THE UNPUBLISHED CONCURRENCE IN *ROMER V. EVANS*

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The recent release of Justice John Paul Stevens's papers for the Supreme Court's 1995 term reveals the existence of a previously unknown proposed concurring opinion in the seminal 1996 case Romer v. Evans. *That proposed concurrence, co-authored by Justices O'Connor and Breyer, would have emphasized the failure of the challenged law, Colorado's Amendment 2, to satisfy traditional rational basis equal protection review, rather than the law's grounding in anti-LGB animus. Had the concurrence been published, it might have blunted the renewal of animus doctrine, with fascinating implications for subsequent constitutional doctrine involving issues as disparate as LGBT rights, immigration, and religious freedom. This Article is the first work of scholarship to identify this opinion and examine its implications.*

Of course, that concurrence was never published. Nevertheless, the Justices' negotiations over how much of that concurrence's content should be incorporated into Justice Kennedy's majority opinion, as recounted in correspondence in Justice Stevens's papers, teaches important lessons about the evolution of constitutional doctrine. In particular, the process by which Romer took its final form reminds us that the creation of judicial doctrine is rife with contingencies that belie any view of such creation as a straight-line process free of extraneous and distracting elements. Those lessons are important for us today, despite the fact that the proposed concurrence this Article reveals was never published.

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TABLE OF CONTENTS

INTRODUCTION

The partial release in May 2023 of the papers of Justice John Paul Stevens opened a window into decision-making at the Supreme Court during a tumultuous period.[1] Among the important cases decided during that era is *Romer v. Evans*,[2] the 1996 case that struck down a Colorado constitutional amendment denying protected status to sexual orientation.[3] *Romer* is known not just as the first significant

1. The most recently opened tranche of Justice Stevens's papers covers the period from 1984 to 2005. *See Supreme Court Justice John Paul Stevens Papers Open for Research at the Library of Congress*, LIBR. OF CONG., (May 2, 2023) https://newsroom.loc.gov/news/supreme-court-justice-john-paul-stevens-papers-open-for-research-at-the-library-of-congress/s/95c1fdd7-9caa-473c-acba-964f82b1edc9. That period includes, for example, the Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and constitutes the first set of released papers covering *Bush v. Gore*, 531 U.S. 98 (2000). *See* Adam Liptak, *Justices Wrestled with Court's Power in Landmark Abortion Case, Papers Show*, N.Y. TIMES, (May 2, 2023), https://www.nytimes.com/2023/05/02/us/politics/supreme-court-john-paul-stevens-papers.html (noting both the opening of Justice Stevens's papers and the fact that his papers are the only Justice's papers thus-far opened that cover the period 1994–2005).

2. 517 U.S. 620 (1996).

3. *Id.* at 623.

Supreme Court victory for gay rights but also for embracing and renewing the Court's "animus" doctrine, which originated in the 1973 case *Department of Agriculture v. Moreno*[4] and was employed a dozen years later in *City of Cleburne v. Cleburne Living Center, Inc.*[5] After *Romer*, both the Court and individual Justices applied that doctrine in gay rights, religious freedom, and immigration cases, often to strike down challenged government actions.[6]

Justice Stevens's papers, the first Justice's papers to be released that included documents concerning *Romer*,[7] reveal the existence of a proposed concurring opinion authored by Justices O'Connor and Breyer.[8] Together, those two Justices were critical to *Romer*'s six-Justice majority; without them, Justice Kennedy's opinion would have become a mere plurality opinion. Even if they had still joined Kennedy's opinion, a separate concurrence adopting a different analytical approach would have blunted the impact of the majority's emphasis on what Justice Kennedy believed was the Colorado law's (known as "Amendment 2's") deep constitutional flaw.[9]

This Article is the first work of scholarship to identify and examine this concurrence. That concurrence is not a matter of general knowledge for the simple reason that it was never officially published. Thus, in a basic sense, it is not law. Nevertheless, by relying on the Justices' discussions of that proposed concurrence and

4. 413 U.S. 528, 537–38 (1973).

5. 473 U.S. 432, 446–47 (1985).

6. *See* United States v. Windsor, 570 U.S. 744, 770 (2013) (majority opinion using the animus concept to strike down a section of the federal Defense of Marriage Act); Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring in the judgment) (employing the animus concept as the justification for voting to strike down Texas's sodomy law); Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (majority opinion using the animus concept to strike down, on religious freedom grounds, an application of a state public accommodations law to a baker who refused on religious grounds to provide a wedding cake to a same-sex couple); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020) (applying animus doctrine to an equal protection claim in the immigration context despite the Court having already resolved the case on a non-constitutional ground); *see also* Dale Carpenter, Windsor Products*: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183 (identifying, as of 2013, "an animus quadrilogy" comprised of *Moreno*, *Cleburne*, *Romer*, and *Windsor*).

