sic] step of limiting the public use to certain purposes."), *aff'd*, 167 U.S. 43 (1897), and continued throughout his tenure on the United States Supreme Court,

today so central to the jurisprudence of Chief Justice Rehnquist that they arguably constitute a freestanding doctrine of American constitutional law.<sup>15</sup> (I recently had the opportunity to ask the

*see, e.g.*, *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 602 (1926) (Holmes, J., dissenting) (“[T]he power to exclude altogether includes the lesser power to condition.”) (quoting *Packard v. Banton*, 264 U.S. 140, 145 (1923)); *City and County of Denver v. Denver Union Water Co.*, 246 U.S. 178, 196 (1918) (Holmes, J., dissenting) (“In view of that right of the City [to order the Water Company to remove its pipes from the streets], which, if exercised, would make the Company’s whole plant valueless as such, the question recurs whether the fixing of any rate by the City could be said to confiscate property on the ground that the return was too low.”); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 519 (1917) (Holmes, J., dissenting) (“[T]he measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event . . . .”); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) (“If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.”).

The argument made its first appearance in a U.S. Supreme Court opinion in *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876), a case involving a state’s withdrawal of a foreign corporation’s business license in apparent retaliation for the corporation’s invocation of federal diversity jurisdiction in a lawsuit. The majority held that “[i]f the State has the power to cancel the license . . . [i]t has the power to determine for what causes and in what manner the revocation shall be made.” *Id.* at 542.

Academic commentary on the argument includes: RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 3-103 (1993); Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1190-91 (1990) [hereinafter Baker, *The Prices of Rights*]; Richard A. Epstein, *Unconstitutional Conditions and Bargaining Breakdown*, 26 SAN DIEGO L. REV. 189, 190-98 (1989) [hereinafter Epstein, *Bargaining Breakdown*]; Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 5-40 (1988); Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 393-95, 426-62 (1995); John H. Garvey, *The Powers and the Duties of Government*, 26 SAN DIEGO L. REV. 209, 215-19 (1989); Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 238-49; Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304-14 (1984); Robert M. O’Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443, 456-63 (1966); Thomas Reed Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 106-12 (1916); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428-56 (1989); Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 745-53 (1981) [hereinafter Westen, *Incredible Dilemmas*]; Peter Westen, *The Rueful Rhetoric of “Rights,”* 33 UCLA L. REV. 977, 1010-18 (1986); John D. French, Comment, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961).

15. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S.

Chief Justice how and why the “greater-includes-the-lesser” rationale had come to have such allure for him. He replied, dryly, “Well, there is a certain logic to the argument.”<sup>16</sup> Thus, an examination of this argument in the context of *Romer* may have important implications for a host of other areas of the law as well.<sup>17</sup>

The most common critique of greater-includes-the-lesser arguments is that the two types of state action being compared are not a “greater” and a “lesser” variant of the same power but

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328, 345-46 (1986) (“[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . .”); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 559-63 (1985) (Rehnquist, J., dissenting) (arguing that the Ohio Legislature’s power to enact a “tenure” law for public employees included the power to define cause for dismissal, and citing *Arnett v. Kennedy*, 416 U.S. 134 (1974)); *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 122-26 (1981) (noting that the federal postal power includes the lesser power of Congress to regulate the terms and conditions of home delivery); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 368 (1981) (Rehnquist, J., dissenting) (accusing majority of ignoring the “common-sense maxim” that the greater-power-includes-the-lesser-power); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 825-27 (1978) (Rehnquist, J., dissenting) (arguing that states’ power to grant certain rights to corporations does not oblige it to grant all rights that would inhere to natural persons); *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974) (employees “must take the bitter with the sweet” in accepting employment with limited due process protections for dismissal that might otherwise run afoul of Due Process Clause).

As I have argued elsewhere, see *Baker, Conditional Federal Spending, supra* note 4, at 1915 & n.13, Chief Justice Rehnquist’s longstanding attraction to the greater includes the lesser argument might explain some apparent inconsistencies in his concern for “states’ rights.” Compare, e.g., *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (holding that “[e]ven if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in [the challenged legislation] is a valid use of the spending power”), with *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding federal Gun-Free School Zones Act to exceed Congress’s authority under the Commerce Clause).

Other of the currently sitting Justices have also employed the greater-includes-the-lesser argument, but less frequently and consistently. Justice O’Connor, for example, has used the argument outside of the area of states’ rights, see, e.g., *South Dakota v. Neville*, 459 U.S. 553, 565-66 (1983) (finding that a state is not obliged to grant suspended drunk driver the right to refuse a blood test; state’s provision of such a right is “a matter of grace bestowed by the South Dakota Legislature”; power to do so includes power to do so subject to later consequence, and such later consequence will not be held to violate Due Process Clause), but has termed the argument “an absurdity” in the federalism context, see *FERC v. Mississippi*, 456 U.S. 742, 781 (1982) (O’Connor, J., dissenting in part and concurring in part). See also, *Baker, The Prices of Rights, supra* note 14, at 1190 n.12.

16. Conversation with William H. Rehnquist, Chief Justice of the U. S. Supreme Court, in Tuscon, Ariz. (Feb. 1, 1996).

17. For examples of some of these other areas of the law, see cases cited *supra* notes 14 & 15.

are qualitatively different powers. As applied to *Romer*, however, dissenting Justices Scalia, Rehnquist, and Thomas would find this critique unpersuasive:<sup>18</sup>

"If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct.<sup>19</sup>

The *Romer* majority might have countered that the dissent's need to distort the substance of both the Georgia statute at issue in *Bowers* and Colorado's Amendment 2 merely underscores the fact that *Bowers* and *Romer* involve qualitatively different state powers. The dissent depicts the laws at issue in the two cases as simply expressing different degrees of disapproval of "homosexual conduct" or "behavior." But Amendment 2, by its own terms, would deny "protected status" and access to the legislative and judicial processes not to specific types of homosexual conduct but to homosexual *persons*. Insofar as sodomy *is* a type of conduct in which persons of the same sex can engage, the *Romer* dissent is correct that the statute at issue in *Bowers* would regulate this form of "homosexual conduct." But the *Romer* dissent goes on to make the critical—and boldly inaccurate—assertion that this type of conduct, in which heterosexuals too can and do engage, is "the behavior that defines the class" of homosexual persons.

