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Equal Protection and Lesbian and Gay Rights

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The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution requires the states to afford equal protection of the laws to all their residents. Additionally, the Supreme Court interprets the Due Process Clause of the Fifth Amendment to impose an identical requirement of equal protection on the federal government. The Fourteenth Amendment requirement applies to all state and local government entities, including such bodies as school districts, public transit authorities, and the like. Thus, American society functions under a constitutional mandate to afford equal protection of the laws to all residents.

What does equal protection mean, as a practical matter, for lesbians, gay men, and bisexuals? Like all provisions of the Constitution, the guarantee acquires meaning in the context of actual cases decided by courts. Court rulings on equal protection claims create a complicated construct of classifications and tests that courts customarily use to explain whether a particular policy complies with the constitutional requirement. These rulings have only occasionally provided protection for gay people, although recent developments suggest a favorable trend.

To understand this body of law we must recognize that virtually every government rule or action may distinguish between different groups of people. Not all differential treatment violates the Constitution, or the whole system would grind to a halt. For example, Articles 1 and 2 of the Constitution as adopted in 1789 specify minimum ages for service in the Congress or as president, thus discriminating against those under the requisite age. Few would argue that the Fifth Amendment Due Process Clause (embodying the equal protection requirement), adopted as part of the Bill of Rights in 1791, should be
held to alter or abolish these age requirements on the ground that they deprive younger citizens of equal protection of the laws. In this instance, age is used as a proxy for maturity and experience that would be recognized by judges as an objective difference affecting qualifications to hold office. One could conclude that younger people and older people are not "similarly situated" with respect to those qualifications relevant to elective office, so it is rational to set an age limit.

Because almost all government policies result in differential treatment, courts hold that the normal distinctions stemming from government policies comply with equal protection as long as there is a rational basis founded in legitimate governmental interests underlying the policy. Governments may make distinctions, allocate benefits, and impose burdens that affect different people differently without violating the equal protection principle, so long as there is some rational justification for the policy. As to what constitutes such a justification, the Court has ruled that arguments based solely on bias, fear, or overbroad stereotypes may not be used as a rational basis to sustain legislation, but justifications based on objective differences may suffice.

Where a government draws distinctions in its treatment of different groups in laws or policies adopted through normal lawmaking procedures, the laws or policies enjoy a presumption of legitimacy. This means that the government incurs no obligation to articulate a justification for discrimination unless a challenger first provides convincing proof that no legitimate justification exists. For example, in *Heller v. Doe* (1993), a case in which a state had drawn distinctions between people who were mentally retarded and people who were mentally ill, the absence of an obvious reason to suspect that the state was motivated by prejudice meant that those challenging the policy bore a burden to prove that there was no legitimate reason for the policy distinction; only if that burden was met would the state incur any burden of justifying its policy. It is unusual in law to require somebody to prove a negative, such as the absence of a justification, and in earlier cases the Court had spoken as if the government was required at least to articulate a plausible justification for differential treatment its policies require. In *Heller*, however, the Supreme Court made clear that unless the challenger met this initial burden, the government could win without submitting any evidence. Consequently, policies reviewed under the rationality standard are rarely invalidated by the courts.

However, the courts have recognized that there are circumstances in which judicial skepticism is appropriate—when differential treatment involves some "fundamental right," grounded in history and tradition, or when a classification or distinction used by the government is "suspect" because, under the circumstances, there is reason to believe that the government was motivated by bias or prejudice rather than objective, unbiased policy concerns. In such cases, the court applies "strict scrutiny" to the government policy, which means that the government must prove that the policy is narrowly tailored to achieve a compelling governmental interest.
A court's determination whether a particular policy is subjected to rationality review, the more stringent strict scrutiny, or some level of heightened scrutiny falling between the two can obviously make a big difference in the outcome of a case. In a rationality review case, somebody challenging the legitimacy of government action bears the burden of persuading the court that the action violates the Constitution. Even in such cases, challenges can succeed when the only apparent justification for unequal treatment rests on bias or prejudice against the disfavored group. But in the absence of such a showing of raw prejudice, it is usually crucial that the challenger show at the outset that the government's policy affects a "fundamental right" or uses a classification that is "suspect."

