

Romer v. Evans (1996)

517 U.S. 620

After various Colorado municipalities including Aspen, Boulder, and the City and County of Denver passed ordinances banning discrimination based on sexual orientation in housing, employment, education, public accommodations, health and welfare services, and other transactions and activities, Colorado voters in 1992 adopted by statewide referendum Amendment 2 to the Colorado Constitution, which precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” Respondents, who included aggrieved homosexuals and municipalities, brought suit in state court against Governor Roy Romer and the Colorado attorney general, in their official capacities, and against the state of Colorado, seeking to declare Amendment 2 invalid and to enjoin its enforcement. The trial court granted a preliminary injunction, which was subsequently sustained by the Colorado Supreme Court on the grounds that Amendment 2 was subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. On remand, the trial court found that the Amendment failed to satisfy strict scrutiny and permanently enjoined Amendment 2’s enforcement. When the State Supreme Court affirmed, the United States Supreme Court granted certiorari.

Opinion of the Court: Kennedy, Breyer, Ginsburg, O’Connor, Souter, Stevens.

Dissenting opinion: Scalia, Rehnquist, Thomas.

MR. JUSTICE KENNEDY delivered the opinion of the Court.

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson* (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution....

Amendment 2 ... prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads: “No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.” ...

The State’s principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment’s language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado’s Supreme Court. The state court, deeming it unnecessary to determine the full extent

of the amendment's reach, found it invalid even on a modest reading of its implications. The critical discussion of the amendment, set out [by the Colorado Supreme Court] is as follows: "The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation.... The 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures."

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere is far-reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations ... [and] enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In following this approach, Colorado's state and local governments have not limited anti-discrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. Rather, they set forth an extensive catalogue of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation.

Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government....

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates.... In any event, even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating 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.

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. 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.... By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence....

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.... Respect for this principle explains why laws singling out a certain class of citizens for disfavored

legal status or general hardships are rare. 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....

Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

MR. JUSTICE SCALIA, with whom THE CHIEF JUSTICE and MR. JUSTICE THOMAS join, dissenting.

The Court has mistaken a *Kulturkampf* for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare ... desire to harm" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick* (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the

Members of this institution are selected, pronouncing that “animosity” toward homosexuality is evil. I vigorously dissent.

Let me first discuss ... the Court’s ... longest section, which is devoted to rejecting the State’s arguments that Amendment 2 “puts gays and lesbians in the same position as all other persons,” and “does no more than deny homosexuals special rights.” The Court concludes that this reading of Amendment 2’s language is “implausible” under the “authoritative construction” given Amendment 2 by the Supreme Court of Colorado.

In reaching this conclusion, the Court considers it unnecessary to decide the validity of the State’s argument that Amendment 2 does not deprive homosexuals of the “protection [afforded by] general laws and policies that prohibit arbitrary discrimination in governmental and private settings.” I agree that we need not resolve that dispute, because the Supreme Court of Colorado has resolved it for us. In *Evans v. Romer*, 882 P. 2d 1335 (1994), the Colorado court stated ... that “general laws and policies that prohibit arbitrary discrimination” would continue to prohibit discrimination on the basis of homosexual conduct as well. This analysis, which is fully in accord with (indeed, follows inescapably from) the text of the constitutional provision, lays to rest such horrors, raised in the course of oral argument, as the prospect that assaults upon homosexuals could not be prosecuted. The amendment prohibits special treatment of homosexuals, and nothing more. It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the “life partner” of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee. Or again, it does not affect the requirement of the State’s general insurance laws that customers be afforded coverage without discrimination unrelated to anticipated risk. Thus, homosexuals could not be denied coverage, or charged a greater premium, with respect to auto collision insurance; but neither the State nor any municipality could require that distinctive health insurance risks associated with homosexuality (if there are any) be ignored.

Despite all of its hand-wringing about the potential effect of Amendment 2 on general antidiscrimination laws, the Court’s opinion ultimately does not dispute all this, but assumes it to be true. The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the state constitution. That is to say, the principle underlying the Court’s opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness....