7. *See* Liptak, *supra* note 1.

8. *See infra* Part IV.

9. *See* Letter from Anthony M. Kennedy, J., Sup. Ct., to Sandra Day O'Connor and Stephen Breyer, JJ., Sup. Ct. 1 (May 6, 1996) [hereinafter Kennedy May 6 Letter], *in* Papers of John Paul Stevens, J., Sup. Ct., Regarding Internal Deliberations about Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter Stevens Papers] (on file with the Library of Congress, Box 717, Folder 7) (describing the Colorado law as raising an issue "more dangerous . . . than is encountered in the usual rational basis case").

the ultimate fate of the ideas it appeared to reflect,[10] I suggest the outlines of a fascinating story of what might have been had the concurrence in fact been published. Those discussions suggest that *Romer*'s revival of the animus idea might have been blunted by O'Connor's and Breyer's proposed emphasis on the Colorado law's more conventional constitutional flaws. The resulting impact would quite likely have shifted the Court's future trajectory away from the animus idea and toward other approaches to equal protection and perhaps other approaches to constitutional individual rights more generally.[11]

Beyond the fascinating what-ifs just alluded to, the story of that unpublished opinion teaches important lessons, if not about the actual state of constitutional doctrine today, then about the process by which such doctrine is created. In turn, those lessons suggest interesting follow-on lessons about the narratives lawyers, judges, scholars, and teachers create about doctrinal evolution.[12] That story also provides another reference point for any discussion of the proper role of the Justices' internal deliberations in the project of understanding the law created by the Court's opinions.[13] Thus, even if this Article's journey through *Romer*'s unpublished concurrence constitutes, in part, an excursion into alternative history, it also holds lessons for the world we actually inhabit.

This Article begins by providing the background to the Justices' deliberations in *Romer*. Part I explains the legal and political environments in 1996 with regard to both gay rights and the equal protection doctrine. It explains that the Court faced a situation in which increasing public acceptance of gay rights presented the Court with a doctrinal conundrum, given the unattractiveness of the primary doctrinal paths it could have traveled had it wished to begin recognizing the constitutional equality rights of LGB[14] persons. Part II tells the story of the *Romer* litigation in the Colorado courts. That story reveals the doctrinal paths open to the Court once it granted certiorari in *Romer*. Part III examines the relevant evolution[15] of

10. Justice Stevens's papers do not include a draft of the concurrence. Instead, those papers reveal its existence from Justice Kennedy's letter to its authors, a copy of which was sent to Justice Stevens and which is included in his papers. *See* Kennedy May 6 Letter, *supra* note 9, at 1.

11. *See infra* Part V (discussing those possible implications).

12. *See infra* Part V (discussing those lessons).

13. *See infra* note 268 and accompanying text (citing scholars' statements of divergent views on this question).

14. The "T" component of LGBT rights is omitted because, at this point in history, transgender equality claims were still not yet front and center in either political or legal discourse. *See* Marie-Amèlie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL'Y REV. 83, 86 n.4 (2017) (making this point).

15. Other aspects of Justice Kennedy's opinion also evolved during the drafting period. Where relevant, this Article considers those other changes.

Justice Kennedy's majority opinion striking down Amendment 2. Part III reveals the changes that eventually made their way into his final opinion as well as those that he made but later withdrew.

Part IV introduces the proposed O'Connor/Breyer concurrence and reveals what seems to have been the somewhat frenzied flurry of correspondence in early May 1996 surrounding those Justices' presentation of that concurrence to Justice Kennedy.[16] It explains Justice Kennedy's response to the concurrence's points and how the other members of his six-Justice majority coalition reacted to his response. In particular, Part IV.A discusses two related aspects of the O'Connor/Breyer approach: its focus on conventional rational basis scrutiny and its inclusion of both a more detailed list of government interests that may have motivated Amendment 2 and an explanation of how those interests failed to satisfy that more conventional review.

Those aspects of the proposed concurring opinion and Justice Kennedy's attempt to accommodate O'Connor's and Breyer's preferences in order to head off its publication triggered reactions from other members of the majority coalition. Those reactions reflected both those other Justices' preferences about the *Romer* opinion in particular, as well as a broader procedural issue concerning the Court's doctrine governing facial versus as-applied strike-downs. That procedural issue centered on the Court's then decade-old decision in *United States v. Salerno*,[17] a case that had generated ongoing controversy at the Court—indeed, controversy which had reignited only a week before the May 1996 correspondence about *Romer* alluded to in the previous paragraph.[18] Part IV.B explains how the debate about *Salerno* impacted the majority coalition's discussions about the proper shape of the *Romer* opinion. The O'Connor/Breyer concurrence and the reaction of the other Justices in the tentative majority combined to create the opinion we know today as *Romer*.