Considerable controversy surrounds the methods used by the courts to identify such cases, because having passed that threshold, the challenger effectively shifts to the government the requirement to show that its discriminatory policy is objectively justifiable. The government's burden has been held to vary depending on the significance of the right at stake or the degree of "suspectness" adhering to the classification the government is using. For example, where the interest is characterized as "fundamental" (such as in voting rights cases) or the classification is "suspect" (such as in race cases), the government's burden is to show that its policy is justified by a compelling interest and that its policy is narrowly tailored to achieve that interest in the way least damaging to the fundamental interest or the equality principle. That is, in such cases the government must show that there is a "close fit" between its policy and the compelling goals the policy seeks to vindicate.

The Supreme Court has been sparing in identifying fundamental rights, although it has not always insisted that they be spelled out in the text of the Constitution. One of the problems in synthesizing rules from past decisions and attempting to project them forward to new controversies is that almost any past decision can be discussed at different levels of specificity or generality. Any particular court decision can be narrowly construed to be limited to its particular facts, or broadly construed to embody a general principle. Thus, in Loving v. Commonwealth of Virginia, the Supreme Court invalidated under the Equal Protection and Due Process Clauses a Virginia statute banning interracial marriages. One way of reading the Court's opinion would treat it as holding that every person has a fundamental right to be free of government interference in selecting a marital partner. Because the case involved a man and a woman, however, it might be construed at a greater level of specificity as establishing that marriage between persons of the opposite sex is a fundamental right. Furthermore, one might view Loving as standing for the proposition that race, as a suspect classification, may not be taken into account by the state in its determination of who may marry, even if the right to select a marital partner is not otherwise deemed fundamental. The Court speaks in its written opinion of marriage as fundamental, but it is speaking within the context of a dispute involving an opposite-sex couple and at a time (1967) when it was unlikely that
anyone on the Court thought their decision created a fundamental right for persons to choose marital partners of the same sex; the main portion of the opinion focuses on the racial aspect of the case.

The precedential scope of Loving became critically important when gay litigants began in the 1970s to challenge the refusal of states to issue marriage licenses to same-sex couples. Courts unanimously refused to find Loving a controlling precedent that the right of same-sex couples to marry is fundamental. Even the Hawaii Supreme Court, which ruled in 1993 that the state had to show a compelling interest to justify refusing to issue marriage licenses to same-sex couples, did not use Loving as precedent for finding a federal or state constitutional fundamental right to marry. Instead, it used an equal protection analysis based on the Hawaii Constitution, finding that just as in Loving the state violated equal protection by using a race classification in its marriage law, in this case the state violated its own state’s constitutional equal protection requirement by using a sex classification in its marriage law; the Hawaii Constitution, unlike the U.S. Constitution, explicitly forbids sex discrimination.

Identifying suspect classifications might begin with the paradigm identified by the Court in Loving: race. Beginning with African slavery from early days of colonial settlement, there is a long history of racism and attendant discrimination in the United States. As a result, racial minority groups have historically wielded inadequate political power to protect themselves from discriminatory government policies through participation in electoral politics, or to rely on free market forces to prevent private race-based discrimination in jobs, education, housing, or places of public accommodation. Furthermore, although one could argue that race is a socially constructed phenomenon, the Court has tended to view it as an immutable biological characteristic, perhaps reflecting the view that however society constructs the classification of racial groups, one’s membership in such a group is largely determined by factors over which one has no control. These attributes of race, that is, a history of discrimination, political powerlessness, and immutability, are frequently recited by lower courts as creating a checklist for determining whether other classifications are suspect.

In 1985, in City of Cleburne v. Cleburne Living Center, a lawsuit challenging a zoning ordinance that erected special barriers to group homes for the mentally retarded, the Supreme Court took a somewhat different approach in describing how it identifies suspect classifications. Writing for the Court, Justice Byron R. White explained that government classifications based on race, alienage, or national origin are deemed suspect because “[t]hese factors are 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. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state in-
terest." White did not mention immutability as being significant in this connection.