A different general critique, first offered eighty years ago, is that many greater-includes-the-lesser arguments do not work as syllogisms; they fail deductively.<sup>20</sup> In other words, the relevant

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18. So would Professor Ronald Dworkin. See Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. BOOKS, Aug. 8, 1996, at 44, 48-50 (discussing the greater-includes-the-lesser argument and concluding that "Scalia was right, in his biting dissent, that the combination of the result in *Evans* and the result in *Bowers* is ludicrous: practicing homosexuals can be jailed but not put at an electoral disadvantage").

19. *Romer*, 116 S. Ct. at 1631-32 (Scalia, J., dissenting) (quoting *Padula v. Webster*, 822 F.2d 97, 103 (1987)).

20. See Powell, *supra* note 14, at 110-11; see also Epstein, *Bargaining*

major and minor premises do not logically yield the conclusion sought. Thus, the relationship between *Bowers* and *Romer*, for example, might be understood in terms of the following syllogism:

- Major Premise: There is a category of persons—homosexuals—whose acts of sodomy the state has the power to criminalize (*Bowers*).
- Minor Premise: Person X is a homosexual.
- Conclusion A: Therefore the state has the power to sponsor discrimination against Person X (*Romer*); or
- Conclusion B: Therefore the state has the power to prohibit all levels of state government from bestowing special protections upon homosexual conduct by Person X (*Romer*).

The conclusion that logically follows from the stated premises, however, is neither Conclusion A nor Conclusion B but that “the state has the power to criminalize acts of homosexual sodomy” by Person X. Indeed, Conclusion A and Conclusion B each have a predicate different from that of the Major Premise: the “power to criminalize” acts of homosexual sodomy is not identical with either “the power to sponsor discrimination against” homosexuals or “the power to prohibit all levels of state government from bestowing special protections upon homosexual conduct.”<sup>21</sup>

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*Breakdown*, *supra* note 14, at 215-19; Garvey, *supra* note 14, at 215-19; Kreimer, *supra* note 14, at 1311-14; O’Neil, *supra* note 14, at 461; Westen, *Incredible Dilemmas*, *supra* note 14, at 747 n.20; French, *supra* note 14, at 239-42.

21. Cf. Powell, *supra* note 14, at 110-11. Professor Thomas Powell accused Justice Holmes of having made the following fallacious argument in his dissent in *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910):

Major Premise: There is a class of corporations “A” (foreign corporations doing intra-state commerce) over which the state has the *power of absolute exclusion*.

Minor Premise: The X corporation is an “A” corporation.

Conclusion: Therefore the X corporation is one upon which the state has *power to impose any burden whatsoever*.

Powell, *supra* note 14, at 110. Powell interpreted Justice Holmes’ observation that “[e]ven in the law the whole generally includes its parts” to imply “that the *power of total exclusion* is a ‘whole,’ of which the *power to impose any burdens whatsoever on those admitted* is a ‘part.’” *Id.*; see also Kreimer, *supra* note 14, at 1313 (“Allowing the government to deny benefits to some, but not all, of the populace gives it a power that is nowhere implicit in the power to deny benefits absolutely.”) (footnote omitted).

Notwithstanding their allure, both of these critiques miss what I see to be the central difficulty with greater-includes-the-lesser arguments, which is that the classic formulation is exactly backwards. In fact, I shall argue, the “lesser” power typically includes the “greater.” Counter-intuitive to be sure, the argument that “the-lesser-includes-the-greater” nonetheless finds support in at least three different sources: mathematical group theory, the structure of the U.S. Constitution, and individual cases including *Romer v. Evans*.<sup>22</sup>

To understand the argument from mathematical group theory, consider two basic algebraic powers: the power to add two to any integer (+2) and the power to add one (+1). The former is clearly the “greater” power since +2 is larger than (indeed, it is precisely *twice* as large as) +1.<sup>23</sup> Now consider the series of integers from zero to 100. Taking zero as the starting point, the repeated exercise of the power to add two will yield the set of fifty *even* positive integers between zero and 100. The repeated exercise of the “lesser” power to add one, however, will yield the set of all 100 positive integers between zero and 100, odd as well as even. The set of *all* positive integers between zero and 100 generated by the “lesser” power obviously includes the set of all *even* positive integers between zero and 100 generated by the “greater” power. Thus, the “lesser” power can generate all of the effects of the “greater” power *and more*, while the “greater” power can generate only *some* (in this example, precisely one-half) of the effects of the “lesser” power.<sup>24</sup> Thus, the “lesser” power includes the “greater.”

Whether or not the Framers knew this argument from group theory, the structure of the U.S. Constitution reveals that they intuitively understood that “lesser” governmental powers were more dangerous than “greater” ones. Consider, for example, that the Constitution grants Congress the “greater” powers to “declare

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22. 116 S. Ct. 1620 (1996).

23. When I made this point at the conference, several participants stated that they considered +1 rather than +2 to be the greater power. Upon further questioning, however, they acknowledged that they reached this counter-intuitive conclusion by considering the *effects* of exercising each power. That is, they anticipated the remainder of the argument made in the text *infra*.

24. For a formal presentation of this point in the context of cyclic subgroups and Abelian groups, see I.N. HERSTEIN, TOPICS IN ALGEBRA 37-46 (2d ed. 1975). I am indebted to Samuel Dinkin for this argument from group theory.



