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## The Irrational Legacy of *Romer v. Evans*: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation that Denies Equal Protection to Members of the Gay Community

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# THE IRRATIONAL LEGACY OF *ROMER V. EVANS*: A DECADE OF JUDICIAL REVIEW REVEALS THE NEED FOR HEIGHTENED SCRUTINY OF LEGISLATION THAT DENIES EQUAL PROTECTION TO MEMBERS OF THE GAY COMMUNITY

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## I. INTRODUCTION

*Romer v. Evans*<sup>1</sup> marked the first time that the U.S. Supreme Court used an equal protection analysis to hold unconstitutional a law that discriminated against members of the gay community.<sup>2</sup> While the decision brought instant hope that the tide had finally turned in our nation's history of legalized homophobia,<sup>3</sup> a decade of precedent reveals that *Romer*'s usefulness lies in upholding rather than overturning law that discriminates on the basis of sexual orientation.<sup>4</sup>

In *Romer*, the majority held that the state action in question, Colorado's Amendment 2,<sup>5</sup> was an outright failure of the Equal Protection Clause.<sup>6</sup> The Court additionally held that the amendment failed rational basis scrutiny.<sup>7</sup> While the Court's decision to invalidate Amendment 2 under rational basis review can be viewed as a refusal to evaluate laws that discriminate against the gay community through a more heightened lens of scrutiny, it can also be understood as part of the Court's decision not to use heightened scrutiny when a case fails to demand it.<sup>8</sup> *Romer* does not hold that laws that classify on the basis of sexual orientation are subject to rational basis scrutiny.<sup>9</sup> Yet, lower courts consistently cite *Romer* as the decision in which the U.S. Supreme Court decided not to classify members of the

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1. 517 U.S. 620 (1996), *aff'd* 882 P.2d 1335 (Colo. 1994).

2. *Id.* at 635. Throughout this Comment I choose to use the terms "gay community" and "same-sex couples" in their broadest sense. This community is marked (like any) by its diversity and includes lesbians, gay men, bisexuals, transgendered persons, and anyone else who, by identity, orientation, practice, or any other reason, is categorized for legal purposes by their lack of membership in the heterosexual community.

3. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 203-04 (1996); Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 894; Katherine M. Hamill, Comment, *Romer v. Evans: Dulling the Equal Protection Gloss on Bowers v. Hardwick*, 77 B.U. L. REV. 655, 656 (1997); Courtney G. Joslin, Recent Development, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick—Romer v. Evans*, 116 S. Ct. 1620 (1996), 32 HARV. C.R.-C.L. L. REV. 225, 225 (1996); Kevin G. Walsh, Comment, *Throwing Stones: Rational Basis Review Triumphs over Homophobia*, 27 SETON HALL L. REV. 1064, 1065 (1997).

4. See *infra* Parts II-III. The sole and major exception is law that impacts the purely private lives of gay individuals and couples. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas criminal sodomy statute as a violation of the liberty and privacy rights ensured by the Due Process Clause of the Fourteenth Amendment).

5. See *infra* note 41.

6. *Romer*, 517 U.S. at 633 (stating that Colorado's Amendment 2 was a "denial of equal protection of the laws in the most literal sense"); see *infra* notes 82-93 and accompanying text.

7. *Romer*, 517 U.S. at 634-35.

8. *Id.* at 625-26, 631-32.

9. *Id.* at 635.

gay community as a suspect group or protected class.<sup>10</sup> As a result, a decade of lower court precedent cites *Romer* for the rule that law that classifies on the basis of sexual orientation is presumed valid so long as the statute is rationally related to any legitimate state interest.<sup>11</sup>

This Comment argues that lower courts fail to read *Romer* thoroughly.<sup>12</sup> As a result, courts have failed to provide members of the gay community with protections necessary to ensure their full equal protection under the law.<sup>13</sup> With ten years of precedent to demonstrate this non-comprehensive reading of *Romer*, it is time for the U.S. Supreme Court to either clarify its analysis in *Romer* or heighten its tier of equal protection scrutiny of governmental action that classifies, limits, or removes the rights of members of the gay community on the basis of their sexual orientation.<sup>14</sup>

Part II of this Comment tells the story of *Romer*, including the passage of the Colorado amendment that created the judicial controversy, a procedural history marked by arguments surrounding equal protection scrutiny status for members of the gay community, and the outcome of this controversy as written by Justice Kennedy ten years ago.<sup>15</sup> Part III demonstrates the legal impact and judicial implications of ten years of *Romer*-based rational basis scrutiny directed at anti-gay legislation and amendments, most specifically in regard to marriage and adoption. Part IV bridges this discussion to New Mexico and argues that, based on New Mexico's unique equal protection jurisprudence and the state's strong policy of protecting the rights of New Mexico's gay community, rational basis scrutiny may be enough to invalidate law that discriminates on the basis of sexual orientation. In the alternative, if rational basis proves insufficient, recent New Mexico case law demonstrates that New Mexico may be prepared to heighten its scrutiny of legislation that classifies on the basis of sexual orientation to the intermediate level. In conclusion, this Comment argues that, as rational basis review has proven insufficient in providing the gay community true equal protection under the law, heightened intermediate scrutiny is necessary. While the federal and many state courts may not be prepared to take such a step, this Comment argues that New Mexico is.

## II. BACKGROUND: THE FEDERAL TIERS OF EQUAL PROTECTION SCRUTINY AS APPLIED TO *ROMER V. EVANS*

### A. *The Federal Tiers of Equal Protection Scrutiny*

[I]f 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

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10. See *infra* Part III.

11. *Romer*, 517 U.S. at 631-36.

12. See *infra* Parts II-III.

13. See *infra* Parts II-III.

14. See *infra* Parts II-III.

15. See *Romer*, 517 U.S. at 629.

a politically unpopular group cannot constitute a *legitimate* governmental interest.<sup>16</sup>

The Fourteenth Amendment's Equal Protection Clause states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>17</sup> To assess Equal Protection Clause claims, the U.S. Supreme Court utilizes an analytical framework designed to minimize the Court's intrusion into the political process and to address the need "to reconcile the principle with the reality"<sup>18</sup> that all law effectively discriminates against some.<sup>19</sup>

Traditionally, the Court employs three tiers of judicial review in its assessment and analysis of Fourteenth Amendment equal protection claims.<sup>20</sup> The tier chosen depends upon the class of individuals affected as well as the rights implicated by the government action in question.<sup>21</sup> To determine the appropriate tier, the Court looks to a history of discrimination and political powerlessness as well as to social policy and legislation that discriminates against a specific class of individuals.<sup>22</sup>

Classifications that implicate an individual's fundamental rights or that impact a "discrete and insular minorit[y]"<sup>23</sup> are subject to strict scrutiny, which requires the state to demonstrate (1) how the classification furthers a compelling governmental interest and (2) how that classification is narrowly tailored to further that compelling interest.<sup>24</sup> Based on U.S. Supreme Court precedent, race/national origin<sup>25</sup> and alienage<sup>26</sup> qualify for strict scrutiny review. Strict scrutiny is also triggered when the state action in question negatively impacts a fundamental constitutional right.<sup>27</sup> A middle tier of intermediate scrutiny applies to classifications based on gender<sup>28</sup> and illegitimacy.<sup>29</sup> Classifications affecting these "quasi-suspect" groups require the state to demonstrate that the classification is substantially related to a sufficiently important governmental interest.<sup>30</sup> For all other classifications, the test is rational

16. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (striking down a law that prevented members of the "hippy" community from qualifying for food stamps because the law was based on irrational prejudice) (emphasis added).

17. U.S. CONST. amend. XIV, § 1.

18. *Romer*, 517 U.S. at 631.

19. *See id.*

20. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) (detailing the Court's three tiers of equal protection analysis).

21. *Id.*

22. *Id.*

23. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (arguing that more demanding scrutiny than rational basis may be appropriate when legislation is aimed at "discrete and insular minorities" who, because of prejudice against them, are unable to protect themselves through ordinary political processes).

24. *See City of Cleburne*, 473 U.S. at 440.

25. *E.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and subject to "the most rigid scrutiny").

26. *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that classifications of legally admitted aliens are "inherently suspect and are therefore subject to strict judicial scrutiny").

27. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that anti-miscegenation laws that prohibit interracial marriages are unconstitutionally violative of the fundamental right to marry).

28. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996).

29. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (holding that classifications based on the paternity of a child do not qualify for strict scrutiny but do require more demanding scrutiny than rational basis review).

30. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985).

basis, under which classifications are presumed to be constitutional as long as they are rationally related to any conceivable legitimate governmental interest.<sup>31</sup>

After *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>32</sup> some legal commentators opined that a new, heightened form of rational basis scrutiny emerged under which state actions are not assumed rational.<sup>33</sup> This commentary was fueled by Justice Marshall's argument that although the majority in *City of Cleburne* claimed to use the rational basis standard, the reality, from his perspective, was a more exacting standard than traditional rational basis review.<sup>34</sup> In response, however, the Court has made clear that there is no such thing as a more active form of rational basis review.<sup>35</sup> On the other hand, the Court does not treat all cases that demand rational basis scrutiny similarly.<sup>36</sup> The Court provides greater deference to the state in cases that deal with taxation,<sup>37</sup> regulation of social welfare programs,<sup>38</sup> and "ordinary commercial transactions."<sup>39</sup> When faced with an equal protection civil rights claim, the Court analyzes the law and the state's asserted reasons more rigorously.<sup>40</sup>

### *B. A History of Discrimination: Romer v. Evans and Colorado's Passage of Amendment 2*

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

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31. See *id.* at 440.

32. *Id.* at 450 (finding that an ordinance requiring group homes for persons with mental retardation to acquire special permits was based on irrational prejudice).

33. See Spiro P. Fotopoulos, *The Beginning of the End for the Military's Traditional Policy on Homosexuals*: Steffan v. Apsin, 29 WAKE FOREST L. REV. 611, 627-28 (1994); Richard B. Saphire, *Equal Protection, Rational Basis Review and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 620-22 (1999-2000); Joslin, *supra* note 3, at 239; Walsh, *supra* note 3, at 1065-67.

34. See *City of Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part) ("[P]erhaps the method employed must hereafter be called 'second order' rational-basis review....[H]owever labeled, the rational basis test invoked today is most assuredly not the [traditional] rational-basis test...."). Marshall went on to object to the majority's "refusal to acknowledge that something more than minimum rationality review is at work here." *Id.* at 459.

35. See *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (rejecting the notion that in *City of Cleburne* the majority applied a different standard than rational basis review).

36. See Brief of the Am. Bar Ass'n as Amicus Curiae in Support of Respondents at 9-10, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), available at 1995 WL 17008433 (arguing that the Court applies a more rigorous form of rational basis review when an equal protection claim implicates civil rights protections).

37. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

38. *Bowen v. Owens*, 476 U.S. 340, 345 (1986).

39. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

40. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., separate opinion) (stating that in fair employment practices claims "[t]he State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis").

persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.<sup>41</sup>

The issue in *Romer* was Colorado's 1992 passage of Amendment 2,<sup>42</sup> an amendment that claimed to put members of the gay community in "the same position as all other persons"<sup>43</sup> but in reality denied them fundamental equal protection guarantees.<sup>44</sup> Beginning in the late 1970s, several municipalities within the State of Colorado passed legislation aimed at protecting the gay community from discrimination within their communities.<sup>45</sup> In response to these legislative initiatives, which many deemed an improper legislative attack upon traditional family and societal moral values, Amendment 2 arose, with its design to rescind all state and local laws designed to protect the gay community and to remove from all three branches of government the power to protect the gay community in the future.<sup>46</sup>

Colorado for Family Values (CFV), the organization that drafted Amendment 2 and the organization credited with the amendment's passage,<sup>47</sup> focused its public campaign on the repeal of "special rights."<sup>48</sup> Members of the gay community "already have the same rights everyone else has—the right to be protected against discrimination on the basis of their race, gender, religion, age, and disability."<sup>49</sup> CFV argued that passage of Amendment 2 was not an issue of hostility toward the gay community, but rather one that endorsed "fairness" through the elimination of additional special rights that anti-discriminatory legislation unlawfully provided for the gay community.<sup>50</sup> CFV's message, as told by its pamphlets, books, and media campaign, was that the gay community is not a disadvantaged minority meriting anti-discrimination protection because the gay community (1) is wealthier than most;<sup>51</sup> (2) is marked by immoral behavior rather than immutable traits such as race,

41. COLO. CONST. art. II, § 30b. Article II, section 30b is titled, "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation." *Id.*

42. *Id.*

43. *Romer v. Evans*, 517 U.S. 620, 626 (1996).

44. *Id.* at 632.

45. See, e.g., COLO. REV. STAT. § 10-3-1104(1)(f)(VIII) (2006) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation); DENVER, COLO. CODE art. IV, §§ 28-91 to -116 (2006), available at <http://www.municode.com/resources/gateway.asp?pid=10257&sid=6> (prohibiting discrimination in employment, housing, and public accommodations on the basis of sexual orientation); BOULDER, COLO. CODE § 12-1 (2000), available at [http://www.bouldercolorado.gov/index.php?option=com\\_content&task=view&id=1594&Itemid=960](http://www.bouldercolorado.gov/index.php?option=com_content&task=view&id=1594&Itemid=960) (same); ASPEN, COLO. CODE § 15.04.570 (1971), available at <http://www.ordlink.com/codes/aspen/> (same); Colo. Executive Order No. D0035, at 31 (Dec. 10, 1990), available at <http://www.colorado.gov/dpa/dhr/rules/docs/execorderspolicies.pdf> (prohibiting employment discrimination for "all state employees, classified and exempt," on the basis of sexual orientation).

46. See Samuel A. Marcossan, *The "Special Rights" Canard in the Debate over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 137 n.1 (1995).

47. See STEPHEN BRANSFORD, *GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2*, at 41 (1994).

48. See Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 96 (1995).

49. *Id.* at 94 n.7.

50. See Marcossan, *supra* note 46, at 140 ("For example, if gay men and lesbians were granted the right to commit murder, that would be a 'special right' in the sense that it is not possessed by heterosexuals."); Will Perkins, *Views on Gay Rights Conflict*, DENV. POST, Oct. 11, 1992, at 1D, 5D.

51. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 292 (1994) (quoting Will Perkins, Executive Chairman of the Board of Colorado for Family Values, who claimed that gays are far from oppressed, as "gays are one of the most privileged groups

gender, and disability;<sup>52</sup> (3) is acceptant of pedophilia;<sup>53</sup> (4) promotes sexual promiscuity;<sup>54</sup> and (5) dies young, partly because of AIDS.<sup>55</sup> CFV's message was that homosexuality is a choice, gays are abhorrent of family, and providing gays with "special rights" is a direct threat to basic freedoms.<sup>56</sup> Finally, CFV campaigned that Amendment 2's elimination of "special rights" would save the government money, maintain community order, promote family autonomy, and advance religious liberty.<sup>57</sup>

On November 3, 1992, after CFV's massive ballot-signing and media campaign, the electorate of the State of Colorado passed constitutional Amendment 2 into law.<sup>58</sup> Nine days later, Colorado Governor Roy Romer, claiming the amendment unconstitutional, filed suit in the Denver district court to enjoin enforcement of Amendment 2.<sup>59</sup> The Supreme Court of Colorado upheld the preliminary injunction granted by the district court<sup>60</sup> and later made it permanent.<sup>61</sup>

### C. The Colorado Court's Choice of Strict Scrutiny

In upholding the preliminary motion to enjoin enforcement of Amendment 2, the Colorado Supreme Court determined that, because Amendment 2 potentially burdened a fundamental constitutional right through the legal endorsement of "private biases," strict scrutiny should apply.<sup>62</sup> The court focused on the disenfranchising effect of Amendment 2, arguing that the amendment not only placed impermissible prohibitions on governmental localities<sup>63</sup> but also denied a

in the country, sporting average annual household incomes [of] over \$55,000"); *see also* Brief for Petitioners at 42, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), *available at* 1995 WL 310026 (defending Colorado's conclusion that gay men and lesbians are "politically powerful and relatively privileged"); *but see* Eric Heinze, *Gay and Poor*, 38 HOW. L.J. 433, 435 (1995) (asserting that, based on findings of significant wage disparity between homosexual and heterosexual men of similar education, experience, and occupation and findings that lesbian and bisexual women earned less than their heterosexual counterparts, "gays are economically disadvantaged in the United States due to 'direct' and 'indirect' discrimination").

52. *See* Colorado for Family Values' Ballot Pamphlets in Support of Amendment 2, *reprinted in* WILLIAM N. ESKRIDGE, JR. & NAN. D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1527 (2d ed. 2004).

53. *Id.* at 1525 (claiming that homosexuals molest children and provide children with educational material to "try and convince children—maybe even your own—that they should consider homosexuality").

54. *Id.* at 1527 (arguing that "monogamy is virtually unknown in the gay lifestyle").

55. *Id.* (claiming that the average age of death for gay men is forty-two and that lesbians die by the age of forty-five).

56. *Id.* at 1523-31. In their pamphlets, CFV additionally contended that "immoral gays" do not deserve special rights, arguing that, if allowed special rights, children may have to dorm with "a gay" in college or heterosexuals could even lose their jobs to them.

57. *See* Schacter, *supra* note 51, at 290-94 (1994) (discussing the deceit-filled CFV campaign that fueled the passage of Amendment 2).

58. This polling data was cited to by the Colorado Supreme Court in *Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993). *See also* BRANSFORD, *supra* note 47, at 1 (stating that Amendment 2 passed by a vote of 813,966 to 710,151 (53.4% to 46.6%)).

59. *Evans*, 854 P.2d at 1272 (joining in the lawsuit was the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen).

60. *Id.* at 1286.

61. *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994).

62. *Evans*, 854 P.2d at 1282.

63. *Id.* at 1284-85.

targeted class the right to "obtain[] legislative, executive, and judicial protection or redress from discrimination absent...a constitutional amendment."<sup>64</sup>

The following year, the Colorado Supreme Court ordered a permanent injunction against enforcement of Amendment 2.<sup>65</sup> In reaching its final decision, the court revisited and reaffirmed its previous decision to apply strict scrutiny.<sup>66</sup> The court held that as the "Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process...any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny."<sup>67</sup> Under strict scrutiny, the state could not meet its burden; the court found none of the state's asserted interests compelling.<sup>68</sup>

With the Colorado Supreme Court's repeated use and justification of strict scrutiny on the record, the issue for the U.S. Supreme Court was framed.<sup>69</sup> Not only would the Court have to issue a final decision regarding the fate of Amendment 2, it would also have to decide under what rationale to make its decision.<sup>70</sup> In 1995, just one year before *Romer*, the U.S. Supreme Court acknowledged that states have the right to enact law that protects the rights of the gay community, marking the first time the Court acknowledged that members of the gay community may actually have rights.<sup>71</sup> Now the Court was asked to further define those rights.<sup>72</sup> While the decision was pending, the citizens of fourteen states pushed for constitutional amendments similar to Colorado's Amendment 2.<sup>73</sup>

#### D. *Romer v. Evans and the U.S Supreme Court's Scrutiny Conundrum*

Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.<sup>74</sup>

64. *Id.* at 1285.

65. *Evans*, 882 P.2d at 1338.

66. *Id.* at 1341 n.3.

67. *Id.* at 1339.

68. *Id.* The interests that the Colorado court found not compelling included:

(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; [and] (5) preventing government from subsidizing the political objectives of a special interest group....

*Id.*

69. See *infra* Part II.D.

70. See *infra* Part II.D.

71. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995) (recognizing the right of states to enact legislation that protects members of the gay community from discrimination on the basis of their sexual identity).

72. See *infra* Part II.D.

73. See Michael Booth & Steven Wilmsen, *The Great Divide: Basic Values at Heart of Debate*, DENV. POST, Sept. 19, 1993, at D1; see also Daniel J. Garfield, Comment, *Don't Box Me in: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 691 n.7 (1995) (discussing jurisdictions in which amendments similar to Colorado's had been voted on or were pending).

74. *Romer v. Evans*, 517 U.S. 620, 633 (1996).



On February 21, 1995, the Supreme Court of the United States granted the state of Colorado's petition for writ of certiorari in the case of *Romer v. Evans*.<sup>75</sup> In addition to the Petitioner and Respondent Briefs, the Court accepted over two dozen Amicus Briefs, the majority on behalf of Respondents: those who won the judicial battle to strike down Amendment 2 in the Colorado Supreme Court.<sup>76</sup>

The legal issue confronted by the U.S. Supreme Court in *Romer* was whether Colorado's Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment,<sup>77</sup> which demonstrates the "commitment to the law's neutrality where the rights of persons are at stake."<sup>78</sup> In framing the analysis, the majority "attempted to reconcile the principle with the reality...that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."<sup>79</sup> Whereas the Colorado Supreme Court found Amendment 2 to be an unconstitutional violation of a fundamental right,<sup>80</sup> and thus adopted a strict scrutiny analysis,<sup>81</sup> Justice Kennedy explicitly stated that, in affirming the Colorado court's result, the U.S. Supreme Court analyzed Amendment 2 on different grounds.<sup>82</sup> The Supreme Court overturned Amendment 2 on two grounds: (1) Amendment 2 was a per se violation of the Equal Protection Clause<sup>83</sup> and (2) Amendment 2 failed even the most deferential rational basis review.<sup>84</sup>

In deciding that Amendment 2 constituted a per se violation of the Equal Protection Clause, the majority relied heavily on a brief submitted by Laurence H. Tribe arguing that "the command of equal protection extends to every person within the state's jurisdiction, regardless of what the person might have done, and certainly regardless of what the person might be inclined to do."<sup>85</sup> Tribe argued that the Court need not address nor apply its three-tiered scrutiny analysis<sup>86</sup> as Amendment 2 was unlike anything the Court had previously seen: a per se violation of the Fourteenth Amendment's equal protection guarantees.<sup>87</sup>

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75. 513 U.S. 1146 (1995). The question presented before the Court by petitioners was whether Amendment 2 violated the rights guaranteed by the Fourteenth Amendment's Equal Protection Clause. *See id.*

76. *See* LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW 196-97 (1998).

77. U.S. CONST. amend. XIV, § 1.

78. *Romer*, 517 U.S. at 623.

79. *Id.*

80. *Evans v. Romer*, 854 P.2d 1279, 1282 (Colo. 1993) (concluding that strict scrutiny was proper in situations where the "fundamental right to participate equally in the political process" is threatened).

81. *Id.*

82. *Romer*, 517 U.S. at 626.

83. *Id.* at 633 (stating 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 is itself a denial of equal protection of the laws in the most literal sense").

84. *Id.* at 632-33.

85. *See* Brief of Laurence H. Tribe et al., as Amici Curiae in Support of Respondents at 10, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), available at 1995 WL 862021.

86. *Id.* at 4 (arguing that "[n]o extrapolation from precedents dealing with racial or other minorities, or from precedents dealing with rights of political or legal participation, is needed to conclude that this selective preclusion of claims of discrimination violates the Equal Protection Clause").

87. *Id.* at 3 ("Never since the enactment of the Fourteenth Amendment has this Court confronted a measure quite like Amendment 2—measure that, by its express terms, flatly excludes some of a state's people from eligibility for legal protection from a category of wrongs."). According to Tribe, a per se violation of the Equal Protection Clause exists when a state's constitution "preclude[s], for a selected set of persons, even the possibility of protection

The majority agreed with Tribe, concluding that Amendment 2 was a per se violation of the Equal Protection Clause because it "confound[ed]...[the] normal process of judicial review"<sup>88</sup> for equal protection claims, namely the three-tiered analysis.<sup>89</sup> "In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."<sup>90</sup> However, as Amendment 2 "identifie[d] persons by a single trait and then denie[d] them protection across the board,"<sup>91</sup> the majority determined the traditional tiered approach insufficient,<sup>92</sup> stating that Amendment 2's "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."<sup>93</sup>

After holding Amendment 2 to be an outright equal protection violation, the majority concluded that Amendment 2 also failed rational basis scrutiny.<sup>94</sup> A law that "impos[es] a broad and undifferentiated disability on a single named group...seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."<sup>95</sup> The Court dismissed and rejected Colorado's asserted interests for the amendment.<sup>96</sup> Addressing the special rights argument, the Court concluded that civil rights protections for lesbians and gay men are not special rights but are protections ensuring that members of the gay community will not suffer from arbitrary discrimination.<sup>97</sup> Although, as the Court acknowledged, most laws impose certain disadvantages, the harm created by Amendment 2, which denied members of the gay community any protection under the laws, could not be justified.<sup>98</sup> The Court, however, did not hold that rational basis is *the* tier of scrutiny to apply when conducting an equal protection analysis of law that implicates the rights of the gay community.<sup>99</sup> The Court held that, in this case, where the law in question created extreme unconstitutional harm to the rights

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under any state or local law from a whole category of harmful conduct, including some that is undeniably wrongful." *Id.* at 2.

88. *Romer*, 517 U.S. at 633.

89. *Id.*

90. *Id.* at 632.

91. *Id.* at 633.

92. *Id.*

93. *Id.*

94. *Id.* at 635.

95. *Id.* at 632.

96. *Id.* at 635.

97. *Id.* At its extreme, it was argued that Amendment 2 would deny members of the gay community the protection of laws of general applicability. *Id.* at 633.

98. *Id.* at 635; *see also* Brief of the Am. Ass'n on Mental Retardation et al. in Support of Respondents at 20-21, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), *available at* 1995 WL 17008437 (stating that Amendment 2 fails rational basis review because it discriminates "on the basis of blatantly invidious motivation...[and] has the explicitly intended effect of preventing the consideration and development of legislatively enacted approaches to the problem of discrimination").

99. *Romer*, 517 U.S. at 635. When the Court decides that it has rejected a higher degree of scrutiny for a specific class of individuals, it does so explicitly. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (stating that persons with mental retardation do not qualify for quasi-suspect classification calling for a more exacting standard of judicial review).

of members of the gay community, no more than rational basis was needed to overturn the enactment.<sup>100</sup>

In application, lower courts rely upon *Romer* for the incorrect proposition that classifications made on the basis of sexual orientation are subject to rational basis review.<sup>101</sup> Only one court to date has discussed and applied *Romer*'s per se violation rationale.<sup>102</sup> With this incomplete reading of *Romer*, lower courts accept almost any state asserted interest as legitimate.<sup>103</sup> As such, these courts fail to recognize that the Court left open the possibility of a higher degree of scrutiny as well as the possibility that legislative classifications designed to exclude members of the gay community from the protection of the law may be an outright violation of equal protection guarantees.<sup>104</sup> Undoubtedly, *Romer* was a landmark decision for members of the gay community. Unfortunately, a narrow reading of *Romer* fails to provide members of the gay community with the equal protection that *Romer* first guaranteed.

### III. POST-ROMER POLITICAL AND JUDICIAL RESPONSES TO LEGISLATION THAT NEGATIVELY IMPACTS THE RIGHTS OF MEMBERS OF THE GAY COMMUNITY

#### A. *Political Response to Romer v. Evans*

Single Most Important Positive Ruling in the History of the Gay Rights Movement<sup>105</sup>

The public response to *Romer* was extreme on both ends of the political spectrum.<sup>106</sup> Suzanne B. Goldberg, then an attorney for Lambda Legal,<sup>107</sup> stated that Justice Kennedy's majority opinion, while not answering all legal issues surrounding the complexities of gay rights, "make[s] the simple yet profound point that lesbians and gay men may not, by virtue of being members of a socially vulnerable minority, be separated out from their neighbors and rendered strangers to the law."<sup>108</sup> But while some heralded *Romer* as the start of a new judicial era that would recognize and protect gay rights, the decision also provoked a social

100. *Romer*, 517 U.S. at 635.

101. See *infra* Part III.

102. See *Andersen v. King County*, 138 P.3d 963, 980–82 (Wash. 2006) (citing *Romer*, 517 U.S. at 633–34). In upholding the state's defense of marriage law, which denied same-sex marriage, the court held that the denial was not a per se equal protection violation, which requires that the law be "motivated *solely* by animus and that it lacked any legitimate governmental purpose." *Id.* at 981. As the court found legitimate the state's asserted interests in procreation and a "commitment to the institution of marriage between a man and a woman," the law was held not to be a per se violation. *Id.* at 982.

103. See *infra* Part III.

104. *Romer*, 517 U.S. at 633.

105. Press Release, Lambda Legal, Statement of Lambda Starr Attorney Suzanne B. Goldberg on U.S. Supreme Court's Striking Down Colorado's Amendment 2 (May 20, 1996), <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=70>. Goldberg served as counsel for Petitioners in *Romer v. Evans*, 517 U.S. 620 (1996).

106. See *infra* notes 107–111 and accompanying text.

107. For more information on Lambda Legal, "a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work," see <http://www.lambdalegal.org>.