White then explained that sex classifications call for a "heightened standard of review" because sex "generally provides no sensible ground for differential treatment." Asserting that "the sex characteristic frequently bears no relation to ability to perform or contribute to society" and that sexually discriminatory policies "very likely reflect outmoded notions of the relative capabilities of men and women," he concluded that such a classification "fails unless it is substantially related to a sufficiently important governmental interest."

On the other hand, White identified a variety of characteristics that would not constitute suspect classifications. For example, intelligence or physical disability would not be suspect classifications because they do bear a "relation to ability to perform or contribute to society." White asserted that age classifications were not suspect because there was no "history of purposeful unequal treatment" and no imposition of "unique disabilities on the basis of stereotyped characteristics" associated with age. Turning to the main issue in the case, the Court held that discrimination against the mentally retarded was not suspect, observing that this characteristic did bear a relation to the individual's ability to perform or contribute to society, and that much legislation on the subject was protective rather than discriminatory. Nonetheless, the Court found, using the rationality test, that the zoning ordinance in this case was unconstitutional because there was no rational justification for treating group homes for the mentally retarded differently from other group homes, apart from stereotypical fears about mentally retarded people.

*Cleburne* illustrates a flexible approach to identifying suspect classes. Rather than utilizing a rigid checklist on which a perfect score is necessary, the Court emphasized particular items on the list and not others in deciding to apply strict or heightened scrutiny to particular classifications. Thus it appears that the determination whether sexual orientation is a suspect classification or, to put the issue somewhat differently, whether government policies that discriminate against lesbians and gay men are subject to strict or heightened scrutiny, is not a simple matter of achieving a perfect score on a checklist based on a comparison to race.

Using the checklist approach, few judges have found that policies discriminating on the basis of sexual orientation should be subjected to strict or heightened scrutiny. One judge who has in U.S. Circuit Judge William Norris, who concluded that all the race-analogy factors were met by sexual orientation. Concurring in *Watkins v. United States Army*, Norris noted that there is a long, well-documented history of antigay prejudice by government and by private actors. Sexual orientation frequently bears no relation to ability to perform or contribute to society. Gays have been saddled with unique disabilities because of prejudice or inaccurate stereotypes. The trait defining the class, in Norris's view, is for all practical purposes immutable, and despite some gains in recent years, at the relevant level of national politics for considering military
policies, gays lack the ability to defend their interests. (This last point was dramatically illustrated by the 1993 battle in Congress over the military policy, which culminated in legislative codification of a ban on service by openly lesbian, gay, or bisexual individuals.) Using strict scrutiny, Norris found that the military policy excluding gays from service was unconstitutional, but the majority of the court disposed of the case using a different theory, one not based on equal protection. Norris's view is definitely a minority view among federal judges who have decided sexual orientation discrimination claims.

Is sexual orientation a suspect classification when it is used by the government to distinguish between people? One might well go back one step and ask whether "sexual orientation" is even a characteristic recognizable for purposes of constitutional analysis. Sexual orientation can be defined as a characteristic based on the direction of erotic or emotional attraction of an individual; thus, everyone who experiences erotic attraction has a sexual orientation, whether toward members of the same sex, the opposite sex, or both. A conceptual problem emerges, however, as one looks at the myriad cases in which litigants sought to attack government policies perceived as discriminating against gay people. What exactly are we talking about in such cases, a status (state of being) or a classification defined by conduct?

For example, Colorado's Amendment 2, which was adopted by voters in 1992 and ultimately declared unconstitutional under the Equal Protection Clause by the Supreme Court in 1996, does not on its face use the term "sexual orientation." Rather, it speaks of "homosexual, lesbian, or bisexual orientation" when it forbids the adoption or enforcement of any policies "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." Is this a policy that discriminates on the basis of "sexual orientation," a status or defining characteristic, or is it, as the state of Colorado argued in defending it before the Supreme Court, only concerned with behavior?