War,”<sup>25</sup> to “raise and support Armies,”<sup>26</sup> to “provide and maintain a Navy,”<sup>27</sup> and to “call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>28</sup> At the same time, however, the Constitution expressly denies Congress the seemingly much “lesser” power to quarter a single soldier during peace time “in any house, without the consent of the Owner.”<sup>29</sup> Similarly, the Constitution grants Congress the “greater” power “[t]o regulate Commerce with foreign Nations, and among the several States,”<sup>30</sup> while explicitly withholding the “lesser” power to impose a “Tax or Duty . . . on Articles exported from any State.”<sup>31</sup>

Consider, as well, the Constitution’s many “uniformity” requirements. For example, the Constitution grants Congress the “greater” power to impose “direct Taxes,”<sup>32</sup> to “lay and collect Taxes, Duties, Imposts and Excises,”<sup>33</sup> to establish a “Rule of Naturalization”<sup>34</sup> and “Laws on the subject of Bankruptcies,”<sup>35</sup> and to impose “Regulation[s] of Commerce or Revenue” on the ports of the states.<sup>36</sup> At the same time, however, the Constitution expressly denies Congress the “lesser” power to impose any of these taxes or regulations on only a *subset* of the states or of the people of the United States. Thus, “direct Taxes” (with the obvious exception of income taxes<sup>37</sup>) must be “apportioned among the several States . . . according to their respective Numbers;”<sup>38</sup> other “Taxes, Duties, Imposts and Excises [must] be uniform throughout the United States;”<sup>39</sup> any “Rule of Naturalization” or

25. U.S. CONST. art. I, § 8, cl. 11.

26. *Id.* cl. 12.

27. *Id.* cl. 13.

28. *Id.* cl. 15.

29. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

30. U.S. CONST. art. I, § 8, cl. 3.

31. *Id.* § 9, cl. 5.

32. *Id.* § 2, cl. 3.

33. *Id.* § 8, cl. 1.

34. *Id.* cl. 4.

35. *Id.*

36. *Id.* § 9, cl. 6.

37. See U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”) (adopted 1913).

38. U.S. CONST. art. I, § 2, cl. 3.

39. *Id.* § 8, cl. 1.

"Laws on the subject of Bankruptcies" must be "uniform . . . throughout the United States;"<sup>40</sup> and no "Regulation of Commerce or Revenue" may give a "Preference . . . to the Ports of one State over those of another."<sup>41</sup> In sum, the very text of the Constitution provides substantial evidence that the Framers believed that the "lesser" government power includes the "greater."

Now consider the lesser-includes-the-greater argument in the specific context of *Romer v. Evans*.<sup>42</sup> Recall that Justice Scalia, in his dissent, denoted as "greater" the state's power to criminalize homosexual sodomy, and described as "lesser" the power embodied in Amendment 2, which "prohibits all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons . . ."<sup>43</sup> There are at least two ways in which this "lesser" power can be understood to "include" (or be "greater" than) the "greater" power.<sup>44</sup> First, state statutes criminalizing homosexual sex—and often only one type of homosexual sex, at that—affect only a narrowly circumscribed (albeit important) area of a homosexual's life.<sup>45</sup> Amendment 2, in

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40. *Id.* cl. 4.

41. *Id.* § 9, cl. 6.

42. 116 S. Ct. 1620 (1996).

43. *Id.* at 1623. This is not the dissent's summary of Amendment 2, but that of Justice Kennedy for the majority, which I believe to be a more accurate description of the substance of the Amendment than those given by Justice Scalia. *See id.* at 1631-32 (Scalia, J., dissenting).

44. A third, more problematic possibility is for one to consider the two types of government power in the context of a hypothetical state with a criminal statute prohibiting sodomy between consenting adults. Should the people of this hypothetical state seek to repeal its antisodomy law, as Colorado did in 1971, *see* 1971 Colo. Sess. Laws ch. 121, § 1, (*cited in Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting)), they need only secure the consent of a simple majority of both houses of the state legislature. If, however, this hypothetical state has adopted a constitutional provision identical to Amendment 2, a court might well find a statute repealing the antisodomy law to be unconstitutional on the ground that it affords "protected status" to homosexual "conduct" or "practices." *See Romer*, 116 S. Ct. at 1623 (quoting text of Amendment 2); *id.* at 1626 (observing that it "is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings"). If so, persons interested in repealing the state's antisodomy law would need to amend the state constitution instead of, or in addition to, securing appropriate legislation.

This reading of Amendment 2 is not especially plausible, however, when one considers that it would, at a minimum, require the invalidation of any law repealing any criminal prohibition of general applicability.

45. The state statute at issue in *Bowers*, for example, did not criminalize "homosexual sex" but rather sodomy. It defined "sodomy" as "any sexual act involving the sex organs of one person and the mouth or anus of another." *Bowers*

contrast, would sanction both public and private discrimination against, and therefore potentially affect, homosexuals in every area of daily life, including that of sex between consenting adults.<sup>46</sup> In the scope of its potential effects, Amendment 2 seems clearly the greater power.

Second, one might consider the two types of state action from the perspective of the target population—homosexuals. It is, of course, an empirical question whether the average Colorado homosexual, if forced to choose, would prefer the criminalization of sodomy, or even of all forms of homosexual sex, to the adoption of Amendment 2. But it seems to me quite plausible that he or she would choose the former, even if the prohibition on homosexual sex were vigorously enforced to the extent permitted by the Constitution.<sup>47</sup> And if my intuition were shown empirically to be

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v. *Hardwick*, 478 U.S. 186, 188 (1986) (quoting GA. CODE ANN. § 16-6-2 (1984)). Such a prohibition does not cover many other erotic acts in which persons of the same sex might engage, including hand-genital stimulation and kissing.

46. One might logically expect the enactment of a law as broad-sweeping as Amendment 2 to cause many homosexuals in the affected jurisdiction to (re)enter the "closet" or to be unwilling to leave it in an attempt to minimize the likelihood that they are the victims of such discrimination. For a moving account of the many ways in which the daily life of a homosexual is constrained by being "in the closet," see Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL., PUB. POL'Y, & L. 142 (1995).

One of the most liberating parts of [coming out of the closet] was that I no longer had to carry cash; if I wanted to pledge money for the Bowlathon or buy Girl Scout cookies I could write a check on our joint checking account without worrying about it. Another thing I could do was put my partner's picture in my office.