108. KEEN & GOLDBERG, *supra* note 76, at 240.

conservative backlash.<sup>109</sup> The National Legal Foundation, which supports the “Biblical Foundations of American Law,” named *Romer* “the worst decision in the history of the court.”<sup>110</sup> The Federalist Society joined in the critique, claiming that in *Romer* the Court ignored that the “‘proper legislative end’ to which Amendment 2 is directed is the preservation of [the institution of family and marriage] by expressing societal disapprobation of sexual immorality and ‘alternative lifestyles’ based on it.”<sup>111</sup>

### B. Judicial Response to *Romer v. Evans*

The hope that *Romer* would bring lower courts to strike legislation that discriminates on the basis of sexual orientation is unrealized. While in the decade since *Romer* the gay community has made many important strides in combating discrimination,<sup>112</sup> new legislation directed at limiting the rights of gay individuals, couples, and families abounds, leaving the gay community more deeply marginalized and unprotected than before *Romer*.<sup>113</sup> For the most part, what lower courts cite to as *Romer*’s holding has not served to overturn this legislation.

Just one year after *Romer*, in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,<sup>114</sup> the Sixth Circuit used *Romer* to hold that a city charter amendment that removed the gay community from the classes of persons protected by city anti-discrimination laws survived rational basis review.<sup>115</sup> The court stated that in *Romer* the U.S. Supreme Court rejected a higher degree of scrutiny than rational basis to analyze equal protection claims involving law that discriminates on the basis of sexual orientation.<sup>116</sup> The U.S. Supreme Court denied certiorari on the case.<sup>117</sup>

109. See, e.g., Katia Hetter, *The New Civil Rights Battle: The Supreme Court Hands Gays a Win in the Struggle Between Tolerance and Tradition*, U.S. NEWS & WORLD REP., June 3, 1996, at 28, available at [http://www.usnews.com/usnews/news/articles/960603/archive\\_009163.htm](http://www.usnews.com/usnews/news/articles/960603/archive_009163.htm) (anticipating that social conservatives would use the Court’s ruling to “energize their grass-roots activists and make homosexuality a wedge issue in the [fall 1996 election] campaign”).

110. Statement of the National Legal Foundation & Minuteman Institute on *Romer v. Evans*, <http://www.nlf.net/Activities/briefs/Romer.html> (last visited Aug. 1, 2006).

111. Robert George & Bill Saunders, *Romer v. Evans: The Supreme Court’s Assault on Popular Sovereignty* (2001), <http://www.fed-soc.org/Publications/practicegroupnewsletters/civilrights/cr010104.htm>.

112. Since *Romer* was decided in 1996, (1) five more states have passed laws to prohibit workplace discrimination to take the total to fourteen states with such prohibitions; (2) the number of employers that offer domestic partner benefits rose from less than six hundred to over eight thousand; (3) the number of universities and colleges offering domestic partner benefits rose from less than ninety to nearly three hundred; (4) the number of cities, counties, and government agencies that offer domestic partnership benefits rose from less than fifty to nearly two hundred; and (5) the number of states, counties, and cities that prohibit private sector discrimination on the basis of sexual orientation nearly doubled. See generally Human Rights Campaign Found., *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2004* (2005), available at [http://www.hrc.org/Content/ContentGroups/Publications/1/State\\_of\\_the\\_Workplace/Workplace0603.pdf](http://www.hrc.org/Content/ContentGroups/Publications/1/State_of_the_Workplace/Workplace0603.pdf).

113. See *infra* notes 129–139, 223–228 and accompanying text.

114. 128 F.3d 289 (6th Cir. 1997).

115. *Id.* at 301 (determining that Cincinnati’s interest in conserving public costs caused by sexual orientation discrimination complaints constituted a legitimate reason for upholding this statute).

116. *Id.* at 294 (stating that in *Romer* the U.S. Supreme Court “resolved that the deferential ‘rational relationship’ test...was the correct point of departure for the evaluation of laws which uniquely burdened the interests of homosexuals”).

117. *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 525 U.S. 943 (1998).

Under *Romer*, courts have also upheld the military's policy concerning homosexuality in the armed forces, also known as "Don't Ask, Don't Tell."<sup>118</sup> In addition, courts consistently cite *Romer* as they uphold legislation and amendments that deny same-sex couples the right to marry, the rights that accompany marriage, and the right to foster parent or adopt a child.<sup>119</sup> To rationalize this denial, these courts incorrectly rely upon *Romer* as the case in which the U.S. Supreme Court decided that rational basis review is the standard to apply to legislation that treats members of the gay community differently.

### 1. Marriage Rights: *Romer's* Inability to Overturn Federal and State Defense of Marriage Legislation and Amendments

In 2003, a legally married same-sex Canadian couple attempted to declare each other as family members at the U.S. border.<sup>120</sup> A U.S. Customs agent refused to recognize their marriage and told the men that they would have to enter the United States as individuals, not as a married couple.<sup>121</sup> The couple refused.<sup>122</sup>

While the ability to travel freely and to protect one another as a couple is just one of the hundreds of legal rights conferred by marriage,<sup>123</sup> many states have enacted legislation that denies same-sex couples and their families the opportunity to seek the protections that heterosexual couples enjoy.<sup>124</sup> Nearly 600,000 same-sex couples registered as such in the 2000 census.<sup>125</sup> These couples live in the vast majority of counties in the United States.<sup>126</sup> Yet nationally, new legislation directed at prohibiting gay couples the right to marry abounds, as a majority of states have now passed constitutional defense of marriage amendments and statutes (commonly referred to as DOMA), which define marriage as between "one man and one woman."<sup>127</sup> The lobbying efforts that passed Colorado's Amendment 2, led by Focus on the Family (the organization formerly known as Colorado for Family Values), are strongly behind the passage of these DOMAs in a campaign entitled "Marriage Under Fire."<sup>128</sup>

118. 10 U.S.C. § 654 (2000); see, e.g., *Able v. United States*, 155 F.3d 628, 634–35 (2d Cir. 1998) (distinguishing *Romer's* inability to find a rational basis for Amendment 2 from the military's "acceptable" rationale of maintaining unit cohesion, reducing sexual tension, and promoting personal privacy); see also *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 172 n.21 (D. Conn. 2005) (citing *Romer* and discussing military recruiters' inability to sign law schools' non-discrimination policies because of the military's legitimate restriction on homosexual activity, as opposed to the illegitimate status-based classification of *Romer*).

119. See *infra* notes 139–213, 227–241, 261–272 and accompanying text.

120. Clifford Krauss, *Married Gay Canadian Couple Barred from U.S.*, N.Y. TIMES, Sept. 19, 2003, at A4, available at <http://www.commondreams.org/headlines/03/0919-02.htm>.

121. *Id.*

122. *Id.* (noting that the men stated that to sign two forms and enter as individuals would have been an "affront to our dignity and human rights").

123. See Karen M. Doering, Nat'l Ctr. for Lesbian Rights, *1,500 Reasons Why We Need Marriage Rights*, at 1–2 (2004), <http://www.nclrights.org/publications/pubs/1500reasons-0304.pdf>.

124. See *infra* notes 129–139 and accompanying text.

125. TAVIA SIMMONS & MARTIN O'CONNELL, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, CENSUS 2000 SPECIAL REPORTS 1 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

126. See *id.*

127. See *infra* note 134.

128. See *Marriage Under Fire*, <http://www.marriageunderfire.com> (last visited Aug. 1, 2006). The website declares:

For the past forty years, the homosexual activist movement has sought to implement a master

Currently, only Massachusetts recognizes same-sex marriage.<sup>129</sup> And, as a result of highly successful DOMA campaigns, there are currently only five other states—California, Connecticut, Hawaii, Vermont, and New Jersey—that allow same-sex couples to enter into some form of legal partnership, be it a civil union, a reciprocal beneficiaries relationship, or a domestic partnership.<sup>130</sup> These legal partnerships offer many, but not all of the rights afforded to those who marry.<sup>131</sup> Research compiled by Lambda Legal Aid and the Human Rights Campaign shows that, of the remaining states, the District of Columbia, New Jersey, New Mexico,<sup>132</sup> New York,<sup>133</sup> and Rhode Island are the only ones without explicit provisions prohibiting same-sex marriage.<sup>134</sup>

At the federal level, in 1996, the same year the U.S. Supreme Court handed down its decision in *Romer*, Congress passed the Federal Defense of Marriage Act (DOMA).<sup>135</sup> Enacted under the Full Faith and Credit Clause of the Constitution,<sup>136</sup> the federal DOMA allows states to disregard the legal marriages and civil unions of other states.<sup>137</sup> To date, every court faced with a challenge to the federal or its state

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plan to utterly destroy the family. Unelectable and unaccountable rogue judges have made a habit of inventing rights that not only don't exist in the Constitution, but also contradict both the will of the people and the actions of the legislative branch.

*Id.*; see also James Dobson, *Eleven Arguments Against Same-Sex Marriage* (May 23, 2004), <http://www.family.org/cforum/extras/a0032427.cfm> (claiming that the legalization of same-sex marriage will severely impact, among other things, family, children, social security, adoption, foster care, and our medical care system).

129. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the denial of marriage rights to same-sex citizens violated the Massachusetts Constitution). *But see* Scott Helman, *Bid Would Leave Gay Marriages Intact*, B. GLOBE, Aug. 30, 2005, at B1, available at [http://www.boston.com/news/local/articles/2005/08/30/bid\\_would\\_leave\\_gay\\_marriages\\_intact?mode=PF](http://www.boston.com/news/local/articles/2005/08/30/bid_would_leave_gay_marriages_intact?mode=PF) (stating that activists plan to launch a massive campaign to gather signatures for a proposed 2008 ballot initiative to ban gay marriage). The amendment, if successful, would leave the thousands of existing same-sex marriages intact because the amendments would have no retroactive effect. *Id.*

130. See CAL. FAM. CODE § 297 (West 2005); CONN. GEN. STAT. ANN. § 46b-38aa (West 2005); HAW. REV. STAT. § 572C-1; N.J. STAT. ANN. §§ 26:8A-1 to -13 (West Supp. 2006); VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002). For a discussion of how states that provide legal domestic partnership recognition constitutionally justify continued denial of same-sex marriage recognition, see *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. 2005).

131. See, for example, the Federal Defense of Marriage Act, 28 U.S.C. § 1738 (2000), which denies federal marriage benefits to all couples legally partnered in these states: California, Connecticut, Hawaii, Massachusetts, Vermont, and New Jersey.

132. For more discussion on New Mexico, see *infra* Part IV.

133. Unfortunately for members of New York's gay community, the highest court of New York recently ruled that, while not explicitly prohibiting same-sex marriage, the provisions of New York's marriage law do not allow for same-sex marriage. See *Hernandez v. Robles*, No. 5239, 2006 N.Y. LEXIS 1836, at \*1 (N.Y. July 6, 2006).

134. Data gathered by the Human Rights Campaign indicates that, as of July 2006, twenty-six states have passed laws that define marriage as between a man and a woman and will not honor marriages between same-sex couples in other jurisdictions, while nineteen states have amended their constitutions and refuse to honor same-sex marriages from other jurisdictions. See HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE LAWS (2006), available at <http://www.hrc.org/Template.cfm?Section=HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=17961>. In the November 2004 general elections, eleven states passed state constitutional amendments defining marriage as only between one man and one woman. Massachusetts is the only state to permit same-sex couples to obtain marriage licenses. Vermont permits same-sex civil unions. See Kathy Gill, *After the Election: Same-Sex Marriage in the US* (2004), [http://uspolitics.about.com/od/gaymarriage/a/status\\_N04.htm](http://uspolitics.about.com/od/gaymarriage/a/status_N04.htm); Kavan Peterson, *50-State Rundown on Same Sex Marriage Laws*, KANSAS CITY INFO ZINE, Feb. 7, 2005, <http://www.infozine.com/news/stories/op/storiesView/sid/1949/>. In April 2005, the Connecticut Legislature passed both civil union legislation and DOMA legislation that defines marriage as between one man and one woman. The bill was signed into law on April 20, 2005. See Susan Haigh, *Connecticut Becomes Second State to Approve Gay Unions After Governor Signs Bill* (Apr. 21, 2005) (on file with author).

135. 28 U.S.C. § 1738C (2000).

136. U.S. CONST. art. IV, § 1.

137. For a discussion of the implications of Congress's enactment of DOMA under the Full Faith and Credit

DOMA has held that rational basis is the appropriate tier of scrutiny for legislation that classifies on the basis of sexual orientation and that DOMA serves a rational state interest.<sup>138</sup>

In the summer of 2006, the Supreme Court of Washington upheld the state's DOMA, finding "that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both."<sup>139</sup> *Andersen* represents possibly the only judicial attempt to find legislation to be a per se violation of the Equal Protection Clause.<sup>140</sup> *Andersen* also represents the confusion surrounding what the U.S. Supreme Court actually held in *Romer* as relating to the level of scrutiny appropriately applied to legislation that classifies on the basis of sexual orientation. Finally, *Andersen* represents the hesitance that some courts face in upholding such classifications under rational basis review.

In *Andersen*, the court began by stressing that "the court's role is limited to determining the constitutionality of DOMA and that our decision is not based on an independent determination of what we believe the law should be."<sup>141</sup> The court then stated, and repeated throughout the opinion, that rational basis was the tier the court must apply<sup>142</sup> and that this standard is "highly deferential" to the legislature.<sup>143</sup> In deciding that rational basis was the appropriate tier,<sup>144</sup> the court rejected arguments that members of the gay community are a suspect class requiring heightened scrutiny, as they failed to show that sexual orientation is immutable,<sup>145</sup> and as a class they are not politically powerless.<sup>146</sup> Restating what it read as *Romer*'s holding, the court reiterated rational basis as the appropriate tier of review.<sup>147</sup> After discussing why the fundamental right to marry does not include same-sex couples,<sup>148</sup> the court held that DOMA was not a per se violation of the equal protection clause<sup>149</sup> and was rationally related to legitimate state interests in procreation and familial stability, which includes the state's "need to resolve the sometimes conflicting rights and obligations of the same-sex couple and the necessary third party in relation to a child."<sup>150</sup>

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Clause, see generally Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act*, 76 NEB. L. REV. 604 (1997) and Emily J. Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507 (2005).

138. See *infra* notes 139–213 and accompanying text. This Comment was last updated on September 13, 2006.

139. *Andersen v. King County*, 138 P.3d 963, 985 (Wash. 2006).

140. See *supra* note 102.

141. *Andersen*, 138 P.3d at 969.

142. *Id.* at 969, 983–84. It is important to note that *Andersen* was not argued under equal protection but rather the state's privileges and immunities clause, for which the court utilized the "same analysis that applies under the federal equal protection clause." *Id.* at 972.

143. *Id.* at 969.

144. *Id.* at 973 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

145. *Id.* at 974.

146. *Id.* at 974–75 (stating that the "enactment of provisions providing increased protections to gay and lesbian individuals... shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power").

147. *Id.* at 976 (citing *Romer*, 517 U.S. at 631).

148. *Id.* at 977–80.