In ruling on the constitutionality of a similarly worded city charter amendment adopted by voters in Cincinnati, Ohio, the U.S. Court of Appeals for the Sixth Circuit rejected the argument that such a policy constituted discrimination based on a personal characteristic or status. Assuming for purposes of its analysis that sexual orientation, as such, is a "characteristic beyond the control of the individual" but that lesbians, gay men, and bisexuals are to all outward appearances indistinguishable from other groups in the population, the court said, "the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts." The court asserted that in terms of one's relationship with others in society, "homosexual," "lesbian," or "bisexual" orientation, as targeted by the Cincinnati policy, was
relevant only in the context of behavior that would identify the individual as having such an orientation, and thus the policy could discriminate only in circumstances when a person's behavior had revealed his or her orientation to others. "Those persons having a homosexual 'orientation' simply do not, as such, comprise an identifiable class," argued the court; only those who acted on their orientation by engaging in revelatory conduct become identifiable.

The Sixth Circuit found this argument significant because of the weight it attached to *Bowers v. Hardwick*, in which the Supreme Court ruled that "homosexuals" do not have a "fundamental right" to engage in sodomy with each other. Interpreting *Bowers* on a more general level, the Sixth Circuit Court characterized it as standing for the proposition that "homosexuals possess no fundamental right to engage in homosexual conduct and consequently that conduct could be criminalized." From there, it was a short logical step to asserting that any conduct that reveals an individual's "homosexual orientation" is "homosexual conduct," and because the state can criminalize "homosexual conduct," a class of people who are identifiable only by the common trait of engaging in "homosexual conduct" cannot be a "suspect class" for equal protection purposes. The Sixth Circuit's argument was not original; it has been a mainstay of federal appellate courts ever since *Bowers*, most frequently cited in cases challenging the refusal of national security agencies or the armed forces knowingly to employ lesbians, gay men, and bisexuals.

The argument depends on several factors for its force, not least of which is an expansive reading of *Bowers* that goes beyond its specific holding. In *Bowers*, the Supreme Court rejected the argument that homosexuals engaging in specific conduct outlawed by a Georgia statute (anal or oral sex) were within the sphere of privacy the Court had previously identified with respect to birth control and abortion. The Sixth Circuit broadened the precedential scope of *Bowers* to all "homosexual conduct" and then labeled "homosexual conduct" any conduct by which a person reveals his or her orientation as homosexual, lesbian, or bisexual, when it asserted that heightened scrutiny could not be applied to a classification that was based on criminally proscribable conduct. However, the way individuals become identifiable as lesbians, gay men, or bisexuals is not invariably by engaging in criminally proscribable conduct, but rather by speaking, engaging in nonsexual social intercourse, and associating themselves with others. Nothing in *Bowers v. Hardwick* suggests that any state could proscribe engaging in nonsexual expressive conduct that identifies one as gay, yet in most cases it seems likely that it is exactly such conduct, not engaging in anal or oral intercourse with a partner of the same sex, that renders somebody an identifiable member of the class of lesbian, gay, and bisexual people.

The Sixth Circuit's approach bears striking similarity to the courts' analytical approach in cases challenging the military exclusionary policy. Under the current version of this policy, Congress asserts that the "presence in the armed forces of persons who demonstrate a propensity or intent to engage in homo-
sexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." Based on this legislative finding, Congress commands that members be separated from the service if they engage in, attempt to engage in, or solicit another to engage in homosexual acts (unless the member proves that he or she is not really homosexual, i.e., somebody who normally desires to engage in such acts), if they state that they are homosexual or bisexual (unless they prove that despite this statement they have not engaged in homosexual acts and have no propensity to do so), or if they attempt to marry a person of the same sex.

Challengers of this policy assert that it is a status-targeted policy. If Congress fears that homosexual conduct will disrupt good order and morale, why is it willing to tolerate the retention of individuals who engage in such conduct if they can demonstrate that they are not really "homosexuals"? Clearly, Congress is trying to rid the armed services of people who have a homosexual, lesbian, or bisexual orientation by mandating the discharge of any member whose nonheterosexual orientation comes to light as a result of any conduct, including expressive conduct or speech. The service member is not discharged because of the conduct or speech, as such, but rather because of what the speech indicates about the individual's status. The Seventh Circuit Court of Appeals first explained this distinction in BenShalom v. Marsh,20 decided under the pre-1994 policy, when it rejected a First Amendment free speech argument by a service member whose discharge was based solely on her statement that she was a lesbian.21