*Id.*

47. As was much discussed at the time of the Court's decision in *Bowers*, the circumstances under which Michael Hardwick was arrested were highly unusual:

The police officer had gone to Mr. Hardwick's house on Aug. 3, 1982, to serve a warrant because he had failed to pay a fine for public drunkenness. The officer asked the man answering the door if Mr. Hardwick was home and the man said he was not sure, but told the officer he could check if he wanted to.

The officer walked down a hall to a bedroom where the door was ajar. He saw Mr. Hardwick, 29 years old, and another man performing oral sex. The officer arrested them both and charged them with sodomy, a felony under Georgia law punishable by up to 20 years in prison.

*Arrest in Man's Home Began Test of Georgia Law*, N.Y. TIMES, July 1, 1986, at A19.

Assuming that most homosexual sex, like most heterosexual sex, takes place in the home (or in close equivalents under the Constitution, such as hotel and motel rooms, see, e.g., *Stoner v. California*, 376 U.S. 158 (1964)), the Fourth Amendment should usually provide protections sufficient to ensure that relatively few homosexuals are actually caught in *flagrante delicto* even under a regime of vigorous enforcement. "It is beyond question . . . that an unconsented police entry into a residential unit, be it a house or an apartment or a hotel or motel room, constitutes a search within the meaning of *Katz v. United States*." 1 WAYNE R. LAFAVE, SEARCH

correct, could anyone still contend that the power to criminalize

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AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 474-75 (3rd ed. 1996) (citations omitted); *see also, e.g.*, *Oliver v. United States*, 466 U.S. 170, 179 (1984) (noting that the home “provide[s] the setting for those intimate activities that the fourth amendment is intended to shelter from governmental interference”); *Payton v. New York*, 445 U.S. 573, 601 (1980) (“[T]he sanctity of the home . . . has been embedded in our traditions since the origins of the Republic.”); *United States v. Orito*, 413 U.S. 139, 142 (1973) (stating that the “Constitution extends special safeguards to the privacy of the home”); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).

Although the Court has interpreted the Fourth Amendment to permit the police under some circumstances to make a search without first obtaining a warrant, a showing of exigent circumstances is typically required. *See, e.g.*, *Wilson v. Arkansas*, 115 S. Ct. 1914, 1915 (1995) (holding that the “common-law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment”); *Ker v. California*, 374 U.S. 23, 40-41 (1963) (plurality opinion) (holding unannounced entry to be reasonable under the “exigent circumstances” of the case). *But see State v. Richards*, 549 N.W.2d 218, 219 (Wis. 1996) (holding that “the Fourth Amendment allows a blanket exception to the general requirement of ‘knock and announce’ . . . for entries into premises pursuant to a search warrant for evidence of felonious drug delivery”), *cert granted*, *Richards v. Wisconsin*, 117 S.Ct. 679 (1997). *See generally*, 2 LAFAVE, *supra*, at 401-06; *id.* at 621-25 (discussing “no-knock” search warrants). Moreover, the Court has narrowly circumscribed this “exigent circumstances” exception when the search would require entry of private premises. *See, e.g.*, *Wilson*, 115 S. Ct. at 1916-19 (recounting historical development of common-law “knock and announce” principle when private premises are involved); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) (holding that only in “a few specifically established and well-delineated” situations . . . may a warrantless search of a dwelling withstand constitutional scrutiny”) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); 2 LAFAVE, *supra*, at 403.

An argument could nonetheless be made that unannounced entry even into private homes is necessary for enforcement of the sodomy laws in order to prevent “destruction” of evidence, *i.e.*, the cessation of the suspects’ sodomitical behavior. *See Wilson*, 115 S. Ct. at 1919 (“[C]ourts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given.”) (quoting *Ker*, 374 U.S. 23, 40-41 (1963)). In any case, law enforcement personnel may, of course, initiate investigations into violations of sodomy (and related) laws through informants or “sting” operations, obtaining arrest warrants based on probable cause. 2 LAFAVE, *supra*, at 7-8.

Homosexuals—or heterosexuals—who engage in sex in automobiles or other locations in which the “reasonable expectation of privacy” is much lower will, of course, receive substantially less protection under the Fourth Amendment. *See, e.g.*, *United States v. Ross*, 456 U.S. 798, 806-07 (1982) (finding that the Fourth Amendment has long recognized “a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship . . . or automobile, . . . where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought”) (quoting *Carroll v. United States*, 267 U.S. 132, 153 (1925)); 4 LAFAVE, *supra*, at 573-77 (discussing “plain view” doctrine).

homosexual sex is the “greater,” the more oppressive, state power? In this regard, one might also wonder why, if criminalizing homosexual sex is truly the “greater” power, the groups that explicitly sought to “eliminat[e] governmental interference in the choices people make in religious, familial, personal, and associational matters”<sup>48</sup> were content to enact Amendment 2 in a state that does not prohibit sodomy.<sup>49</sup>

## II. THE STATE’S NEAR PLENARY POWER OVER ITS POLITICAL SUBDIVISIONS AND THE SPECIAL STATUS OF AMENDMENT 2

Notwithstanding the arguments presented above, the *Romer* dissenters clearly find the traditional greater-power-includes-the-lesser-power argument attractive. It is therefore odd that they never mention the potentially most persuasive argument of this type.<sup>50</sup> If, as is clearly the case, the State of Colorado has the

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48. Petitioners’ Brief at 43, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039).

49. As Justice Scalia noted, “Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so.” *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting) (citing 1971 Colo. Sess. Laws 121, § 1).

50. Although I find this particular greater-includes-the-lesser argument facially more attractive than the *Romer* dissent’s argument from *Bowers* discussed *supra* Part I, I do not mean to suggest either that I find the argument ultimately persuasive or that I consider it immune from the general criticisms of such arguments that I have presented above in Part I. Understood in terms of the following syllogism, for example, this argument too is clearly flawed:

Major Premise: There is a category of political subdivisions—municipalities—that the State of Colorado has the power to abolish.

Minor Premise: Denver, Boulder, and Aspen are municipalities.