149. See *supra* note 102.

150. *Andersen*, 138 P.3d at 982.

What remains an open issue from this Washington decision is whether the denial of marriage benefits is constitutional, about which the court declared it was "acutely aware."<sup>151</sup> As the plaintiffs "affirmatively asked that [the court] not consider any claim regarding statutory benefits and obligations separate from the status of marriage," the court held this issue out for another day.<sup>152</sup>

In *Smelt v. County of Orange*,<sup>153</sup> a California district court used a similar analysis to hold that, under both the California<sup>154</sup> and Federal DOMAs, gay couples could not marry because both pieces of legislation were rationally related to the governmental interests of encouraging procreation and encouraging the creation of stable relationships that facilitate child-rearing by both biological parents.<sup>155</sup> While the court cited to *Romer* to demonstrate that "the Supreme Court does not consider unsubstantial a constitutional challenge brought by homosexual individuals on equal protection grounds,"<sup>156</sup> it also relied upon *Romer* to hold that, "[e]ven if the rationale for the law seems tenuous, it is rationally related to the government interest if it bears some relation to that interest."<sup>157</sup>

In *Wilson v. Ake*,<sup>158</sup> the court used this same line from *Romer* to deny a lesbian couple the right to marry and to uphold both the Florida<sup>159</sup> and the Federal DOMA.<sup>160</sup> The court then accepted the government's offered interests—procreation and the support of relationships in which children are raised by their biological parents—as legitimate reasons to deny same-sex couples the ability to marry.<sup>161</sup> Likewise, in *Stanhardt v. Superior Court ex rel. County of Maricopa*,<sup>162</sup> an Arizona appellate court denied two gay men the ability to marry and cited to *Romer* to hold that, even though the state DOMA<sup>163</sup> "disparately treats an affected class[, it] is presumptively constitutional and will be upheld if the classification rationally furthers a legitimate state interest."<sup>164</sup>

In denying the recognition of same-sex unions, state courts also fail to assist in the dissolution of those unions.<sup>165</sup> This refusal to recognize the same-sex marriages and legal unions of other states impacts not only same-sex partners, but the children

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151. *Id.* at 985.

152. *Id.*

153. 374 F. Supp. 2d 861 (C.D. Cal. 2005).

154. CAL. FAM. CODE § 308.5 (West 2004).

155. *Smelt*, 374 F. Supp. 2d at 879–80.

156. *Id.* at 873 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

157. *Id.* at 879 (citing *Romer*, 517 U.S. at 632–33).

158. 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005).

159. FLA. STAT. ANN. § 741.212 (West 2005).

160. *Wilson*, 354 F. Supp. 2d at 1308 (citing *Romer*, 517 U.S. at 632).

161. *Id.*

162. 77 P.3d 451 (Ariz. Ct. App. 2003).

163. ARIZ. REV. STAT. ANN. § 25-101 (2000).

164. *Stanhardt*, 77 P.3d at 464 (citing *Romer*, 517 U.S. at 632–33); see also *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (App. Div. 2005) (holding that denying a same-sex couple the right to marry does not violate New York's equal protection and due process clauses).

165. See, e.g., *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002) (refusing to dissolve a Vermont civil union because Connecticut allows neither same-sex marriage nor same-sex domestic partnership and will not give full faith and credit to the civil unions entered into in another state). However, given Connecticut's recent enactment of a law that provides same-sex couples with the ability to enter into civil unions, the state may soon hold that it can assist in the dissolution of other state's civil unions. See *supra* note 130.



of gay individuals and couples.<sup>166</sup> In *Burns v. Burns*,<sup>167</sup> the legal issue surrounded a child visitation decree entered into upon the couple's divorce, which stated that "no child visitations would occur during any time the party being visited cohabited with or had overnight stays with any adult to whom that party was not legally married or related within the second degree."<sup>168</sup> The former wife, Susan Burns, and her same-sex partner obtained a legal certificate for civil union in the state of Vermont.<sup>169</sup> Her ex-husband filed a motion for contempt, claiming that Susan violated the visitation order "while cohabitating with her female lover."<sup>170</sup> Susan claimed that the denial of her visitation rights violated equal protection. The Georgia Court of Appeals held that a civil union is not a marriage and that it would not give full faith and credit to the same-sex unions and marriages of other states.<sup>171</sup> The court additionally noted that its decision was rationally related to the public policy of Georgia, which recognizes only the union of one man and one woman and prohibits marriages between persons of the same sex.<sup>172</sup>

In contrast, in *Loving v. Virginia*,<sup>173</sup> the Supreme Court recognized marriage as a fundamental right, one which "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>174</sup> And while the fundamental right determination flowed from the racial implications of *Loving*, which distinguishes it from cases involving same-sex marriage,<sup>175</sup> the Court made it clear that state police powers regulating marriage are not unlimited and must comport with the commands of the Fourteenth Amendment.<sup>176</sup>

In choosing to deny same-sex couples the fundamental right to marry,<sup>177</sup> as well as the legal protections and benefits secured by all heterosexual couples in matrimony and other forms of legalized unions, courts reinforce the value that same-

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166. See, e.g., *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002).

167. *Id.*

168. *Id.* at 48.

169. *Id.*

170. *Id.*

171. *Id.* at 48-49.

172. *Id.* at 49. The court quoted the Georgia Code, which states that "[n]o marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state." GA. CODE ANN. § 19-3-3.1(b) (2004).

173. 388 U.S. 1 (1967).

174. *Id.* at 12.

175. See, e.g., *Andersen v. King County*, 138 P.3d 963, 977-79 (Wash. 2006) (citing *Loving*, 388 U.S. at 11) (distinguishing *Loving* by its history and tradition because, by the time the Court struck down anti-miscegenation statutes, the majority of this nation's states had legally accepted interracial marriage); see *Hernandez v. Robles*, No. 5239, 2006 N.Y. LEXIS 1836, at \*10 (July 6, 2006) (noting that the history behind *Loving* distinguished it from the struggle for same-sex marriage because the country has long recognized the evils of racism and even "fought a civil war to eliminate racism's worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges" (citing *Loving*, 388 U.S. at 11)).

176. *Loving*, 388 U.S. at 7.

177. See, e.g., *Andersen*, 138 P.3d at 977-79 (citing *Loving*, 388 U.S. at 11) (holding that there was no history or tradition of same-sex marriage in this nation, but rather a bulk of law against it, and until "community standards...show a societal commitment to inclusion of same-sex marriage as part of the fundamental right to marry," the Washington court will not deem it a fundamental right). The Washington court went on to note the similar history of *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003), stating that, by the time the Court ruled that criminal sodomy statutes were an unconstitutional due process violation, only four states prohibited homosexual sodomy, and these laws were rarely, if ever, enforced. *Anderson*, 138 P.3d at 977 n.9. Under this rationale, laws that deny same-sex marriage rights cannot be overturned so long as a majority of states have and enforce such laws.

sex relationships are inferior and undeserving of equal protection under the law.<sup>178</sup> *Romer* is consistently relied upon to support and maintain the gay community's inferior status.<sup>179</sup> In *Bailey v. City of Austin*,<sup>180</sup> the Texas appellate court held that under rational basis review the city of Austin's reformed government benefits package, which denied dependent coverage to all but married couples and children, did not violate the state's equal protection guarantees.<sup>181</sup> Citing *Romer*, the court held that the city's government package served the legitimate interest of "recognizing and favoring legally cognizable relationships such as marriage."<sup>182</sup>

In addition, under *Romer* courts have yet to uphold the joint tax and bankruptcy filings of same-sex couples who have entered into long-term civil unions, as well as the legal same-sex marriages of other countries.<sup>183</sup> In *In re Kandu*,<sup>184</sup> the Bankruptcy Court for the District of Washington relied on *Romer* in its decision that the debt of one member of a gay couple cannot attach itself to the other and that the U.S. government does not recognize legal marriages entered into between gay individuals on foreign soil.<sup>185</sup> *In re Kandu* involved two lesbian U.S. citizens, Lee and Ann Kandu, who entered into a legal marriage in British Colombia, Canada on August 11, 2003.<sup>186</sup> On October 31, 2003, Lee Kandu filed for bankruptcy protection under Title 11, Chapter 7 of the Federal Bankruptcy Code and listed Ann as a joint debtor.<sup>187</sup> On December 5, 2003, the court determined that this was an improper joint filing and demanded that Lee show cause.<sup>188</sup> On March 25, 2004, Ann died.<sup>189</sup>

In addition to arguing that the court had a duty of comity to recognize foreign marriages, which the court quickly rejected,<sup>190</sup> Lee relied on *Romer* to advance her

178. See *Hernandez*, 2006 N.Y. LEXIS 1836, at \*11. The court acknowledged the "serious injustice in the treatment of homosexuals" but seemed to defer its obligation to end this injustice until it compares to Civil War and civil rights era racism. *Id.* As the idea of same-sex marriage is recent, the court stated that it should not "lightly conclude that everyone who held this belief [against same-sex marriage] was irrational, ignorant or bigoted." *Id.*

179. See, e.g., *Bailey v. City of Austin*, 972 S.W.2d 180, 189–90 (Tex. Ct. App. 1998); see also *infra* notes 180–182 and accompanying text.

180. 972 S.W.2d 180.

181. *Id.* at 189.

182. *Id.* at 189–90.

183. See, e.g., *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (holding that under *Romer* the court did not have to give comity to a Canadian same-sex marriage and the bankruptcy code did not violate the Equal Protection Clause in its denial of the right of a same-sex couple to jointly file for bankruptcy); cf. *In re Goodale*, 298 B.R. 886 (Bankr. W.D. Wash. 2003) (holding that a lien could not attach to a former same-sex partner of eighteen years to whom a Chapter 7 debtor was indebted because the partner did not qualify as a "spouse" or "former spouse" within the meaning of the bankruptcy statute); *In re Allen*, 186 B.R. 769, 773 (Bankr. N.D. Ga. 1995) (holding that, under the Federal Bankruptcy Code, two gay men who had exchanged marriage vows before a Baptist minister could not jointly file for Chapter 13 bankruptcy protection because the state did not recognize the marriage).

184. 315 B.R. 123 (Bankr. W.D. Wash. 2004).

185. *Id.* at 147–48.

186. *Id.* at 130.

187. *Id.* The Federal Bankruptcy Code provides that "[a] joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse." 11 U.S.C. § 302(a) (2000).

188. *Kandu*, 315 B.R. at 130.

189. *Id.*

190. *Id.* at 133 (stating that the U.S. "Supreme Court has concluded, in the event of a conflict of laws between nations, a court must prefer the laws of its own nation"); see also *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166, 178 (N.J. Tax Ct. 2005) (stating that, in regard to the recognition of a marriage license issued by Canada to two gay men who are U.S. citizens, comity is "neither a matter of absolute obligation...nor of mere courtesy and

arguments that DOMA violates her constitutional guarantees of equal protection and due process.<sup>191</sup> Applying its interpretation of *Romer*, the court stated that, “[i]f a law neither burdens a fundamental right, nor targets a suspect class, the Supreme Court ‘will uphold the legislative classification so long as it bears a rational relation to some legitimate’ governmental end.”<sup>192</sup> According to the court, under a rational basis review, “DOMA does not burden a fundamental right nor target a suspected class.”<sup>193</sup> Distinguishing DOMA from Colorado’s Amendment 2, the court stated that, whereas Amendment 2’s breadth imposed “‘a broad and undifferentiated disability on a single named group,’”<sup>194</sup> DOMA “‘simply codified that definition of marriage historically understood by society.’”<sup>195</sup>

The lesson of these opinions is that lower courts consistently fail to read *Romer* in its entirety. *Romer* neither held nor bound lower courts to rational basis review of legislation that negatively impacts the rights of gay individuals.<sup>196</sup> Yet, each of these cases cite *Romer* as the U.S. Supreme Court’s decision that legislative classifications on the basis of sexual orientation are subject to rational basis review. With this incomplete reading of *Romer*, it is seemingly impossible to overturn state and federal action designed to deny members of the gay community the ability to marry and the ability to receive the legal benefits of marriage. At least one court has attempted to use the “*Romer* stands for rational basis review of anti-gay legislation” approach to overturn a state’s DOMA amendment, but this approach was quickly overturned.<sup>197</sup>

## 2. *Romer*’s Near Success: Nebraska’s DOMA Amendment Temporarily Overturned

*Romer*’s “rational-basis analysis” brought temporary success in overturning at least one state DOMA. In *Citizens for Equal Protection, Inc. v. Bruning*,<sup>198</sup> a U.S. District Court in Nebraska used *Romer* to hold unconstitutional Nebraska’s DOMA.<sup>199</sup> The case focused on article 1, Section 29 of the Nebraska Constitution,<sup>200</sup> which was passed by voters through a ballot initiative on November 7, 2000, and signed into law one month later.<sup>201</sup>

In *Citizens for Equal Protection*, the plaintiffs petitioned the court to permanently enjoin Section 29, arguing that, like Colorado’s Amendment 2, the amendment denies all members of the gay community “an equal opportunity to convince

good will....Comity is voluntary”).

191. *Kandu*, 315 B.R. at 137–38.

192. *Id.* at 144 (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

193. *Id.*

194. *Id.* at 147 (quoting *Romer*, 517 U.S. at 632).

195. *Id.* at 148.

196. *See supra* Part II.D.

197. *See infra* notes 198–213 and accompanying text.

198. 368 F. Supp. 2d 980 (D. Neb. 2005), *rev’d*, 455 F.3d 859 (8th Cir. 2006), *reh’g and reh’g en banc denied*, 2006 U.S. App. LEXIS 22372 (Aug. 30, 2006).

199. *Id.* at 985, 994.

200. NEB. CONST. art. I, § 29 (stating that “[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska” and that “[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska”).