The Defense Department responds that the policy has everything to do with conduct and no particular concern with status, except as status bears predictive value toward conduct. Its argument is that under Bowers the Defense Department is constitutionally entitled to proscribe homosexual conduct, but its main concern is with maintaining good order and morale necessary to an efficient fighting force. The department contends that the occurrence of homosexual conduct in the military will be detrimental to its mission; thus its main concern in any particular case is to determine whether the individual is likely to engage in such conduct. Anything revealing a "propensity" to engage in homosexual conduct, including a statement that one is gay, is deemed relevant for this purpose. Such speech may identify the speaker as a member of a class defined by sexual orientation22 or it may identify the speaker as a person with a propensity to engage in homosexual conduct, a class defined by conduct. The Defense Department argues that it is concerned only with the latter; thus if the speaker can convince the department that his or her speech does not indicate such a propensity, the department will retain him or her in the service. By contrast, the military member who can persuade the Defense Department that despite his or her homosexual activity he or she is not a "homosexual" theoretically does not present a threat to the military mission, because he or she lacks the "propensity" to engage in such conduct in the future.

The level of judicial scrutiny given to Amendment 2, the Cincinnati charter
amendment, or the military policy depends on whether fundamental rights or suspect classifications are involved. When courts are considering Amendment 2 or the military policy, are they considering a status classification issue or a behavioral classification issue? Is there a meaningful distinction between the two? Should it make a difference for purposes of equal protection? Is Bowers dispositive, as most federal courts of appeals have insisted, in rejecting equal protection claims brought by lesbian and gay litigants?

It is possible that government policies may vary with respect to the type of classifications they create. There may be times when classifications or distinctions are based solely on status, others in which behavior is the central concern, and finally those in which status and behavior are conflated so that it is difficult to disaggregate them. An example of this problem is the criminal prohibition of sodomy, an issue the Supreme Court analyzed in Bowers using the privacy doctrine that has evolved under the Due Process Clause but which, as Justice John Paul Stevens observed in dissent, also presented a serious equal protection issue.

Michael Hardwick challenged the constitutionality of a Georgia statute that makes oral or anal sex a felony punishable by up to twenty years in prison. The statute does not distinguish between same-sex and opposite-sex conduct. Hardwick was a gay man who was arrested in his bedroom while having oral sex with another man. His lawsuit was joined by a married heterosexual couple, who alleged that the statute violated their right to engage in oral or anal sex. The lower courts held that the heterosexual couple lacked “standing” (i.e., the requisite personal interest in the outcome) to challenge the law, because Georgia was not actively enforcing the law against married couples. A federal appeals court ruled that unless the state could show a compelling interest justifying the law, it would violate Hardwick’s right of privacy, a fundamental right. The state appealed to the Supreme Court.

The Supreme Court framed the question as whether the constitutional right of privacy might prevent the state from making it a crime for homosexuals to engage in sodomy. According to Justice White, the question was thus restricted because Michael Hardwick, as a gay man, was limited to contesting the application of the law to him. At oral argument, counsel for the state conceded that it would be unconstitutional to prosecute a married couple under this statute. The Court held, by a vote of five to four, that the right of homosexuals to engage in sodomy did not “resemble” other kinds of conduct previously held to come within the right of privacy, and dismissed Hardwick’s challenge.

Dissenting, Justice Stevens argued that the Court had failed to address a significant equal protection issue. If, as seemed likely, the Court would hold that Georgia could not prosecute heterosexuals for engaging in sodomy in private, then there was discrimination on the basis of sexual orientation. While the sodomy law was apparently aimed at conduct, the status of those engaging in the conduct would become crucial in a determination of whether it was prohibited. The historical factors on which the Court relied in determining that
homosexuals lack a right to engage in sodomy did not support the discriminatory result of the Court’s decision, because the sources cited by the Court all involved absolute, across-the-board prohibitions on sodomous conduct, regardless of the genders of participants. (The English sodomy law from which American sodomy laws initially derived, for example, outlawed all anal intercourse and disregarded lesbianism, and biblical precedents are not gender-specific.)