Conclusion: Therefore the State of Colorado has both the power to repeal any ordinances these cities may enact prohibiting discrimination on the basis of sexual orientation, and the power to prohibit these cities from adopting any such ordinances in the future.

The fact that this particular greater-includes-the-lesser argument was not made by the Petitioners, the Governor and the State of Colorado, in either their Brief or their Reply Brief to the U.S. Supreme Court is less surprising than its absence from the *Romer* dissent, given that the Petitioners were appealing the decision of the Colorado Supreme Court, *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (*Evans II*), which had adopted a rationale very different from that ultimately offered by the U.S. Supreme Court. See *Romer*, 116 S.Ct. at 1624 (affirming the judgment, “but on a rationale different from that adopted by the State Supreme Court”). The closest the Petitioners came to making this argument was their statement that “[i]t is indisputable that under this Court’s well-settled precedent the Colorado General Assembly was constitutionally free not to pass laws giving homosexuals and bisexuals protected status, to repeal any such previously enacted laws, and to refuse

power to abolish the very cities of Aspen, Boulder, and Denver,<sup>51</sup>

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to pass any similar laws in the future." Petitioners' Brief at 58-59, *Romer v. Evans*, 116 S.Ct. 1620 (1996) (No. 94-1039).

51. As one treatise notes:

As the doctrine of inherent home rule . . . has been almost universally rejected, municipalities in the United States are subject to the complete control of the states in which they are located except as such control is limited by constitutional provisions. . . . Thus, the state may take away the powers of municipalities, may transfer their functions to other governmental units, and may turn their property over to other governmental entities without making compensation.

OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* 75 (1982) (citations omitted); see also *Barnes v. District of Columbia*, 91 U.S. 540, 544 (1876) (holding that a state legislature may "strip [a municipal corporation] of every power, leaving it a corporation in name only"); *Northwestern Sch. Dist. v. Pittenger*, 397 F. Supp. 975 (W.D. Pa. 1975) (holding that a municipality has no rights under the U.S. Constitution that it may invoke against its creator state); *Jefferson County v. City of Anchorage*, 393 S.W.2d 608 (Ky. 1965) (holding that a municipality has no inherent powers of self-government under the state constitution).

The Colorado Constitution does not at present contain any provisions that could be read to restrict the power of the state legislature to abolish its municipalities. In practice, however, it might be difficult to secure a legislative majority in favor of abolishing Denver, Boulder, and Aspen, which together account for 27 % (9 of 35) of the state senators and 25 % (16 of 65) of the state representatives. See *STATE YELLOW BOOK* 534-38 (Fall 1996). Moreover, even if some provision of the Colorado Constitution were interpreted to restrict the state legislature's authority to abolish its municipalities, the constitution could always be amended to grant the legislature that authority.

Some of the ordinances at issue in *Romer*, however, were enacted by a special entity, "the City and County of Denver." See COLO. CONST. art. XX, § 1; *Romer*, 116 S. Ct. at 1623. And the Colorado Constitution does contain a provision that could be read to restrict the ability of the state legislature to abolish counties:

*Except as provided by statute*, no part of the territory of any county shall be stricken off and added to an adjoining county, without first submitting the question to the registered electors of the county from which the territory is proposed to be stricken off; nor unless a majority of all the registered electors of said county voting on the question shall vote therefor.

COLO. CONST. art. 14, § 3 (emphasis added). Even this provision, however, appears to reserve to the state legislature the power to create an exception to the restriction via statute (see phrase in italics above). In any case, any constitutional constraints on the legislature's power in this area could be removed through a constitutional amendment.

The Colorado Constitution provides three routes for its amendment: proposal by two-thirds of the membership of each house of the state legislature and ratification by a simple majority of voters, see COLO. CONST. art. XIX, § 2(1); a constitutional convention called by two-thirds of the membership of each house of the state legislature and approved by a simple majority of voters, with amendments proposed by the convention to be ratified by a simple majority of voters, see *id.* art. XIX, § 1; an initiative, proposed by a petition signed by registered electors numbering "at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election," and approved by a simple majority of voters, see *id.* art. V, § 1(2) & (4).

then should not the state also logically have the power to repeal any ordinances these cities may enact prohibiting discrimination on the basis of sexual orientation, as well as the power to prohibit these cities from adopting any such ordinances in the future?

There is, to my mind, no question that in 1992 either the Colorado Legislature or the people of Colorado through direct democracy<sup>52</sup> could have repealed the ordinances banning discrimination that Aspen, Boulder, and Denver had previously enacted.<sup>53</sup> I am equally certain that a state statute prohibiting all Colorado

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52. See COLO. CONST. art. V, § 1(2) & (4) (reserving to “the people” the power of the initiative; a constitutional amendment or statute may be proposed upon the submission of a petition with “signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election”; a simple majority of votes cast thereon at the biennial regular general election is necessary for adoption); see also *id.* art. V, § 1(3)-(4) (reserving the power of the referendum; a referendum may be ordered either through the petition process described *supra* or by the General Assembly).

53. Denver, Boulder, and Aspen are all “home-rule” cities under Colorado law. See, e.g., COLO. CONST. art. XX, §§ 1-5 (City and County of Denver); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 43 (1982) (Boulder); *Artes-Roy v. City of Aspen*, 856 P.2d 823, 826 (Colo. 1993) (Aspen). As such, they have “the full right of self-government in both local and municipal matters.” COLO. CONST. art. XX, § 6. Under Colorado law, however, a state statute will supersede a conflicting ordinance even of a home-rule city in “a matter of purely state-wide concern” or a “matter[] of mixed local and state concern.” See *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1066 (Colo. 1992); *R.E.N. v. City of Colorado Springs*, 823 P.2d 1359, 1362 (Colo. 1992); *City and County of Denver v. State*, 788 P.2d 764, 767-68 (Colo. 1990). The factors that a court will consider in determining whether a state statute preempts an inconsistent ordinance enacted by a home-rule city are: “whether there is a need for state-wide uniformity of regulation; whether the municipal regulation has extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Constitution specifically commits a particular matter to state or local regulation.” *Voss*, 830 P.2d at 1067; see also *R.E.N.*, 823 P.2d at 1362; *City and County of Denver*, 788 P.2d at 768.