201. *Bruning*, 368 F. Supp. 2d at 987.

members of the Nebraska Unicameral [Legislature] that same-sex relationships deserve some of the legal protections afforded to other relationships.”<sup>202</sup> The district court agreed.<sup>203</sup>

In its decision, the district court used *Romer*’s “rational basis analysis” to hold that, as defendants could not “justify the amendment under deferential ‘rational basis’ review, the court need not discuss the more stringent level of scrutiny.”<sup>204</sup> Analogizing to Amendment 2, the district court found that Section 29 caused clear harm by depriving the gay community of equal protections “‘taken for granted by most.’”<sup>205</sup> By disallowing the gay community’s political ability to effectuate change, Section 29 imposed an impermissible legal disability upon them.<sup>206</sup> This harm, according to the district court, bore no “rational relation to some legitimate end,”<sup>207</sup> was status-based (designed against a specific class of individuals),<sup>208</sup> and was fueled by animus toward that class.<sup>209</sup> Quoting *Romer*, the court noted that “[a] State cannot so deem a class of persons a stranger to its laws.”<sup>210</sup>

In July 2006, the Eighth Circuit overruled the district court, holding that, unlike Colorado’s Amendment 2, Section 29 served a legitimate state interest in promoting procreation “within the socially recognized unit that is best situated for raising children.”<sup>211</sup> In reaching this decision, the Eighth Circuit inferred that denying members of the gay community the ability to marry is no different than denying thirteen year olds the right to marry, denying polygamy, or requiring the passage of a venereal disease exam before marriage.<sup>212</sup> In conclusion, the court highlighted the need for heightened constitutional scrutiny of a law that denies members of the gay community equal protection under the law: “If there is no constitutional right to same-sex marriage...[a state amendment that denies members of the gay community the ability to marry] survives rational basis review.”<sup>213</sup> As courts increasingly deny and persist in their unwillingness to provide members of the gay community the equal protection afforded all heterosexual citizens, the need for heightened scrutiny becomes only more apparent.

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202. *Id.* at 984.

203. *Id.*

204. *Id.* at 989.

205. *Id.* at 994–95 (quoting *Romer v. Evans*, 517 U.S. 620, 631–32 (1996)); see also *id.* at 1004 (finding that “Section 29 inflicts ‘immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it’” (quoting *Romer*, 517 U.S. at 635)).

206. *Id.* at 992 (stating that “the possible ability of a group or association to pursue goals by other means will not significantly ameliorate the disabilities imposed by a restraint on freedom of association” (citing *Romer*, 517 U.S. at 631)).

207. *Id.* at 994–95 (quoting *Romer*, 517 U.S. at 631–32).

208. *Id.* at 1002 (citing *Romer*, 517 U.S. at 635).

209. *Id.* (citing Amar, *supra* note 3, at 220).

210. *Id.* (quoting *Romer*, 517 U.S. at 635). The district court also recognized the economic impact that Section 29 would have on same-sex families as the denial of the ability to enter legalized unions potentially impacted other benefits associated with marriage, including insurance contracts, adoption contracts, estate planning, and business agreements. *Id.* at 1003–05 (citing Jill Schachner Chanen, *Marriage Law Could Reach Contracts*, A.B.A. J. E-REPORT, July 16, 2004; Christopher Rizzo, *Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska’s Initiative 416*, 11 J.L. & POL’Y 1, 57–58 (2002)).

211. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (internal quotation marks omitted).

212. *Id.* (citing *Zablocki v. Redhail*, 414 U.S. 374, 392 (1978) (Stewart, J., concurring)).

213. *Id.* at 871.

### 3. Adoption Rights: *Romer*'s (In)Ability to Overturn Discriminatory Parenting Legislation

Not only has a narrow reading of *Romer* failed to provide marriage and domestic partnership protections, it has also failed, with few exceptions,<sup>214</sup> to provide otherwise qualified gay individuals the ability to adopt or foster parent a child.<sup>215</sup> Research shows that children raised by same-sex couples fare no differently than those raised by heterosexual couples.<sup>216</sup> Gay parents are just like all other parents, with the same strengths and foibles.<sup>217</sup> Yet, as evidenced by the Indiana legislature's recent attempt to pass a bill that would prohibit gays, lesbians, and unmarried people from using medical science to assist them in having a baby,<sup>218</sup> much of society continues to believe that people who are gay are not suitable parents and that the citizenry of this country has the right to stop them from having children. The Indiana bill, if passed, would have required doctors to investigate the education and employment histories, criminal backgrounds, family plans, and the marital status of each person who sought that doctor's assistance.<sup>219</sup> Fortunately for members of the gay and single community wishing to have a baby, the bill was dropped in committee when the sponsor of the bill, state Republican Senator Patricia Miller, realized that "the issue was more complex than anticipated."<sup>220</sup>

As to same-sex adoption laws, only two states—California and Vermont—permit same-sex adoption by statute.<sup>221</sup> The courts of other states, including New Mexico,<sup>222</sup> have determined that, under their state's adoption statutes, same-sex adoption is not prohibited and sexual orientation is not dispositive in the determination of whether the adoption is in the best interests of the child.<sup>223</sup> Alternatively, courts in four states—Colorado, Nebraska, Ohio, and Wisconsin—have disallowed same-sex second-parent or stepparent adoption, holding that these adoptions are not in the best interest of the child.<sup>224</sup> The statutes of Michigan, Mississippi, and Utah prohibit both

214. See, e.g., *infra* notes 243–248.

215. See *supra* notes 169–174 and accompanying text; see *infra* notes 230–244 and accompanying text.

216. Linda Little, *Study: Same-Sex Parents Raise Well-Adjusted Kids*, Oct. 12, 2005, <http://www.webmd.com/content/Article/113/110762.htm> (finding that the one to six million children in the United States that are raised by gay and lesbian parents are virtually the same in every way as children raised by heterosexual couples); *contra* PAUL CAMERON & KIRK CAMERON, *CHILDREN OF HOMOSEXUAL PARENTS REPORT CHILDHOOD DIFFICULTIES* (2002), [http://www.familyresearchinst.org/FRI\\_homokids.html](http://www.familyresearchinst.org/FRI_homokids.html) (summarizing narratives of problems related by children of gay and lesbian parenting).

217. See generally Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 196–205 (1995) (summarizing social science research about the development of children with lesbian and gay parents).

218. *Bill Limiting Procreation Assistance Abandoned*, J. GAZETTE (Ft. Wayne, Ind.), Oct. 6, 2005, at A1.

219. Associated Press, *Indiana Bill Would Limit Reproduction Procedures for Gays, Singles*, Oct. 5, 2005, available at <http://hrc.org/Template.cfm?Section=Home&CONTENTID=29219&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

220. *Bill Limiting Procreation Assistance Abandoned*, *supra* note 218, at A1.

221. CAL. FAM. CODE ANN. § 9000(b) (West 2004); VT. STAT. ANN. tit. 15A, § 1-102 (2002).

222. See *A.C. v. C.B.*, 113 N.M. 581, 585, 829 P.2d 660, 664 (Ct. App. 1992). For a full discussion of New Mexico's status within this legal discussion, see *infra* Part IV.

223. See, e.g., *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); *In re Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Two Children*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002).

224. See HUMAN RIGHTS CAMPAIGN, *SECOND-PARENT/STEEPARENT ADOPTION LAWS IN THE U.S.* (2006), available at [http://www.hrc.org/Template.cfm?Section=About\\_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16302](http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16302).

unmarried and same-sex couples from adopting, while Florida's statutes explicitly forbid adoptions by gay individuals.<sup>225</sup> This year, sixteen states will vote on ballot initiatives aimed at denying the ability of gay individuals and couples to adopt.<sup>226</sup>

### a. Same-Sex Adoption and Foster Parenting Challenges Since *Romer*

#### i. *In re the Adoption of T.K.J.*<sup>227</sup>

In 1996, the Colorado Court of Appeals interpreted *Romer*'s rational basis standard of review to uphold Colorado's adoption law,<sup>228</sup> which allows a second-parent to adopt only when he or she is married to the child's natural parent.<sup>229</sup> The petitioners in *In re the Adoption of T.K.J.* lived together as domestic partners.<sup>230</sup> Each was the natural parent of one child, and each sought to second-parent adopt the other child.<sup>231</sup> The trial court held that, under Colorado's statute, the children would be available for adoption only if the couple were married or if each relinquished her natural parent-child relationship.<sup>232</sup> These petitioners challenged Colorado's statute.<sup>233</sup> In addition to holding that the statute did not deny due process, the Colorado Court of Appeals cited *Romer* to determine that rational basis was the appropriate equal protection scrutiny level.<sup>234</sup> As the statute's "disparate treatment" is rationally related to "promoting the best interests of children and familial stability," the court held that the statute did not violate the children's rights to equal protection.<sup>235</sup>

#### ii. *Lofton v. Secretary of the Department of Children & Family Services*<sup>236</sup>

In 2004, the Eleventh Circuit relied on *Romer* to uphold Florida's anti-gay adoption statute in *Lofton v. Secretary of the Department of Children & Family Services*.<sup>237</sup> The court first used *Romer* to determine that rational basis was the appropriate standard of review as the statute did not burden a fundamental right and members of the gay community were not a protected class.<sup>238</sup> "Under this deferential

225. See HUMAN RIGHTS CAMPAIGN, ADOPTION AND FOSTER CARE LAWS AND POLICIES (2006), available at [http://www.hrc.org/Template.cfm?Section=About\\_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16302](http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16302).

226. See Andrea Stone, *Drives to Ban Gay Adoption Heat Up in 16 States*, USA TODAY, Feb. 21, 2006, at A1 (arguing that this multi-state effort to ban gays and lesbians from adopting is the next front in the culture wars that began in 2004 with the highly successful push to pass DOMA amendments and statutes).

227. 931 P.2d 488 (Colo. Ct. App. 1996).

228. *Id.* at 495.

229. COLO. REV. STAT. §§ 19-5-200.2 to -216 (2005).

230. *Adoption of T.K.J.*, 931 P.2d at 490.

231. *Id.*

232. *Id.* at 491.

233. *Id.* at 494. The petitioners also challenged the court's construction of the statute. *Id.* at 492-93.

234. *Id.* at 495 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

235. *Id.* at 496. The court additionally stated that, while "[n]atural parents have a fundamental liberty interest in the care, custody, and management of their children[.],... we find no indication of such an interest regarding the relationship between a child and a potential adoptive parent." *Id.* at 494 (citations omitted).

236. 358 F.3d 804 (11th Cir. 2004).

237. *Id.* at 806, 818.

238. *Id.* at 818 (stating that, "[u]nless the challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest" (citing *Romer*, 517 U.S. at 631)).

standard, a legislative classification 'is accorded a strong presumption of validity' and 'must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'"<sup>239</sup> Directly quoting *Romer*, the court stated that rational basis validates government action "'even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.'"<sup>240</sup> Rejecting an analogy to Colorado's Amendment 2, the court stated that, whereas "Amendment 2's classification encompassed both conduct *and* status[...],...Florida's adoption prohibition is limited to conduct....Thus, we conclude that *Romer*'s unique factual situation and narrow holding are inapposite to this case."<sup>241</sup>

### iii. *Romer*'s Success in Overturning Anti-Gay Adoption and Foster Parenting Regulations

While the summer of 2006 brought numerous judicial decisions that further secured denial of marriage rights,<sup>242</sup> it also brought at least two decisions that protected the adoption and foster parenting rights of members of the gay community.<sup>243</sup> In 2004, Oklahoma amended its adoption statute to state that, while the foreign adoptions of other states are generally honored, "this state, any of its agencies, or any court of this state *shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.*"<sup>244</sup> In May, 2006, the U.S. District Court for the Western District of Oklahoma held that the amendment violated the Full Faith and Credit Clause.<sup>245</sup> In addition, by declaring them illegitimate upon their entrance to the state, the court held that the amendment violated the adopted children's equal protection guarantees.<sup>246</sup> Citing *Romer*, the court additionally held that the amendment violated the same-sex parents' equal protection guarantees because it "targets an unpopular group and singles them out for disparate treatment."<sup>247</sup> In so doing, the court found not legitimate the state's asserted interest in "halt[ing] the erosion of the mainstream definition of the family unit and...protect[ing] Oklahoma children from being targeted for adoption by gay groups across the nation and...ensur[ing] that children are raised in traditional family environments."<sup>248</sup>

While the court in *Finstuen* did not discuss this issue, the Oklahoma amendment also violated the requirements of the Federal Parental Kidnapping Prevention Act (PKPA).<sup>249</sup> Although federal DOMA legislation permits states to deny full faith and credit recognition of another state's marriage decree, the PKPA states that full faith

239. *Id.* (citations omitted) (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)).

240. *Id.* (quoting *Romer*, 517 U.S. at 632).

241. *Id.* at 827 (citations omitted).

242. See *supra* notes 139–152, 211–213 and accompanying text; *infra* notes 261–272 and accompanying text.

243. *Finstuen v. Edmondson*, No. CIV-04-1152-C, 2006 U.S. Dist. LEXIS 32122 (W.D. Okla. May 19, 2006); *Dep't of Human Servs. v. Howard*, No. 05-814, 2006 Ark. LEXIS 418 (Ark. June 29, 2006).

244. OKLA. STAT. ANN. tit. 10 § 7502-1.4(A) (West Supp. 2006) (emphasis added).

245. *Finstuen*, 2006 U.S. Dist. LEXIS 32122, at \*22–37.

246. *Id.* at \*31.

247. *Id.* at \*36.

248. *Id.* at \*36–37. According to the court, this rationale demonstrates that the law was intended to target and harm an unpopular group, which is not a legitimate rationale. *Id.* at \*37.

249. 28 U.S.C. § 1738A (2000).

and credit must be given to the child custodial decrees of another state.<sup>250</sup> As a result, even in those states with amended constitutions that deny same-sex marriage and the recognition thereof, courts have been forced to uphold the same-sex adoptions of other states.<sup>251</sup> In 2000, Mississippi attempted to pass legislation similar to Oklahoma's but recognized that, under the PKPA and the Full Faith and Credit Clause, the proposed legislation was invalid.<sup>252</sup> It is fortunate for members of the gay community who wish to adopt, and for those who have already jumped many hurdles to adopt, that the Oklahoma amendment failed, as it could have made the hurdles of adoption insurmountable.

At issue in *Department of Human Services & Child Welfare Agency Review Board v. Howard* was an Arkansas Child Welfare Agency Review Board regulation that denied the ability to foster parent to those engaged in homosexual activities, as well as to those who lived with a homosexual.<sup>253</sup> In overturning the regulation, the Arkansas Supreme Court relied heavily on the lower court's memorandum opinion, which upheld the regulations under its reading of *Romer*'s rational basis analysis.<sup>254</sup> The lower court upheld the regulations reluctantly,<sup>255</sup> as highly persuasive expert testimony demonstrated that sexual orientation does not influence parenting ability.<sup>256</sup>

In review of the lower court opinion, the state supreme court held the regulations to be invalid under the separation of powers doctrine<sup>257</sup> and declined to review the regulation's equal protection implications.<sup>258</sup> However, the concurrence took the opportunity to state that "[t]here is no question but that gay and lesbian couples have

250. *Id.* For a more detailed discussion of how the Oklahoma statute violates the Full Faith and Credit Clause and the PKPA, see Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467 (2005).

251. See generally Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003); Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711 (2000).

252. Polikoff, *supra* note 251, at 735 (discussing Mississippi House Bill 49, which was introduced on January 12, 2000, but died on calendar March 16, 2000).