When the Court found that a fundamental right of privacy did not apply to Hardwick’s case, it evaluated the sodomy law using rationality review, because the Due Process Clause requires that all government policies that restrict personal freedom must at least be found to serve some legitimate state interest. The Court concluded that the presumed moral judgment of Georgians that homosexual sodomy should be forbidden was sufficient justification. Stevens pointed out that Georgians had never made such a judgment, as all Georgia laws forbidding sodomy had been gender-neutral and made no sex-based distinctions. Georgia never presented any rationale for forbidding homosexuals from engaging in conduct that was, apparently, constitutionally protected when engaged in by heterosexuals. The Court’s opinion makes no response to Stevens’s argument.

Was Bowers about conduct, status, or both? In an amicus brief filed with the Bowers Court, which has recently taken on notoriety due to its citation and quotation by lower federal courts denying gay equal protection claims, Lambda Legal Defense and Education Fund argued that “the ‘regulation of same sex behavior constitutes the total prohibition of an entire way of life because homosexuality is inexorably intertwined with ‘homosexual conduct.’ ” Expressing agreement with this view, the circuit court in Steffan v. Perry held that the Defense Department, permitted by Bowers to forbid homosexual conduct, could rationally presume that any person identifying himself or herself as gay or lesbian was, in effect, admitting a “propensity” to engage in homosexual conduct.

Does the conflation of conduct and status mean, in the wake of Bowers, that claims of discrimination on the basis of sexual orientation must inevitably be dealt with using the relatively undemanding rationality test, as the circuit courts in the Cincinnati and Steffan cases suggest? Or, to the contrary, are the basic purposes of equal protection and due process so different that it is inappropriate for a court to look to Bowers as a precedent when evaluating a statute for compliance with equal protection? The Court’s recent decision in Romer v. Evans did not address this question but implicitly raised doubts about the continued viability of Bowers as a precedent.

In Romer, the Colorado Supreme Court held that Amendment 2 violated equal protection because of its discriminatory treatment of a fundamental right of political participation. By removing the subject of antidiscrimination protection for lesbians, gay men, and bisexuals from the normal process of legislative and executive policy making, argued the plaintiffs in that case, the state had discriminated on the basis of sexual orientation. Because participation
in the normal political process is a fundamental right, they argued, the state’s
discriminatory policy was subject to strict scrutiny under equal protection. The
Supreme Court agreed that Amendment 2 is unconstitutional but did not
directly embrace the Colorado court’s fundamental rights analysis, preferring
to analyze the measure as categorically discriminating on the basis of sexual
orientation.

The Sixth Circuit Court of Appeals, evaluating the similarly worded Cincin­
натi ordinance, found that the city had several rational bases for withdrawing
authority from the city government to forbid discrimination against gay men,
lesbians, and bisexuals. According to the court, the measure “encouraged
enhanced associational liberty” by allowing individuals to refrain from associat­
ing with homosexuals; returned the city to a “position of neutrality” on the
controversial issue of homosexuality: “reduced governmental regulation of the
private social and economic conduct of Cincinnati residents” and thus “aug­
mented the degree of personal autonomy and collective popular sovereignty
legally permitted concerning deeply personal choices and beliefs which are
necessarily imbued with questions of individual conscience, private religious
convictions, and other profoundly personal and deeply fundamental moral is­
suess”; and saved the city the expense of enforcing nondiscrimination policies.
In sum, the court found that preserving the right of its residents to discriminate
against homosexuals was a legitimate concern of the city of Cincinnati, making
rational its decision to disempower its government from forbidding such dis­
crimination. After deciding *Romer v. Evans*, the Supreme Court vacated the
Sixth Circuit’s decision and remanded the case for reconsideration.

*Romer* may signal an important development in equal protection doctrine
and its application to governmental antigay discrimination. Although the Court
never directly addressed either the question whether sexual orientation should
be treated as a suspect classification or the question of what precedential weight
*Bowers* should be given in an equal protection case, the Court’s analysis of
Amendment 2 did settle some important issues.

First, Justice Anthony Kennedy’s opinion for the Court implicitly rejected
the Sixth Circuit’s assertion that persons having a homosexual orientation could
not constitute an “identifiable class.” Kennedy implicitly rejected the attempt
to conflate behavior and status. By focusing exclusively on status, Kennedy
avoided having to mention or deal with *Bowers*. After *Romer*, the argument
that gay people are not a constitutionally cognizable class for equal protection
purposes is dead.