It seems highly unlikely that regulating discrimination on the basis of sexual orientation would be found to be a “matter of purely local concern.” See *Voss*, 830 P.2d at 1066; *R.E.N.*, 823 P.2d at 1362. Thus, a state statute prohibiting all Colorado cities from adopting any ordinances banning discrimination on the basis of sexual orientation would likely be found to supersede the conflicting local ordinances that gave rise to Amendment 2. See *Romer*, 116 S. Ct. at 1623 (listing ordinances). Such a statute is likely to be problematic or ineffective only insofar as it would deny home-rule cities their state constitutional right to “legislate upon, provide, regulate, conduct and control . . . [t]he creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees.” COLO. CONST. art. XX, § 6; see also *City and County of Denver*, 788 P.2d 764 (holding the residency of employees of a home-rule municipality to be a matter of “local concern”).

cities from adopting *any* antidiscrimination ordinances would pass constitutional muster.<sup>54</sup> Moreover, I do not think that any of the following three amendments to the Colorado Constitution would have been obviously problematic under the U.S. Constitution in 1992: an amendment granting Colorado landlords the constitutional right to discriminate on the basis of sexual orientation in renting their property;<sup>55</sup> an amendment granting Colorado employers the constitutional right to discriminate on the basis of sexual orientation in hiring and promotion;<sup>56</sup> or an amendment simply abolishing the cities of Aspen, Boulder, and Denver.<sup>57</sup>

What, then, makes Amendment 2 not only different from these various exercises of state power but unconstitutionally so? There are, I believe, four characteristics that, taken together, render Amendment 2 both unique and unconstitutional. Amendment 2 would (1) deny to a single class of persons,<sup>58</sup> (2) identified on the basis of a general status rather than specific conduct,<sup>59</sup> (3) direct access to the political and judicial processes,<sup>60</sup> (4) for the

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54. The reasoning is essentially the same as that presented *supra* note 53. The only difference is that a state statute that expressly prohibited only some, rather than all, Colorado cities from adopting any antidiscrimination ordinances might be found to violate the Colorado Constitution's prohibition on special legislation. See COLO. CONST. art. V, § 25 ("[W]here a general law can be made applicable no special law shall be enacted.").

55. Although the Supremacy Clause of Article IV of the U.S. Constitution ensures that federal legislation enacted pursuant to Congress's Article I powers would preempt any conflicting state law in this area, none currently exists. The anti-discrimination provisions of existing federal housing law prohibit only discrimination on the basis of "race, color, religion, sex, familial status, or national origin." See Federal Housing Act, 42 U.S.C. § 3604 (1994). The reference to "familial status" refers not to sexual orientation but to "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody." *Id.* § 3602(k).

56. The antidiscrimination provisions of existing federal employment law prohibit only discrimination on the basis of "race, color, religion, sex, or national origin," see Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (1994), and on the basis of age, see Age Discrimination in Employment Act, 29 U.S.C. § 623 (1994).

57. See *supra* note 51.

58. Those of "Homosexual, Lesbian, or Bisexual Orientation" and persons who engage in "homosexual, lesbian or bisexual . . . conduct, practices or relationships." COLO. CONST., Art. II, § 30b.

59. Those identified as being of "Homosexual, Lesbian, or Bisexual Orientation." *Id.*

60. "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 . . ." *Id.*



purpose of seeking protection against discrimination on the basis of that general status.<sup>61</sup> Understood in this way, Amendment 2 is readily distinguishable, not only from other exercises of the state's near plenary power over its political subdivisions, but also from other state or federal constitutional provisions that require a particular group "to amend the constitution to obtain legislation it favors or believes it needs."<sup>62</sup>

Consider two examples of the latter type of constitutional provision that Professor Ronald Dworkin recently offered: "It would not be unconstitutional, in principle, for Colorado's constitution to forbid municipalities to adopt rent-control legislation . . . even though that would pose special problems for people who rent."<sup>63</sup> And "groups who fervently want prayer back in their schools would have to repeal the First Amendment [of the U.S. Constitution] before petitioning the local school board."<sup>64</sup> It is crucial, however, that the "electoral disadvantage"<sup>65</sup> that such constitutional constraints impose, unlike the disadvantage imposed by Amendment 2, does not deny the affected group constitutional "protection across the board."<sup>66</sup>

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61. Prohibiting "bisexual orientation, conduct, practices or relationships" from "constitut[ing] or otherwise be[ing] the basis of or entitl[ing] any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." *Id.*

62. Dworkin, *supra* note 18, at 48.

63. *Id.*

64. *Id.* at 49. Or consider Justice Scalia's example:

[C]onsider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality.

*Romer v. Evans*, 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting). As Professor Andrew Koppelman has noted, "Even if the legislative history makes it plain that the statute was enacted solely in response to one city's too-cozy dealings with the mayor's brother, the law is valid, because its purpose is legitimate." Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional* 37 n.102 (Oct. 1996) (unpublished draft manuscript, on file with author).

65. See Dworkin, *supra* note 18, at 50.

66. *Cf. Romer*, 116 S. Ct. at 1628 (stating that Amendment 2 "identifies persons by a single trait and then denies them protection across the board"). See also *id.* at 1625 ("Sweeping and comprehensive is the change in legal status effected by [Amendment 2]."); *id.* at 1626 ("It is a fair, if not necessary inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."); *id.* at 1627 (Amendment 2 withholds from homosexuals "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society"); *id.* at 1629

The religion clauses of the First Amendment, for example, do not preclude an Orthodox Jew from suing his municipality if it displays a crèche but not a menorah in the town square in December,<sup>67</sup> or from securing federal legislation prohibiting discrimination on the basis of religion in the sale of rental property.<sup>68</sup> Nor does a state constitutional prohibition on rent control require a tenant to amend the constitution in order to be able to sue his landlord for breach of the implied warranty of habitability,<sup>69</sup> or to secure a state statute prohibiting retaliatory evictions.<sup>70</sup> If "tenant" were substituted for "homosexual" in the text of Amendment 2, in contrast, one would seem to have a constitutional provision with not only these latter two effects regarding the implied warranty of habitability and retaliatory evictions, but with many other effects as well.<sup>71</sup>

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(Amendment 2 would "deem a class of persons a stranger to its laws").

