US Supreme Court

Case: Romer (Governor of CO) v. Evans, 517 U.S. 620 (1996)
Date: May 20, 1996   **Votes:** 6-3

Opinion: Kennedy   **Dissents:** Scalia

Tags: Homosexual rights, Equal Protection Clause, Colorado's Constitution, religious animus, rational basis review

Question(s) Presented: Does CO's Constitution (Am. 2) violate EPC by forbidding official protections for sexual orientation discrimination?

Holdings: Yes. The Amendment violates the EPC.

Rationale: Not only does Amendment 2 not "bear a rational relationship to a legitimate governmental purpose," at 635, but it raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."   635

- "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 EPC does not permit."   635

Facts: Amendment 2 to CO's Constitution, adopted in referendum 1992, repealed ordinances in Aspen, Boulder, & Denver that protected individuals from sexual orientation discrimination. The Amendment also "prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class." 624

Legal History, Prior Appeals & Trial Court Input:
- **1977/1987/1991:** Ordinances protecting individuals from discrimination on the basis of sexual orientation passed in Aspen, Boulder, and Denver, respectively.   623-24
- **1992:** Amendment 2 passes by statewide referendum.   625
- **1993:** District Court (State) granted preliminary injunction to stay Amendment 2   625
- **1993:** CO SC "held that Amendment 2 was subject to strict scrutiny under the 14th Am because it infringed the fundamental rights of gays and lesbians to participate in the political process." (Decision based on voting rights cases)   625
- **1994:** On remand, State District Court enjoined enforcement of Am. 2   626
- **1994:** CO SC affirmed.
- **1995:** SC granted certiorari.

Attorneys' Arguments:
- **State:**
  - "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."   626
    - "This reading of the amendment's language is implausible."   626
  - Protect other citizens' freedom of association—e.g., landlords and employers with religious objections   635

▪ "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." 635

Appeals to Statute & Precedent: (*inter alia*)

- *Plessy v. Ferguson*, **163 U.S. 537, 559 (1896) (Harlan, J., dissenting):** the Constitution "neither knows nor tolerates classes among citizens."
- *Railroad Retirements Bd. v. Fritz*, **449 U.S. 166, 181 (1980) (Stevens, J., concurring):** "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect."
- *Sweatt v. Painter*, **339 U.S. 629, 635 (1950):** "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).
- *Skinner v. Oklahoma ex rel, Williamson*, **316 U.S. 535, 541 (1942):** "The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws.'" (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).
- *Department of Agriculture v. Moreno*, **413 U.S. 528, 534 (1973):** "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (emphasis in original)

Relevant U.S. History:

- Some states and municipalities have written detailed statutes prohibiting discrimination on the basis of things not covered by the SC's decisions, e.g. "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability . . . –and, in recent times, sexual orientation." 629
- Ordinances passed in Aspen (1977), Boulder (1987), Denver (1991) banning sexual orientation discrimination in housing, employment, education, public accommodations, health and welfare services. 623-24
- Colorado for Family Values—socially conservative group that led the campaign against the ordinances (existed solely to defeat the ordinances and draft and pass Amendment 2).
- Amendment 2 passed by a 53-47 percent margin.
- Governor Romer had actually opposed adopting Amendment 2, but he was sued in his official capacity so he got his name on the caption.

Discussion:

- (on Harlan's quote, above:) "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." 623
- "Sweeping and comprehensive is the change in legal status effected by this law." 627
- "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 discrimination of these laws and policies." 627
- Noting the effect with reference to laws prohibiting *general* discrimination in CO:
  - "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." 630
- "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 these persons alone.**"
  631

- "**these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.**" 631
- "The 14th Am'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**." 631
  - o "Amendment 2 fails, indeed defies, even this conventional inquiry." 632
    - ▪ Imposes "a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation." 632
    - ▪ "its sheer breadth is so discontinuous with the reasons offered for it that **the amendment seems inexplicable by anything but animus toward the class it affects;** it lacks a rational relationship to legitimate state interests." 632
- **Riff on Rational Basis Review:**
  - o "The search for the link between classification and objective gives substance to the EPC; 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." 632
  - o "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." 633
- "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.**" 633
- "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." 633
- **"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."** 633
- "A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." 634
- "Amendment 2 . . ., in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them the immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." 635
- **"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."** **635**

Dissent: Scalia

- "The Court has mistaken a Kulturkampf for a fit of spite."   636
  - All the Coloradans are trying to do is preserve "traditional sexual mores against the efforts of a politically powerful minority to revise these mores through use of the laws."   636
- BTW, *Bowers* is still good law. Homosexuality *can* be singled out for disfavorable treatment. 636
- Should have left this up to democratic means. The Constitution says nothing about it. 636
- "The amendment prohibits *special treatment* of homosexuals, and nothing more."   638
- "If merely stating this alleged 'equal protection' violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness."   639
- "The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation."   639
- "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."   640
- The holding of *Bowers* is "unassailable, except by those who [641] think that the Constitution changes to suit current fashions."   640-41
- "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."   644
- On the charge of "animus": "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*."   644
- Besides, gays usually have lots of money and political power, and they can make the laws work in their favor in the geographical areas where they are concentrated.   645-46
- Colorado made "reasonable effort to preserve traditional American moral values."   651
- Notes that law firms cannot refuse to hire on the basis of sexual orientation (IOW, gays have the lawyer lobby)   652-53
- "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."   653

Commentary:

- Majority = Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer
- Minority = Rehnquist, Scalia, Thomas