16. Justice Stevens's papers do not contain a copy of the concurrence, but merely contain Justice Kennedy's response, from which strong clues may be divined about the contents of that concurrence. At this point of public access to the Justices' papers it is impossible to know whether Justices O'Connor and Breyer circulated their proposed concurrence to all the members of the Court, solely to Justice Kennedy, or to the members of the six-Justice *Romer* majority. Circumstantial evidence suggests the last of these possibilities. *See infra* note 164 (noting that Justice Kennedy's response to Justices O'Connor and Breyer copied all the other members of the tentative majority). On the other hand, Justice Kennedy's response to those authors thanks them for "offering [their concurrence] to me," Kennedy May 6 Letter, *supra* note 9, at 1, thus potentially implying that they sent it only to Justice Kennedy. And, of course, Justice Stevens's papers lack a copy of the proposed concurrence.

17. 481 U.S. 739 (1987).

18. *See infra* Subpart IV.C.

Part V steps back and considers what the Justices' deliberations in *Romer* teach us. Part V.A sketches out a possible alternative doctrinal trajectory that might have come to pass had Justices O'Connor and Breyer decided to publish their concurrence. It speculates that such a decision might have blunted the impact of Justice Kennedy's focus on Amendment 2's uniquely problematic character, and in particular, his ascription of "animus" as Amendment 2's (illegitimate) motivation. In turn, the muted impact of Kennedy's focus on animus might have stalled or even blocked the Court's turn toward animus in more recent years, in equal protection and beyond.[19]

Moving beyond speculation, Part V.B considers what the Justices' deliberations about the O'Connor/Breyer concurrence suggest about the nature of doctrinal evolution and the stories legal professionals create about that evolution. It concludes that such evolution is often more contingent than it appears in retrospect, especially without the benefit of access to the Justices' internal deliberations. While the contingent nature of legal doctrine may not change the reality of the doctrine itself,[20] it does—or at least should—impact how we understand the Court and its individual Justices as they go about constructing it. In turn, this richer, more nuanced understanding of that creation process can help us reach a deeper understanding of that doctrine. The Article concludes by considering the significance of these insights.

I. GAY RIGHTS AND EQUAL PROTECTION IN 1996

As it pertained to gay rights, the social, political, and legal world confronting the Court as *Romer* loomed was an uncomfortable mixture of stasis and roiling change.[21] By the mid-1990s, the campaign for gay rights had restarted its forward march as the gay community slowly emerged from the worst of the AIDS crisis and refocused its attention on lobbying and agitating for equality. To be sure, progress was neither immediate nor uni-directional: to take just one prominent example, President Clinton's 1993 attempt, soon after taking office, to end the military's sexual orientation discrimination policy collapsed after political and military opposition, leading to the "Don't Ask, Don't Tell" compromise that effectively satisfied neither

19. *See supra* note 6 (setting forth the use of animus-style reasoning in post-*Romer* cases).

20. *But see* Adrian Vermuele, *Judicial History*, 108 YALE L.J. 1311, 1311–12 (1999) (presenting arguments in favor of using such internal deliberations to understand the law a particular opinion creates).

21. *See*, *e.g.*, Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 856–57 (2014) (referring to that era's "changing" "cultural . . . landscape" as relevant to gay rights claims).

side.[22] Reflecting a similar equipoise in the strength and motivation of both sides, in the mid-1990s, members of Congress began attempting to amend Title VII of the Civil Rights Act of 1964 to cover sexual orientation employment discrimination, only to fail time after time.[23] More generally, as the gay rights movement became more prominent, states and localities became the sites of dispute over "no promo homo" laws that sought to prevent schools and other institutions from promoting or even acknowledging homosexuality.[24]

That social and political tumult encountered a legal context that was both slowly accommodating but also resistant to change. Despite the roadblock to federal constitutional change thrown up by the Supreme Court's 1986 decision in *Bowers v. Hardwick*,[25] some state courts, interpreting their own constitutions, had begun striking down such laws, while a few legislatures did the same.[26] But at the federal level, *Bowers* proved to be a deeply problematic precedent for gay rights litigators. Beyond rejecting any due process claim for a right to engage in same-sex intimacy,[27] *Bowers* also provided support for lower federal court decisions rejecting gay rights litigators' equality arguments.[28] Those courts reasoned that *Bowers*'s upholding of criminal penalties for same-sex *conduct* conclusively refuted any argument that unequal treatment of LGB[29] *persons* violated the

22. For an analysis of the "Don't Ask, Don't Tell" policy, see generally Robert Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413 (2008).