253. Dep't of Human Servs. v. Howard, No. 05-814, 2006 Ark. LEXIS 418, at \*2-3, \*13-16 (June 29, 2006) (discussing the lower court's finding that sexual orientation in no way impacts foster parenting ability).

254. *Id.* at \*3-4, \*12-16 (citing Howard v. Child Welfare Agency Rev. Bd., No. CV 1999-9881, 2004 WL 3154530, \*10-12 (Ark. Cir. Ct. Dec. 29, 2004)) (accepting the state's asserted interest in "public morality" and holding that, because members of the gay community do not qualify as a suspect class, because there is no judicial precedent for heightened scrutiny, and because foster parenting does not qualify as a fundamental right, it could not, under *Romer*, overturn the regulation).

255. Howard, 2004 WL 3154530, at \*11-13. The lower court additionally proclaimed that "[t]he 'confrontation' in this case has presented us all with an excellent opportunity to replace ignorance with knowledge and to make an informed decision based on information as opposed to assumption." *Id.* at \*13.

256. *Id.* at \*3-4. Also influential was the fact that no court has yet to hold that members of the gay community qualify as a suspect class. *Id.* at \*10.

257. Howard, 2006 Ark LEXIS 418, at \*17-18 (holding the regulation a separation of powers violation because the legislature did not delegate to the Board the authority to regulate or promote morality and the "driving force behind adoption of the regulation was...the Board's views of morality and its bias against homosexuals").

258. *Id.* at \*19 ("As we have held that [the regulation] is unconstitutional on the basis of separation of powers, we will not address the other constitutional arguments raised by Appellees on cross-appeal because to do so would amount to an advisory opinion.").



had their equal-protection and privacy rights truncated without any legitimate and rational basis in the form of foster-child protection for doing so."<sup>259</sup>

#### 4. The Irrationality of Rational Basis Review Revealed

In addition to rulings issued by the Eighth Circuit and the Washington Supreme Court,<sup>260</sup> New York's highest court used the summer of 2006 to hold that rational basis review is the appropriate tier of scrutiny for laws that classify on the basis of sexual orientation and that the legalized denial of same-sex marriage survives this review.<sup>261</sup> While New York is one of the few remaining states without legislative language defining marriage as between a man and a woman,<sup>262</sup> the court held that the state's marriage statute "clearly limits" marriage to heterosexual couples<sup>263</sup> and that this limit is rationally related to the state's legitimate interest in fostering the stability of opposite sex households.<sup>264</sup>

The New York decision highlights not only the irrationality that rational basis review permits, but also the injustice perpetuated through its application. In its determination that the legislative denial of same-sex marriage was rationally related to the state's interests in promoting familial stability,<sup>265</sup> the court acknowledged both the "serious injustice" faced by members of the gay community,<sup>266</sup> as well as the "undisputed" and numerous benefits of marriage.<sup>267</sup> In defining aspects of familial stability, the court stated that same-sex couples, because they "do not become parents as a result of accident or impulse,"<sup>268</sup> provide inherently more stable households than opposite sex households, as "relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes."<sup>269</sup> Without factual backing, the court assumed that heterosexual couples need the protections of marriage more than same-sex couples because, unlike heterosexual couples, same-sex couples must make the conscious choice, either through artificial insemination or adoption, to have a child.<sup>270</sup> Thus, the logic flows that, because children of same-sex families are born into more stable

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259. *Id.* at \*26–27 (Brown, J., concurring). The concurrence further noted that the majority erred in not striking down the regulation on equal protection and privacy grounds as the "Board's proffered reasons surrounding best interest of the child are gossamer thin and have no foundation in objective reason." *Id.* at \*27.

260. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

261. *Hernandez v. Robles*, No. 5239, 2006 N.Y. LEXIS 1836 (July 6, 2006).

262. *See supra* note 134.

263. *Hernandez*, 2006 N.Y. LEXIS 1836, at \*2–3 (holding that, although the state's marriage law does not expressly state "that only people of different sexes may marry each other," heterosexual provisions and references within the law "clearly limits" marriage to heterosexual couples).

264. *Id.* at \*6–11.

265. *Id.* (discussing how the legislature could decide that marriage is rationally related to children's security, that it is better for children to be raised in the presence of a mother and father, and that children fare better with parents of the opposite sex).

266. *Id.* at \*11 (stating that, in spite of this injustice, "the traditional definition of marriage is not merely a by-product of historical injustice" and "[i]ts history is of a different kind").

267. *Id.* at \*5 (noting that, beyond the 316 identified benefits under New York's marriage law, including tax incentives, probate and intestacy rights, divorce rights, and insurance and medical rights, marriage confers upon couples "the symbolic benefit, or moral satisfaction, of seeing their relationships recognized by the State").

268. *Id.* at \*7.

269. *Id.*

270. *Id.*

environments, in part because of biology and in part because their parents are not allowed to marry, their same-sex parents do not need the protections and benefits of state-recognized marriage.<sup>271</sup> Further highlighting the illogical reasoning perpetrated by New York's rational basis review, the court, after assuming that same-sex households are more stable, refused to accept the plaintiffs' factual offerings demonstrating that the children of same-sex parents fare no differently than those of opposite sex parents and deemed these factual offerings as assumptions unacceptable to the court.<sup>272</sup>

Although a core constitutional foundation envisioned by the Framers was the protection of minority groups from the tyranny of the masses,<sup>273</sup> the New York decision highlights how rational basis review provides for majority tyranny disguised in the form of respect for democracy.<sup>274</sup> As this democracy demonstrates increased disrespect and contempt for the gay community, rational basis review ensures that members of the gay community remain subject to the oppression of a democratically based tyranny.

Lastly, while the New York opinion is useful to demonstrate the lack of logic perpetuated by rational basis review, it also offers a glimpse of *Romer*'s unrealized potential. While the majority never cited to *Romer*, the dissent demonstrates how *Romer* could be used to further, rather than deny, equal protection guarantees. First, the dissent relies on *Romer* to state that, under rational basis review, the legitimate interest must rationally relate to the denial and that, as a denial of marriage to same-sex couples fails to promote the interest of heterosexual family stability, the denial fails rational basis review and reveals the actual interest of promoting discrimination.<sup>275</sup> Citing *Romer* again, the dissent then declares, "[t]he breadth of protections that the marriage laws make unavailable to gays and lesbians is 'so far removed' from the State's asserted goal of promoting procreation that the justification is, again, 'impossible to credit.'"<sup>276</sup> Finally, under *Romer*, the dissent noted that the problem with reliance upon tradition as the existence of tradition only demonstrates that the "discrimination has existed for a long time. A classification, however, cannot be maintained merely 'for its own sake.'"<sup>277</sup>

If the time has not come for a heightened form of equal protection scrutiny for members of the gay community, perhaps the time has come for the U.S. Supreme Court to clarify what it actually stated and held in *Romer*. In the alternative, it would also be helpful for the Court to declare that the values of procreation and familial

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271. *Id.*

272. *Id.* at \*8-9 (refusing the plaintiffs' offered evidence because it failed to demonstrate "beyond doubt that children fare equally well in same-sex and opposite-sex households").

273. See, e.g., THE FEDERALIST NO. 10 (James Madison), NO. 78 (Alexander Hamilton); see generally LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

274. *Hernandez*, 2006 N.Y. LEXIS 1836, at \*22 (concluding that, although "future generations" may decide that same-sex marriage is right, "the present generation should have a chance to decide the issue through its elected representatives").

275. *Id.* at \*77 (Kaye, C.J., dissenting) (citing *Romer*, 517 U.S. at 633); see also *id.* at \*85 ("[C]lassifications 'drawn for the purpose of disadvantaging the group burdened by the law' can never be legitimate." (quoting *Romer*, 517 U.S. at 633)).

276. *Id.* at \*81-82 (quoting *Romer*, 517 U.S. at 635).

277. *Id.* at \*86 (quoting *Romer*, 517 U.S. at 635). The dissent concludes that "the justification of 'tradition' does not explain the classification; it merely repeats it." *Id.* at \*87.

stability have nothing to do with the prejudice contained in laws designed to deny members of the gay community equal protection under the law.

#### IV. ANALYSIS: IMPLICATIONS FOR NEW MEXICO AND THE CASE FOR INTERMEDIATE SCRUTINY FOR NEW MEXICO'S GAY COMMUNITY

After ten years, *Romer*'s results are apparent. Case law consistently claims that *Romer* stands for a rational basis review of law that discriminates on the basis of sexual orientation.<sup>278</sup> Furthermore, only one case refers to *Romer*'s secondary holding, that state actions that are so broad as to deny political redress to the gay community are an outright violation of the Equal Protection Clause.<sup>279</sup> Perhaps with only one exception,<sup>280</sup> courts that rely on this incomplete reading of *Romer* have used it to uphold classifications that unfairly discriminate against individuals who are gay. As a result, *Romer* has (1) not succeeded in overturning legislation and amendments directed at marginalizing the gay community, (2) been unsuccessful in overturning legislation that negatively impacts the gay community, and (3) failed to provide the gay community equal protection under the law. Either the time has come for the U.S. Supreme Court to clarify its position in *Romer*, or, as rational basis has proven inadequate, it is time for a more heightened form of scrutiny.

What this means for New Mexico is uncertain. Only two New Mexico cases have cited to *Romer*.<sup>281</sup> In neither case were issues related to the differential treatment of the gay community in dispute.<sup>282</sup> As such, New Mexico's courts have yet to address which scrutiny level best applies to legislation that classifies on the basis of sexual orientation. New Mexico, however, has a legal history of protecting and expanding the rights of members of the gay community.<sup>283</sup> Furthermore, New Mexico's accepted version of equal protection analysis recognizes a higher form of rational basis review, one that requires the government to assert a rationale that is actually reflected in state law.<sup>284</sup> As a result, if New Mexico courts are faced with a situation in which the equal protection rights of members of the gay community are at issue, the challenge may not survive rational basis review as the state will have a difficult time meeting its burden of showing how this differential treatment is rationally related to any legitimate government interest.<sup>285</sup> Alternatively, recent New Mexico case law demonstrates that, even if the federal government does not heighten its equal protection scrutiny for certain classes of individuals, New Mexico may.<sup>286</sup>

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278. See *supra* Part III.

279. See *supra* notes 85–93, 102 and accompanying text.

280. See *supra* note 149.

281. *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 41, 114 P.3d 1050, 1063 (Bosson, C.J., concurring in part and dissenting in part) (complaining about the confusion of the U.S. Supreme Court's rational basis analysis in *Romer*); *State v. Druktenis*, 2004-NMCA-032, ¶¶ 94, 102, 86 P.3d 1050, 1078, 1080 (analyzing the constitutionality of a sex offender registration law).

282. See *infra* Part IV.B.

283. See *infra* Part IV.B.

284. See *infra* Part IV.A.

285. See *infra* Part IV.C.

286. See *infra* Part IV.D.

### A. *New Mexico's Tiers of Equal Protection Scrutiny*

New Mexico's equal protection clause states that "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."<sup>287</sup> In most respects, New Mexico's approach to equal protection review reflects the federal model.<sup>288</sup> However, in 1998, the New Mexico Supreme Court clarified its approach to rational basis review and declared that, under New Mexico jurisprudence, rational basis review requires the government to assert an actual legitimate basis, one that is founded in either fact or law.<sup>289</sup> In announcing New Mexico's new rational basis test, the court stated that this test is neither a "virtual rubber-stamp"<sup>290</sup> nor "toothless."<sup>291</sup> Unlike its federal counterpart, rational basis review in New Mexico does not "preordain[] the result by applying no real scrutiny."<sup>292</sup> As a result, New Mexico's rational basis review is the heightened form discussed by Justice Marshall in *City of Cleburne*<sup>293</sup> but rejected by the U.S. Supreme Court in *Heller v. Doe*.<sup>294</sup> In analyzing an equal protection claim under New Mexico's rational basis review, the issue before the court will be whether the government interest in treating a class of similarly situated individuals is rationally related to actual legitimate interests that can be fairly traced in fact or law. If New Mexico courts decide that an equal protection claim brought by a member or members of the gay community is deserving of rational basis review, the government will have to assert a reason based in actual policy or law to legitimize its differential treatment of the gay community. As New Mexico law and policy is replete with examples of providing more, rather than less, protection for the gay community,<sup>295</sup> it will be difficult for any branch of New Mexico government to convince the court that its differential treatment of the gay community is rationally related to any actual law or policy.

### B. *Evidence of New Mexico's Current Law and Policy Toward the Gay Community*

For over thirty years, New Mexico's political and jurisprudential history reveals a commitment to provide members of the gay community with equal protection under the law. In 1973, New Mexico Senate Bill 322, codified in 1975, abolished the law that made sodomy and sexual acts between consenting adults a criminal violation.<sup>296</sup> The legislation, sponsored by Democrat Senator Thomas Rutherford and Republican Representative Paul Brecht, was issued over twenty years before the

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287. N.M. CONST. art. II, § 18.

288. See *supra* Part II.A.

289. *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 31, 965 P.2d 305, 314; see also *Alvarez v. Chavez*, 118 N.M. 732, 740, 886 P.2d 461, 469 (Ct. App. 1994) (holding that, to survive rational basis review, the court "must be persuaded that there is an adequate basis in fact or law for the challenged classifications"). *Trujillo* rejected the heightened rational basis test of *Alvarez* and instead found that the heightened *Alvarez* standard was subsumed by its clarified approach. *Trujillo*, 1998-NMSC-031, ¶ 32, 965 P.2d at 314.

290. *Trujillo*, 1998-NMSC-031, ¶ 30, 965 P.2d at 314.

291. *Id.*

292. *Id.* (citations omitted).

293. See *supra* notes 33–34 and accompanying text.

294. See *supra* note 36.

295. See *infra* Part IV.B.

296. NMSA 1978, § 30-9-11 (1975).

U.S. Supreme Court held criminal sodomy statutes unconstitutional in *Lawrence v. Texas*.<sup>297</sup>

The New Mexico Human Rights Act<sup>298</sup> was amended in 2003 to include a prohibition against employment discrimination on the basis of sexual orientation and gender identity.<sup>299</sup> This enactment made New Mexico the fourth state to ban discrimination based on gender identity,<sup>300</sup> one of sixteen states to ban employment discrimination on the basis of sexual orientation in both the public and private sector,<sup>301</sup> and one of eleven to offer state employees domestic partner benefits.<sup>302</sup> Several governmental entities, local municipalities, and school districts, including the State of New Mexico, Albuquerque Public Schools, the City of Las Cruces, the Los Alamos School District, and the Santa Fe School Board, offer these same domestic partnership benefits.<sup>303</sup>

In 1992, New Mexico became one of the first states to hold that under New Mexico adoption law<sup>304</sup> the sexual orientation of a parent would not be a determinative factor barring second-parent adoption.<sup>305</sup> In making its decision, the court relied on New Mexico precedent, which indicated that sexual orientation is not dispositive in the determination of whether a parent is fit for custodial rights.<sup>306</sup> New Mexico courts will also hear and resolve cases involving the child custody disputes of same-sex domestic partners.<sup>307</sup>

New Mexico remains one of five states without some form of legislation defining marriage as between a man and a woman.<sup>308</sup> New Mexico's marriage law does not mention gender, but defines marriage as a civil contract between contracting parties.<sup>309</sup> This statute, in combination with the Equal Rights Act of 1973,<sup>310</sup> which

297. 539 U.S. 558 (2003).