67. *Cf., e.g., Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2444 (1995) (holding that a state does "violate[] the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government"); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 600 (1989) (holding that "by permitting the 'display of the crèche in this particular physical setting,' the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message," in violation of the Establishment Clause (citation omitted) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)). *But see Lynch*, 465 U.S. at 680 (holding that "[w]hen viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche [in a Christmas display in a park owned by a non-profit organization and located in the heart of the city's shopping district] is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message" in violation of the Establishment Clause).

68. *See Fair Housing Act*, 42 U.S.C. § 3604 (1988) (prohibiting discrimination on the basis of religion in the sale or rental of housing).

69. *See, e.g., Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831, 842 (Mass. 1973) (holding that "tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition"); *Hilder v. St. Peter*, 478 A.2d 202, 210 n.3 (Vt. 1984) (holding that "the tenant's obligation to pay rent is contingent on the landlord's duty to provide and maintain a habitable dwelling"); *see also* RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT §§ 5.1, 5.4 (1977) (requiring that rental property be suitable for residential use on the date the lease is made, and obligating the landlord to keep leased premises in condition meeting health, safety, and housing codes); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 533-37 (3d ed. 1993) (discussing implied warranty of habitability).

70. *See, e.g., N.J. STAT. ANN. § 2A:18-61.1* (West 1987) (prohibiting retaliatory evictions by landlords); TEXAS [PROP.] CODE ANN. §§ 92.331-92.333 (West 1996) (same); RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT §§ 14.8-14.9 (1977) (same).

71. A suit seeking enforcement of a common law or statutory implied warranty

No Protected Status Based on [Being a Tenant]. 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 [being a tenant] 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.<sup>72</sup>

There would not seem to be “any . . . legitimate purpose or discrete objective”<sup>73</sup> that one could identify to justify imposing on tenants (or blue-eyed persons, or any other group not entitled to heightened scrutiny<sup>74</sup>) so all-encompassing an “electoral disadvantage.”<sup>75</sup> And merely being a “tenant” is, in any case, today not likely to trigger discrimination on the basis of that status in “employment, education, public accommodations, and health and

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of habitability would arguably constitute a claim of “protected status” by a tenant, pursuant to a state statute or “policy,” which this hypothetical amendment would prohibit the Colorado courts from recognizing (no “political subdivision[] . . . shall . . . enforce any statute, regulation, . . . or policy”). COLO. CONST. art. II, § 30b. Similarly, the passage of a statute prohibiting retaliatory evictions would arguably constitute the adoption of a statute affording tenants “protected status.”

72. Cf. COLO. CONST. art. II, § 30b.

73. *Romer v. Evans*, 116 S. Ct. at 1620, 1629 (1996).

74. The *Romer* majority identified four classifications or “groups that have so far been given the protection of heightened equal protection scrutiny under our cases.” *Id.* at 1625-26. They are: sex, see, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994); illegitimacy, see, e.g., *Lalli v. Lalli*, 439 U.S. 259, 265 (1978); race, see, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); and ancestry, see, e.g., *Oyama v. California*, 332 U.S. 633 (1948).

At times, the Court has also provided aliens heightened protection against discrimination, with the unanimous decision in *Graham v. Richardson*, 403 U.S. 365, 372 (1971), arguably constituting “the high-water mark of judicial protection of aliens.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1548 (2d ed. 1988). Since 1978, however, the Court has been less eager to afford aliens heightened protection. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (holding that a state’s refusal to employ aliens as probation officers is “a necessary consequence of the community’s process of political self-definition”); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a New York law barring aliens from employment as public schoolteachers); *Foley v. Connelie*, 435 U.S. 291, 294-95 (1978) (holding heightened scrutiny appropriate only where state action “struck at the noncitizens’ ability to exist in the community” by denying them important benefits or the opportunity to enter certain professions). *But see Plyler v. Doe*, 457 U.S. 202, 224 (1982) (holding that in order to be found “rational,” a Texas education law prohibiting state funds from being used to educate illegal aliens and authorizing local school authorities to refuse to enroll such children would have to further a “substantial” state interest). See generally TRIBE, *supra*, at 1544-53 (discussing alienage cases).

75. Dworkin, *supra* note 18, at 50.

welfare services.”<sup>76</sup> This latter fact, of course, substantially diminishes both the impact of the electoral disadvantage wrought by such an amendment as well as the likelihood that such an amendment will even be proposed.<sup>77</sup>

These are the distinctions that in the end make all the difference. Contrary to Dworkin’s claim, the disadvantage to which Amendment 2 would put Colorado homosexuals is patently *not* the same as the “electoral disadvantage . . . that many other groups, including people who favor prayer in schools, suffer.”<sup>78</sup> The disadvantage to homosexuals effected by Amendment 2 is far more thoroughgoing.<sup>79</sup> Indeed, it is so comprehensive that the *Romer* majority, rightly, could not find “any identifiable legitimate purpose or discrete objective” to which Amendment 2 bore a “rational relationship.”<sup>80</sup> And in so holding, the Court surely startled those who have come erroneously to believe that the “rational basis” requirement of equal protection doctrine imposes a constraint that is minimal in theory but nonexistent in fact.<sup>81</sup>

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76. *Romer*, 116 S. Ct. at 1623 (summarizing and citing municipal codes of Denver, Aspen, and Boulder).

77. In order for such a constitutional amendment to be proposed, a substantial portion of the state’s population must be interested in permitting, and engaging in, discrimination against tenants “across the board.” *Cf. id.* at 1628.

78. Dworkin, *supra* note 18, at 50.

79. In the words of the *Romer* majority, Amendment 2 “is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.” 116 S. Ct. at 1628.