Second, Kennedy’s basis for holding Amendment 2 unconstitutional was his
determination that the various justifications advanced by Colorado in its de­
fense were pretexts for animus against homosexuals. Kennedy characterized
Amendment 2 as having singled out homosexuals as virtual “strangers to the
law” by categorically depriving them of any redress against discriminatory
treatment by the state. The justifications offered for Amendment 2 seemed
so disproportionately trivial in comparison to this extraordinary breadth of
discrimination as to be blatantly pretextual. Kennedy asserted that animus
against homosexuals could not, by itself, be a legitimate justification for a
discriminatory policy.

In dissent, Justice Antonin Scalia asserted the inconsistency of this result
with Bowers, which premised approval of outlawing homosexual sodomy solely
on the presumed majoritarian moral disapproval of homosexuality. How could
moral disapproval be sufficient to sustain criminal penalties imposed solely on
homosexuals, while insufficient to sustain the apparently lesser deprivation of
making it more difficult for homosexuals than for others to obtain redress for
discriminatory state policies?

The Court’s subsequent action vacating the Sixth Circuit’s decision in the
Cincinnati case and sending the matter back to the lower court for reconsidera-
tion appears to confirm this interpretation of Kennedy’s opinion. Although the
Court did not directly address whether sexual orientation is a suspect classifica-
tion or specify that antigay measures are subject to heightened or strict scrutiny
by the courts, it has established the beginnings of a new framework for analyz-
ing equal protection claims by homosexual litigants. Policies that discriminate
against homosexuals may be challenged under the Equal Protection Clause, and
animus against homosexuals will not serve as an adequate sole justification to
sustain discriminatory policies.

Whether this methodology will serve to strike down the current military
policy or bans against same-sex marriage has yet to be determined. In both of
those cases, the government will attempt to articulate justifications apart from
simple animus and may well succeed in convincing courts that the requirements
of Romer have been met. As we observed earlier, a Supreme Court decision
day have different meanings depending on the level of generality at which it is
described. Romer might be seen as sui generis, a case narrowly confined to the
extraordinarily offensive measure it invalidated. On the other hand, Romer’s
apparent contradiction of some of the reasoning of Bowers holds out hope that
future equal protection challenges to antigay government policies may fall on
more fertile soil.

Notes

1. The Supreme Court has ruled that unintentional discrimination (“disparate treat-
ment”) does not violate the Constitution. Thus, policies that do not on their face require
unequal treatment are not subject to constitutional attack. By contrast, in the Civil
Rights Act of 1964, as most recently amended in 1991, Congress has outlawed discrimi-
nation on the basis of race, religion, national origin, or sex whether intentional or
unintentional, placing on “unintentional” discriminators the burden of showing that
their actions are “consistent with business necessity.”

2. E.g., U.S. Dept. of Agriculture v. Moreno, 413 U.S. 5287 (1973) (denial of food
stamp eligibility based solely on disapproval of “hippie communes” was unconstitu-
tional); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (denial of
permit for location of residence for mentally retarded based solely on fear and stereo-
types about the retarded was unconstitutional).

mental retardation justify different standards for commitment decisions).
4. See Cleburne, supra n. 2.
5. The Court has held, for example, that sex classifications are subject to an intermediate level of heightened scrutiny, requiring the government to show that its policy is justified by important government interests. See Craig v. Boren, 429 U.S. 190 (1976).
16. The first court to articulate a version of this theory was the U.S. Court of Appeals for the District of Columbia Circuit in Padula v. Webster, 822 F.2d 97 (1987). It has since been articulated in some form by virtually every federal circuit case rejecting an equal protection claim on the merits by a gay litigant. Although the battle over military service by openly lesbian, gay, or bisexual individuals continues, in 1995 President Clinton formally ended discrimination on the basis of sexual orientation in security clearance; the Justice Department had previously ended sexual orientation discrimination in employment by the Federal Bureau of Investigation.
24. Id., quoting Lambda amicus brief.
25. 41 F.3d 677 (D.C. Cir., en banc, 1994).