298. NMSA 1978, § 28-1-7 (2004).

299. Human Rights Act, ch. 383, § 2, 2003 N.M. Laws 5.B.28.

300. Human Rights Campaign Found., *supra* note 112, at 34. For updated law concerning state and local protection of individuals on the basis of gender identity, see HUMAN RIGHTS CAMPAIGN, TRANSGENDER AMERICANS: A HANDBOOK FOR UNDERSTANDING (2005), available at [http://www.hrc.org/Template.cfm?Section=About\\_HRC&CONTENTID=29235&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.hrc.org/Template.cfm?Section=About_HRC&CONTENTID=29235&TEMPLATE=/ContentManagement/ContentDisplay.cfm), and Transgender Law & Policy Institute, <http://www.transgenderlaw.org/> (last visited Aug. 3, 2006).

301. Human Rights Campaign Found., *supra* note 112, at 28.

302. *Id.* at 20.

303. *Id.* at 22–23.

304. NMSA 1978, § 32A-5-36(F) (2003) (“The court shall grant a decree of adoption if it finds that the petitioner has proved by clear and convincing evidence that...the petitioner is a suitable adoptive parent and the best interests of the adoptee are served by the adoption....”).

305. A.C. v. C.B., 113 N.M. 581, 585, 829 P.2d 660, 664 (Ct. App. 1992) (holding that an adoption petitioner’s “sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation”).

306. *Id.* at 585, 829 P.2d at 664 (citing *In re Jacinta M.*, 107 N.M. 769, 771–72, 764 P.2d 1327, 1329–30 (Ct. App. 1988) (holding that the homosexual orientation of an elder brother was not dispositive in the determination of the best interests of the child, and that “[d]isapproval of morals or other personal characteristics cannot be used to determine the fitness of a person to care for a child”).

307. *Barnae v. Barnae*, 1997-NMCA-077, 943 P.2d 1036.

308. See *supra* note 136 and accompanying text.

309. NMSA 1978, § 40-1-1 (1953) (defining marriage as a “civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential”). For a history of New Mexico’s marriage law, see *In re Gabaldon’s Estate*, 38 N.M. 392, 34 P.2d 672 (1934).

310. N.M. CONST. art. II, § 18.

outlaws discrimination on the basis of sex, leaves open the question of whether, under New Mexico law, the state already implicitly allows for same-sex marriage.<sup>311</sup>

### C. Rational Basis Review Applied in New Mexico

As a result of New Mexico's established policy and law to protect the gay community from discrimination and to provide the gay community with equal rights and opportunities under the law, a law suffering a judicial challenge by a gay individual or same-sex couple may not survive rational basis review. To convince the court that its differential treatment of the gay community is rationally related to any actual law or policy, the government must be able to proffer actual evidence of law or policy to justify such differential treatment.<sup>312</sup> Unlike the gay individual or same-sex couple in any of the states that prohibit same-sex adoption by members of the gay community,<sup>313</sup> legally define marriage as between a man and a woman,<sup>314</sup> or fail to provide protection from discrimination on the basis of sexual orientation,<sup>315</sup> New Mexico is without law or policy to demonstrate the state's commitment to treating members of the gay community differently.<sup>316</sup> As such, the state can only show a policy of legally endorsing and supporting the rights of the gay community.<sup>317</sup> Without such demonstration, the government will have a difficult time meeting its burden and may not survive New Mexico's standard of rational basis review.

The court may take seriously the government's fiscal concerns as rationally related to the government's decision to legally treat a class of individuals differently.<sup>318</sup> The raising of fiscal concerns, however, is not dispositive.<sup>319</sup> The government may

311. The issue of whether same-sex marriage is implicitly allowed under New Mexico law is exemplified by the 2004 issuance of over sixty same-sex marriage licenses by Sandoval County Clerk Victoria Dunlap. Dunlap told reporters that she was "not aware of anything that would prohibit issuing marriage licenses for same-sex couples." See Joshua Akers, *Sandoval to Allow Same-Sex Nuptials*, ALBUQUERQUE J., Feb. 20, 2004, at A1 (Dunlap stated that "[t]his has nothing to do with politics or morals. If there are no legal grounds that say this should be prohibited, I can't withhold it....This office won't say no until shown it's not permissible."); see also Steve Barnes, *New Mexico: Gay-Marriage Injunction Stands*, N.Y. TIMES, Aug. 27, 2004, at A15; Christopher Lisotta, *Bringing Marriage to New Mexico*, THE ADVOCATE, July 6, 2004, at 20; Mariella Savidge, *No, You Don't: Controversy Continues to Build over the Right of Gay Couples to Wed*, MORNING CALL (Allentown, Pa.), Mar. 9, 2004, at E1. Although State Attorney General Patricia Madrid issued an injunction against Dunlap to stop issuing the licenses, the marriage licenses issued by Dunlap remain unchallenged in court. In the 2005 legislative session, the New Mexico legislature successfully blocked DOMA legislation in both the House and the Senate. See H.R. 445, 47th Leg., 2005 Reg. Sess. (N.M. 2005) (defining marriage as between a man and a woman); S. 597, 47th Leg., 2005 Reg. Sess. (N.M. 2005) (same).

312. See *supra* notes 291–296 and accompanying text.

313. See *supra* notes 223–228 and accompanying text.

314. See *supra* note 134.

315. Human Rights Campaign Found., *supra* note 112, at 28.

316. See *supra* Part IV.B.

317. See *supra* Part IV.B.

318. See *Marrujo v. N.M. State Highway Transp. Dep't*, 118 N.M. 753, 760–61, 887 P.2d 747, 754–55 (1994) (holding that under the New Mexico Torts Claim Act the state's asserted interest in protecting the public treasuries are rationally related to legitimate government interest); *Candelaria v. Gen. Elec. Co.*, 105 N.M. 167, 173–74, 730 P.2d 470, 476–77 (Ct. App. 1986) (recognizing the importance of the government's fiscal concerns in the regulation and implementation of the state's workers' compensation statutes), *superseded by statute*, NMSA 1978, § 52-1-24 (1990); *Garcia v. Albuquerque Pub. Sch. Bd. of Educ.*, 95 N.M. 391, 395, 622 P.2d 699, 703 (Ct. App. 1980) (holding that under the New Mexico Torts Claim Act limiting the liability of public employees was rationally related to the government's fiscal concerns).

319. See *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶¶ 33–35, 120 P.3d 413, 424 (holding that the government's asserted interest of avoiding additional workers' compensation costs was not an important interest);

claim that providing full access to domestic partnership benefits or providing the right to marry or enter some form of legally recognized civil union is too costly and that not providing these rights and benefits is rationally related to the states' fiscal concerns. However, given the State of New Mexico's willingness to provide its employees with domestic partnership benefits,<sup>320</sup> its interest in insuring its citizens, and the economic benefits the state will gain by providing the right to legal same-sex unions,<sup>321</sup> this fiscal challenge is unlikely to prove persuasive.

If the court does side with the government under rational basis review, recent New Mexico case law suggests that a more heightened form of scrutiny may be required.<sup>322</sup> Recent case law, coupled with New Mexico's equal protection analysis, additionally suggests that New Mexico is prepared to provide a higher degree of scrutiny to laws that differentially classify and treat members of its gay community on the basis of their sexual orientation.<sup>323</sup>

#### *D. An Argument for Intermediate Scrutiny for New Mexico's Gay Community*

While we take guidance from the Equal Protection Clause of the United States Constitution and the federal courts' interpretation of it, we will nonetheless interpret the New Mexico Constitution's Equal Protection Clause independently when appropriate.<sup>324</sup>

In *Breen v. Carlsbad Municipal Schools*, the New Mexico Supreme Court articulated the way in which members of a class of individuals who are treated differently from those who are similarly situated can prove to the court that a higher degree of equal protection scrutiny is needed to ensure their equal protection under the law.<sup>325</sup> If the New Mexico Supreme Court decides that rational basis review is not enough to strike down a law that treats members of the gay community differently than other people, then the court, under *Romer*, has the freedom to decide on a higher degree of scrutiny.<sup>326</sup> *Breen* provides the foundation for a legal argument

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Schirmer v. Homestake Mining Co., 118 N.M. 420, 423, 882 P.2d 11, 14 (1994) (holding that, under the state's workers' compensation statute, the state's legitimate fiscal concerns were less important than the health risks faced by employees); N.M. Taxation & Revenue Dep't v. Whitener, 117 N.M. 130, 133, 869 P.2d 829, 832 (Ct. App. 1993) (finding that the state's asserted interests in imposing taxes under the Controlled Substance Act were less important than the rights of criminal defendants).

320. See *supra* notes 304–305.

321. See, e.g., *Communities in Charge in Central New Mexico* (2000), <http://www.communitiesincharge.org/Phase%20One/Albet.htm> (stating that New Mexico ranks last in the nation in the percentage of its population between the ages of nineteen and sixty-four that is uninsured); Paying a Premium: *The Increased Cost of Care for the Uninsured* (2005), <http://www.familiesusa.org/resources/publications/reports/paying-a-premium-findings.html> (stating that, by 2010, New Mexico will rank second only to Texas in its number of uninsured residents). Recent research demonstrates the wealth the state will gain by providing same-sex couples the right to marry. See M.V. LEE BADGETT, R. BRADLEY SEARS, STEVEN K. HOMER, PATRICE CURTIS & ELISABETH KUKURA, THE IMPACT ON NEW MEXICO'S BUDGET OF ALLOWING SAME-SEX COUPLES TO MARRY (Mar. 2006), available at <http://www.law.ucla.edu/williamsinstitute/publications/new%20mexico%20econ%20study.pdf>.

322. See *supra* Part IV.B.

323. See *supra* Part IV.B.

324. *Breen*, 2005-NMSC-028, ¶ 14, 120 P.3d at 418.

325. *Id.*

326. This is true not only because *Romer* did not hold that laws implicating the rights of members of the gay community are subject to rational basis review but also because states can constitutionally provide more protection than the Federal Constitution. See *supra* notes 94–100 and accompanying text.

that heightened scrutiny is required for legislation directed at limiting the rights of homosexuals.<sup>327</sup> While *Breen* did not specifically address the legal issues that affect the rights of gay individuals and couples, the legal argument articulated by the New Mexico Supreme Court in *Breen* may prove helpful in an attempt to increase scrutiny protection for members of New Mexico's gay community.<sup>328</sup> If a member of the gay community or a same-sex couple raises an equal protection challenge in New Mexico, and if the challenge includes heightening scrutiny to the intermediate level, the challengers will have to follow the test laid out in *Breen*.<sup>329</sup> With over sixty same-sex married couples in New Mexico,<sup>330</sup> it is likely that the challenge will be about marriage rights but could also focus upon the denial of domestic partnership benefits.

*Breen* held that one of New Mexico's workers' compensation provisions violated the Equal Protection Clauses of both the U.S. and New Mexico Constitutions as it provided less compensation for workers impaired by mental rather than physical impairments.<sup>331</sup> In reaching its decision, the New Mexico Supreme Court decided that rational basis scrutiny provided insufficient protection for persons with mental disabilities<sup>332</sup> and held that persons with mental disabilities constitute a sensitive class deserving of intermediate scrutiny protection.<sup>333</sup> In arguing for heightened intermediate scrutiny for the gay community, members of the gay community are able to demonstrate to the court how rational basis protection has proven insufficient.<sup>334</sup>

In *Breen*, the New Mexico Supreme Court conducted a two-part analysis of New Mexico's equal protection clause.<sup>335</sup> The first part of the analysis required the petitioners to "prove that they are similarly situated to another group but are treated dissimilarly."<sup>336</sup> Upon a successful showing, the court must then determine the level of scrutiny to be applied to the challenged legislation.<sup>337</sup> By affording people with mental disabilities less compensation and therefore less protection than those with physical disabilities, the court held that New Mexico's workers' compensation legislation treats similarly situated workers differently.<sup>338</sup>

Under *Breen*, members of the gay community will be able to show how New Mexico law treats them differently than similarly situated individuals who are not gay.<sup>339</sup> For example, if the issue raised is the government's denial of domestic partnership benefits or the inability to enter some form of legally recognized union, members of the gay community can demonstrate that they are treated differently

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327. Cf. *Breen*, 2005-NMSC-028, 120 P.3d 413.

328. Cf. *id.*

329. *Id.* ¶ 8, 120 P.3d at 417.

330. See *supra* note 313.

331. *Breen*, 2005-NMSC-028, ¶¶ 7, 50, 120 P.3d at 417, 427 (stating that equal protection guarantees that the "government will treat individuals similarly situated in an equal manner").

332. *Id.* ¶¶ 17–29, 120 P.3d at 419–23.

333. *Id.* ¶ 28, 120 P.3d at 422–23.

334. For examples of how rational basis protection has proven insufficient, see *supra* Part III.

335. N.M. CONST. art. II, § 18.

336. *Breen*, 2005-NMSC-028, ¶ 8, 120 P.3d at 417.

337. *Id.*

338. *Id.* ¶ 10, 120 P.3d at 417–18.

339. Cf. *id.* ¶ 8, 120 P.3d at 417.



than heterosexuals who are married and receive the benefits of marriage, including the right to family insurance, and heterosexual couples who have the opportunity to marry, thereby receiving the benefits of marriage. Through this denial, either in the form of domestic partner benefits or the right to enter into some form of legal union, New Mexico law would treat similarly situated individuals of the gay community dissimilarly.<sup>340</sup> This differential treatment would cause members of the gay community to suffer concrete harm.<sup>341</sup>

The second step of the *Breen* analysis is the determination of the appropriate degree of scrutiny.<sup>342</sup> To qualify for intermediate scrutiny, *Breen* provides two options: "The Legislation must either (1) restrict the ability to exercise an important right or (2) treat the person or persons challenging the constitutionality of the legislation differently because they belong to a sensitive class."<sup>343</sup> The court held that, although the legislation did not impact an important or fundamental right, as people with mental disabilities belong to a sensitive class, they did qualify for intermediate scrutiny.<sup>344</sup>

While in *City of Cleburne*, the U.S. Supreme Court refused to heighten scrutiny for classifications based upon mental disability as it found these classifications at times relevant to the state's interests in providing protections and adequate services to persons with mental disabilities.<sup>345</sup> *Breen* never cited this relevance factor in its determination that classifications based on mental disability require intermediate scrutiny. But, if raised, members of the gay community can argue this factor even less relevant to classifications based upon sexual orientation.<sup>346</sup>

Members of New Mexico's gay community would be able to meet the requirements that trigger intermediate scrutiny as they could demonstrate that the law differentially treats them (1) by restricting the ability to exercise an important right and/or (2) by treating members of the gay community differently because they belong to a sensitive class.<sup>347</sup> In a challenge for domestic partnership benefits, members of the gay community may not be able to show that insurance is an important right. Yet in a challenge to civil union or marriage rights, a same-sex couple could provide precedent that states that marriage is a fundamental right.<sup>348</sup>

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340. Cf. *id.* ¶ 10, 120 P.3d at 417–18.