80. *Id.* at 1629 (stating that Amendment 2 “is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit”).

81. This view of the “rational basis” requirement of modern equal protection doctrine originated with Gerald Gunther: “The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive ‘new’ equal protection, with scrutiny that was ‘strict’ in theory and fatal in fact; in other contexts, the deferential ‘old’ equal protection reigned, with minimal scrutiny in theory and virtually none in fact.” Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); see also TRIBE, *supra* note 74, at 1442-43 (“The traditional deference both to legislative purpose and to legislative selections among means continues, on the whole, to make the rationality requirement largely equivalent to a strong presumption of constitutionality.”).

In a variety of decisions, the Court has given ample evidence that Gunther’s “virtually” nonexistent constraint nonetheless exists, that even rational basis review has some bite. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (finding unconstitutional a city’s denial, pursuant to its zoning ordinance, of a special use permit for the operation of a group home for the mentally retarded on the ground that requiring the special permit in this case appears “to rest on an

## CONCLUSION

The final question to consider is what, if anything, the majority decision in *Romer*, with or without the missing pages I have just offered, will do for the cause of gay rights in America. The answer, I suspect, may be “very little” for two reasons. First, as I have shown, “the combination of the result in [*Romer*] and the result in *Bowers*,” contrary to the claims of the *Romer* dissenters as well as Ronald Dworkin, is not only *not* “ludicrous”<sup>82</sup>

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irrational prejudice against the mentally retarded”); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 621-22 (1985) (finding unconstitutional a New Mexico law providing Vietnam veterans residing in the state, and who were state residents before May 8, 1976, a \$2,000 property tax exemption, on the basis that the “statute’s distinction between resident veterans is not rationally related to the State’s asserted legislative goal”); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (finding unconstitutional a provision of the Alaska Constitution, which provides adult Alaska residents who established residency prior to 1959 cash dividends for each year of state residency subsequent to 1959, on the ground that “Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then”); *O’Brien v. Skinner*, 414 U.S. 524, 530 (1974) (finding “wholly arbitrary” and therefore unconstitutional a state statute prohibiting citizens incarcerated in their county of legal residence from voting by absentee ballot, but permitting absentee voting by those incarcerated outside their county of legal residence); *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973) (holding provision of Food Stamp Act that excludes from participation in the food stamp program any household containing an individual who is unrelated to any other household member to be “wholly without any rational basis,” and finding that “a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest”); *United States Dep’t of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (finding unconstitutional a provision of Food Stamp Act that excludes from participation in the food stamp program any household that includes a person who has reached his eighteenth birthday and who is claimed as a dependent child for federal income tax purposes by a taxpayer who is not a member of an eligible household, because “the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives”); see also *TRIBE*, *supra* note 74, at 1439-46 (discussing cases and observing that: “In the early and mid-1980s, . . . [w]hile invoking the ‘rational basis’ standard, the Court’s inquiry sometimes took on a new, more penetrating character.”).

82. Dworkin, *supra* note 18, at 50; see also *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting) (“In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision [*Bowers v. Hardwick*], unchallenged here . . . .”); *id.* at 1631-32 (Scalia, J., dissenting) (accusing the majority of indulging in “the luxury of ignoring inconvenient precedent” in the form of *Bowers v. Hardwick*).

*New Yorker* reporter Jeffrey Rosen recently “asked Justice Kennedy what he thought of Dworkin’s argument that [*Bowers* and *Romer*] can’t be reconciled. ‘I’m not going to comment,’ [Kennedy] said appropriately . . . .” Jeffrey Rosen, *Annals of Law: The Agonizer*, *NEW YORKER*, Nov. 11, 1996, at 82, 90.

but is in fact entirely logical. This also means, however,—again, *contra* Dworkin<sup>83</sup>—that I do not think *Romer* must be read as a first step toward the overruling of *Bowers*.

Second, as I have also demonstrated, it is Amendment 2's unjustifiable and unprecedented scope, it's "sheer breadth,"<sup>84</sup> that distinguishes it not only from other exercises of the state's near-plenary power over its political subdivisions, but also from other state or federal constitutional provisions that require a particular group "to amend the constitution to obtain legislation it favors or believes it needs."<sup>85</sup> I therefore do not think that *Romer* would preclude proponents of "traditional family values" from enacting piecemeal a series of statutes or state constitutional amendments that would facilitate equally far-reaching discrimination on the basis of sexual orientation throughout both the public and private sectors.<sup>86</sup>

Nonetheless, in the world beyond the courts, I think the future of gay rights is bright. My evidence, ironically, is Amendment 2 and Justice Scalia's dissent in *Romer*. An Amendment 2 would not be thought necessary in a state in which there are not cities such as Aspen, Boulder, and Denver enacting ordinances that prohibit discrimination on the basis of sexual orientation in "housing, employment, education, public accommodations, and health and welfare services."<sup>87</sup> And if homosexuality is at the center of what Justice Scalia has described as a present-day "Kulturkampf,"<sup>88</sup> then it must no longer in our culture be "the love that dare not speak its name."<sup>89</sup>

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83. See Dworkin, *supra* note 18, at 50 ("The members of the majority in *Romer v. Evans* may have done more than simply ignore *Bowers*: they may have begun the process of isolating and finally overruling it altogether . . .").

84. *Romer*, 116 S. Ct. at 1627.

85. Dworkin, *supra* note 18, at 48.

86. For examples of such possible enactments, see *supra* text accompanying notes 55-57.

87. *Romer*, 116 S. Ct. at 1623 (summarizing and citing municipal codes).

88. *Id.* at 1629 (Scalia, J., dissenting); see also Jeremy Rabkin, *The Supreme Court in the Culture Wars*, 125 PUBLIC INTEREST 3, 4 (Fall 1996) (describing the "original *Kulturkampf*" in Nineteenth Century Germany and various successors in other countries).

89. Lord Alfred Douglas, *Two Loves*, in "TWO LOVES" AND OTHER POEMS (1990) ("I am the love that dare not speak its name.").