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court’s opinion: In *Bowers v. Hardwick*, we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions. But in any event it is a given in the present case: Respondents’ briefs did not urge overruling *Bowers*, and at oral argument respondents’ counsel expressly disavowed any intent to seek such overruling. If it is constitutionally permissible for a State to

make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit has aptly put it: “If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open ... to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”) And a *fortiori* it is constitutionally permissible for a State to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct. Respondents (who, unlike the Court, cannot afford the luxury of ignoring inconvenient precedent) counter *Bowers* with the argument that a greater-includes-the-lesser rationale cannot justify Amendment 2’s application to individuals who do not engage in homosexual acts, but are merely of homosexual orientation....

But assuming that, in Amendment 2, a person of homosexual “orientation” is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.

Moreover, even if the provision regarding homosexual “orientation” were invalid, respondents’ challenge to Amendment 2—which is a facial challenge—must fail. “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” It would not be enough for respondents to establish (if they could) that Amendment 2 is unconstitutional as applied to those of homosexual “orientation”; since, under *Bowers*, Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct, the facial challenge cannot succeed. Some individuals of homosexual orientation who do not engage in homosexual acts might successfully bring an as-applied challenge to Amendment 2, but so far as the record indicates, none of the respondents is such a person.

The foregoing suffices to establish what the Court’s failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here. But the case for Colorado is much stronger than that. What it has done is not only unprohibited, but eminently reasonable, with close, congressionally approved precedent in earlier constitutional practice.

First, as to its eminent reasonableness. The Court’s opinion contains grim, disapproving hints that Coloradans have been guilty of “animus” or “animosity” toward homosexuality, as though that has been established as Unamerican. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*. The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are homosexuals; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct—that is, it prohibits favored status for homosexuality.

But though Coloradans are, as I say, entitled to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceivable. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled "gay-bashing" is so false as to be comical. Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens.

There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. The Court cannot be unaware of that problem; it is evident in many cities of the country, and occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable "alternate life style." The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and of course care about homosexual rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality. See, e.g., Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 *Neb. L. Rev.* 723, 724 (1993) ("[T]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation.").

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed "sexual orientation" as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry.... I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic counter-measures as well.

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it must be unconstitutional, because it has never happened before.... What the Court says is ... demonstrably false [even] at the constitutional level. The Eighteenth Amendment to the Federal Constitution, for example, deprived those who drank alcohol not only of the power to alter the policy of prohibition locally or through state legislation, but even of the power to alter it through state constitutional amendment or federal legislation. The Establishment Clause of the First Amendment prevents theocrats from having their way by converting their fellow citizens at

the local, state, or federal statutory level; as does the Republican Form of Government Clause prevent monarchists.

But there is a much closer analogy, one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it. The constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah to this day contain provisions stating that polygamy is “forever prohibited.” ...

The United States Congress, by the way, required the inclusion of these anti-polygamy provisions in the constitutions of Arizona, New Mexico, Oklahoma, and Utah, as a condition of their admission to statehood.... Thus, this “singling out” of the sexual practices of a single group for statewide, democratic vote—so utterly alien to our constitutional system, the Court would have us believe—has not only happened, but has received the explicit approval of the United States Congress....

It remains to be explained how ... [these state constitutional provisions are] not an “impermissible targeting” of polygamists, but (the much more mild) Amendment 2 is an “impermissible targeting” of homosexuals. Has the Court concluded that the perceived social harm of polygamy is a “legitimate concern of government,” and the perceived social harm of homosexuality is not? I strongly suspect that the answer to the last question is yes, which leads me to the last point I wish to make: ... I think it no business of the courts (as opposed to the political branches) to take sides in this culture war. But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes....

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation’s law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant’s homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: “assurance of the employer’s willingness” to hire homosexuals. This law-school view of what “prejudices” must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws and which took the pains to exclude them specifically from the Americans with Disabilities Act of 1990.

Today’s opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means

that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.