341. See *supra* notes 125, 133, 167–168 and accompanying text.

342. *Breen*, 2005-NMSC-028, ¶¶ 11–22, 120 P.3d at 418–21.

343. *Id.* ¶ 17, 120 P.3d at 419.

344. *Id.* ¶¶ 17, 28, 120 P.3d at 419, 422–23.

345. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The Court held that classifications denying equal protection demand intermediate or strict scrutiny when the defining feature of that classification is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id.*

346. If the state claims that laws protecting members of the gay community demonstrate the relevance in treating them differently, this argument is rebutted by all laws that protect civil rights on the basis of race and gender, which do not impact the heightening of scrutiny. The relevance contemplated by the Court in *City of Cleburne* relates to laws and state actions, such as those found in special education, that treat persons with mental disabilities differently because their disability requires the state to provide special accommodations. See *id.* at 442.

347. *Breen*, 2005-NMSC-028, ¶ 17, 120 P.3d at 419.

348. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

In addition, in a challenge to a law that either denies domestic partnership benefits or denies the ability to enter some form of legalized partnership, members of the gay community could demonstrate that the law treats them differently because they belong to a sensitive class.<sup>349</sup>

The court in *Breen* stated that intermediate scrutiny is appropriate for classes whose historic discrimination results in a systematic denial from participation in the political process.<sup>350</sup> Even after the group makes political advances, the degree of scrutiny must still apply "to protect against more subtle forms of unconstitutional discrimination created by unconscious or disguised prejudice."<sup>351</sup> The court analogized to cases that determined that gender-based classifications qualify for intermediate scrutiny to determine that similar protection is required for persons with mental disabilities.<sup>352</sup> As stated in *Breen*, the similar "historical treatment of both women and persons with mental disabilities makes it clear that the courts should be sensitive to classes of people who are discriminated against in this manner."<sup>353</sup> In spite of the government's remedial measures to overcome this history of discrimination,<sup>354</sup> there is a continuing need to provide legal protections to people with mental disabilities.<sup>355</sup> The "history of invidious discrimination" faced by people with mental disabilities continues to make them susceptible to stereotyping and further discrimination.<sup>356</sup>

As with persons with mental disabilities, New Mexico's gay community can demonstrate how, in spite of political advances, members of the gay community remain subject to "more subtle forms of unconstitutional discrimination created by unconscious or disguised prejudice."<sup>357</sup> The history of discrimination against the gay community is impossible to deny. Although there have been numerous advances,<sup>358</sup> the gay community remains subject to both federal and state discrimination<sup>359</sup> created by the inability to obtain domestic partner benefits,<sup>360</sup> in many states the inability to adopt,<sup>361</sup> and in all but one state, the inability to marry.<sup>362</sup> In nearly half

349. Cf. *Breen*, 2005-NMSC-028, ¶ 28, 120 P.3d at 422–23 (holding that persons with mental disabilities are treated differently by the law because they belong to a sensitive class).

350. *Id.* ¶ 19, 120 P.3d at 420 (citing *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

351. *Id.* ¶ 20, 120 P.3d at 420; see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (referring to the more searching judicial scrutiny required when governmental action "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

352. *Breen*, 2005-NMSC-028, ¶ 19, 120 P.3d at 420.

353. *Id.* ¶ 20, 120 P.3d at 420; see also *id.* ¶ 22, 120 P.3d at 421 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461–63 (1985) (Marshall, J., concurring) (likening the "'lengthy and tragic history' of segregation and discrimination" of persons with mental disabilities to "the worst excesses of Jim Crow" and discussing the history of forced institutionalization and sterilization)).

354. *Id.* ¶¶ 23–26, 120 P.3d at 421–22 (citing *Americans with Disabilities Act*, 42 U.S.C. § 12101 (2000); *Individuals with Disabilities Education Act*, 20 U.S.C. §§ 1400–91 (2002); and *Mental Health Parity Act* 42 U.S.C. § 300gg-5 (2000) as examples of congressional enactments to demonstrate national trends of affording people with mental disabilities protections from societal discrimination).

355. *Id.* ¶ 29, 120 P.3d at 423.

356. *Id.* ¶ 25, 120 P.3d at 422.

357. Cf. *id.*; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

358. See Human Rights Campaign Found., *supra* note 112; *supra* Part IV.B.

359. See *supra* notes 118, 133, 135–137 and accompanying text.

360. Human Rights Campaign Found., *supra* note 112.

361. See *supra* notes 216–243 and accompanying text.

362. See *supra* note 131 and accompanying text.

of our states, members of the gay community can be fired merely because they are gay.<sup>363</sup> This history of “invidious discrimination” faced by members of the gay community continues to make them susceptible to stereotyping and further discrimination.<sup>364</sup>

Under *Breen*, the final step in the determination of intermediate scrutiny is the demonstration of New Mexico’s commitment to greater protection for the class.<sup>365</sup> In *Breen*, the court stated that, although persons with mental disabilities are organized in politically effective ways, “their effective advocacy is seriously hindered by the need to overcome the already deep-rooted prejudice against their integration in society.”<sup>366</sup> Without heightened scrutiny, the advances gained by persons with mental disabilities could easily be lost.<sup>367</sup> Political gains do not “obviate the need for heightened scrutiny to examine legislation that draws distinctions based on mental disabilities.”<sup>368</sup>

As with persons with mental disabilities, members of New Mexico’s gay community can demonstrate the state’s commitment to provide protections needed to overcome discrimination.<sup>369</sup> Moreover, as noted in *Breen*, members of the gay community may warrant heightened scrutiny, as they remain affected by “deep-rooted prejudice,”<sup>370</sup> and without heightened protection the advances gained could easily be lost.<sup>371</sup> As with persons with mental disabilities, political and legal gains made by the gay community “do not obviate the need for heightened scrutiny to examine legislation that draws distinctions based on”<sup>372</sup> sexual orientation.

Upon a determination that intermediate scrutiny is proper, the last step is its implementation, under which the court will “balance the importance of the government interest against the ‘burdens imposed on the individual and on society.’”<sup>373</sup> In *Breen*, the court decided that the government’s asserted rationale of preserving the state treasury by not providing additional benefits did not outweigh the important interest of providing equal benefits to persons with mental disabilities.<sup>374</sup>

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363. Only twenty-eight states have law that prohibits an employee’s termination on the basis of sexual orientation. See Human Rights Campaign Found., *supra* note 112, at 28.

364. Cf. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 25, 120 P.3d 413, 421. The reality of homophobia is demonstrated by the increasing number of hate crimes against people purely because they are gay, as well as the disproportionate suicide rates of gay teens and the fact that many people who are gay do not publicly “come out” because they fear societal homophobic reaction. See John Alan Cohen, *Parental Duties and the Right of Homosexual Minors to Refuse “Reparative” Therapy*, 11 BUFF. WOMEN’S L.J., 67, 69–72 (2002–2003); Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gay Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 186–90 (2004).

365. *Breen*, 2005-NMSC-028, ¶ 27, 120 P.3d at 422.

366. *Id.* ¶ 29, 120 P.3d at 423.

367. *Id.*

368. *Id.*

369. See *supra* Part II.B.

370. Cf. *Breen*, 2005-NMSC-028, ¶ 29, 120 P.3d at 423.

371. Cf. *id.* For a discussion on how rational basis review is not enough to overturn DOMA and anti-adoption legislation, see *supra* Part III.

372. Cf. *Breen*, 2005-NMSC-028, ¶ 29, 120 P.3d at 422.

373. *Id.* ¶ 31, 120 P.3d at 423 (quoting *Trujillo v. City of Albuquerque*, 110 N.M. 621, 629, 798 P.2d 571, 579 (1990)).

374. *Id.* ¶¶ 40–45, 130 P.3d at 425–26.

If a New Mexico court decides that an equal protection challenge brought by members of the gay community demands intermediate scrutiny, the court must then decide whether the government has an important interest in treating members of the gay community differently and whether that interest substantially relates to the ways in which the law treats gays differently.<sup>375</sup> In the case of domestic partner benefits, as noted earlier, the government will have a difficult time demonstrating that the cost of providing the benefits is too great to provide.<sup>376</sup> While fiscal concerns are important,<sup>377</sup> the cost of providing insurance benefits to domestic partners is outweighed by the costs created by the uninsured.<sup>378</sup> If the challenge brought before the court is that of legally recognized partnerships, the question becomes more difficult given the current national climate against same-sex unions.<sup>379</sup> However, as New Mexico has successfully blocked DOMA legislation<sup>380</sup> and has a gender neutral statute that led to the marriage of over sixty same-sex couples in 2004,<sup>381</sup> it will be difficult for a New Mexico court to be persuaded that New Mexico has any public policy against same-sex unions.

As members of New Mexico's gay community could demonstrate that (1) they are treated differently than similarly situated heterosexuals; (2) this differential treatment is because they are gay; (3) in spite of political and legal advances, they require additional equal protection than rational basis review provides; (4) New Mexico's political and legal practice demonstrates a strong commitment to providing the gay community with equal protection; (5) in spite of New Mexico's demonstrated commitment, more is needed to provide members of the gay community with equal protection; and (6) as the government's important fiscal interest is outweighed by the need to provide members of the gay community with equal protection under the law, members of New Mexico's gay community should be able to survive the test set out in *Breen*. In so doing, New Mexico would become the first state to officially raise its equal protection scrutiny not only for its community with mental disabilities, but also for its gay community. With over thirty years of history to demonstrate that New Mexico's policy is to provide greater protections to members of the gay community, New Mexico may be able to accomplish this unprecedented challenge.

In *Breen*, the Supreme Court of New Mexico recognized that "the Equal Protection Clause of the New Mexico Constitution affords 'rights and protections' independent of the United States Constitution."<sup>382</sup> The court stated that, while it

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375. See *supra* notes 28–30 and accompanying text.

376. See *supra* note 323 (demonstrating New Mexico's high rates of uninsured residents). New Mexico courts require, even under rational basis review, that the interest be based in fact or law. In New Mexico, there is no fact of policy or law to demonstrate New Mexico's commitment to anything but protection of the gay community. See *supra* notes 291–296 and accompanying text.

377. *Breen*, 2005-NMSC-028, ¶ 47, 120 P.3d at 426 (noting that the government's fiscal concern about expanding workers' compensation benefits is an important interest).

378. See *supra* note 323.

379. See *supra* notes 130, 133–137.

380. See *supra* note 313.

381. See *supra* notes 311–313.

382. *Breen*, 2005-NMSC-028, ¶ 14, 120 P.3d at 418 (stating that, "[w]hile we take guidance from the Equal Protection Clause of the United States Constitution and the federal courts' interpretation of it, we will nonetheless interpret the New Mexico Constitution's Equal Protection Clause independently when appropriate").

looks to "federal case law for the basic definitions for the three-tiered approach[,]...[it has] applied those definitions to different groups and rights than the federal courts."<sup>383</sup> New Mexico's judicial approach to equal protection analysis is its own, and it may not provide other states with a model to follow. Under its equal protection law, members of the gay community both demand and deserve a higher degree of scrutiny than rational basis. This holding would go a long way toward overcoming a decade of judicial rulings upholding law that unfairly differentiates members of the gay community solely because they are not heterosexual.

## V. CONCLUSION

The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.<sup>384</sup>

A primary function of the U.S. Supreme Court is its supervisory role. The Court's opinions are the "supreme law of the land,"<sup>385</sup> and what they provide in terms of civil rights and equal protection is the constitutional floor that a state must provide. In light of a decade of precedent that cites *Romer* as the case in which the Court held rational basis the appropriate scrutiny for law that denies members of the gay community equal protection, *Romer* has served the gay community poorly, as this decade has upheld nearly all law aimed at their disparate treatment. Perhaps lower courts fail to read *Romer* thoroughly, or perhaps lower courts simply are hesitant to give *Romer* a broader reading. As courts face increased attacks of "judicial activism," it is not surprising that judges take a more conservative (even if incorrect) reading of *Romer*, especially as most judges, unless protected by Article III, face re-election.

*Romer v. Evans* remains a landmark decision as it is the first time the Supreme Court declared that legislation fueled by pure animus towards the gay community is neither legal nor tolerable. However, as *Romer* stands as a beacon for the gay community in their struggle for equal protection, its success is shadowed by the precedent discussed throughout this Comment and by an era in which anti-gay law has been promulgated and upheld under the guise of *Romer*. While it is easy to place the burden of this failure on the lower courts, either because they just did not read *Romer* fully or because they chose not to, the failure may rest with the U.S. Supreme Court. If the role of the Court's opinion is supervisory, the question a decade later is, how well has *Romer* supervised? If the intent of the *Romer* Court was to send a message of equal protection for the gay community, *Romer* has not supervised well. If the Court's intent was to pronounce that law excluding the gay community from the protection of all three branches will not be constitutionally tolerated, *Romer* was both a success and a failure for the gay community. It was a success because no law as exclusionary as Amendment 2 has since been attempted. It was a failure because, ever since the Court struck down Amendment 2, governments have successfully

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383. *Id.*

384. *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984).

385. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

used it as a draft-writing guide. As long as governments do not write a law to exclude gays entirely from all three branches of government, the law will most likely survive a judicial equal protection challenge under *Romer*. Maybe the Court's directions were not clear enough. On the other hand, maybe the Court would not have had a majority if the majority opinion had been written with more direction.

For whatever reason, a decade later, the lesson of *Romer* is that rational basis review will not provide the gay community equal protection under the law. Although this Comment demonstrates both the failure of *Romer* as well as an opportunity to resolve the scrutiny issues created by *Romer*, this is still not enough. Equality and equal protection cannot be accomplished until the majority of this nation accepts that legislation that discriminates against and marginalizes the gay community serves no purpose, let alone a rational one.