23. *See* E. Gary Spitko, *A Reform Agenda Premised on the Reciprocal Relationship Between Anti-LGBT Bias in Role Model Occupations and the Bullying of LGBT Youth*, 48 CONN. L. REV. 71, 98 (2015).

24. *See*, *e.g.*, David Skover & Kellye Testy, *Lesbigay Identity as Commodity*, 90 CAL. L. REV. 223, 226–27 (2002) (referring to "the 'no promo homo' creed that inspired so many statutory prohibitions and [state] constitutional initiatives in the 1990s").

25. 478 U.S. 186, 196 (1986) (upholding against a due process challenge a Georgia law prohibiting sodomy).

26. *See* Kristin Booth Glen, *Plenary Remarks: Judges and the Role of International Human Rights Law*, 3 N.Y.C. L. REV. 13, 14 n.5 (1998) (listing state court decisions, most of which were decided after *Bowers*, striking down sodomy bans under state constitutional provisions); Christopher Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws From Constitutional Attack*, 2001 WIS. L. REV. 29, 32 n.5 (recounting the progress of state legislatures repealing sodomy laws).

27. *Bowers*, 478 U.S. at 191.

28. *See, e.g.*, Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987) (affirming summary judgment against a litigant claiming the Federal Bureau of Investigation's policy against hiring homosexuals violated the equal protection component of the Fifth Amendment's Due Process Clause).

29. As explained previously, this Article's discussion of gay rights claims generally does not include transgender rights claims, as those latter claims had not claimed a prominent place on courts' constitutional agendas by the time

Equal Protection Clause.[30] To be sure, isolated lower court opinions, applying the Court's suspect class doctrine, found sexual orientation to be a quasi- or fully suspect classification, despite *Bowers*.[31] But the vast majority of federal court decisions during this era concluded that *Bowers* precluded meaningful equal protection scrutiny of sexual orientation discrimination.[32]

To be sure, as reflected in those isolated cases ruling for gay rights plaintiffs during this era,[33] *Bowers* did not conclusively preclude equal protection victories, especially if the Supreme Court led the way by example. But as *Romer* loomed, the Court's options were limited, even assuming that *Bowers* did not otherwise stand in the way.

One such option would have been for the Court to follow the example of cases such as *Watkins v. U.S. Army*[34] and conclude that sexual orientation was a suspect or quasi-suspect class, despite *Bowers*. But leaving aside the conceptual hurdle of reaching that conclusion in the teeth of *Bowers*'s validation of laws prohibiting same-sex sexual conduct,[35] that route would have required the Court to resurrect its dozen-year long experiment with suspect class analysis. That experiment, begun in earnest in the 1973 sex discrimination case *Frontiero v. Richardson*,[36] had early on encountered problems in keeping its promise of providing a value-free, purely political process-based approach to equal protection scrutiny.[37]

Bowers was decided. *See* discussion *supra* note 14. *But see infra* note 239 (explaining how more recent court opinions have connected equality claims made on behalf of LGB and transgender persons).

30. *See, e.g.*, Steffan v. Perry, 41 F.3d 677, 690–93 (D.C. Cir. 1994) (upholding a discharge of a naval midshipman after he stated he was gay, rejecting his equal protection argument on the ground that that statement reasonably reflected a proclivity to engage in conduct that under *Bowers* could be criminalized).

31. *See, e.g.*, Watkins v. U.S. Army, 847 F.2d 1329, 1349 (9th Cir. 1988), *aff'd on different grounds*, 875 F.2d 699, 731 (9th Cir. 1989) (en banc).

32. *See* Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy, and Equality*, 65 OHIO ST. L.J. 1341, 1385 n.170 (2004) (describing this approach as "[t]he standard judicial line to *de jure* discrimination in the *Bowers* period").

33. *See Watkins*, 847 F.2d at 1329.

34. *See id.*

35. *See supra* text accompanying notes 25–32.

36. 411 U.S. 677 (1973).

37. *See* John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1980) (observing that suspect class doctrine's focus on the relevance of a characteristic to the government's purposes undermines a critical component of that doctrine's process focus); Richard Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 39–40 (2010) (identifying both political

By 1985, in *City of Cleburne v. Cleburne Living Center, Inc.*,[38] the Court had signaled its dissatisfaction with that methodology. In *Cleburne*, the Court ruled in favor of the equal protection plaintiff, an entity that wished to provide services to intellectually disabled persons, but only after rejecting those persons' claim to be a quasi-suspect class.[39] In reaching that preliminary conclusion, the Court appeared to throw up its collective hands at the prospect of recognizing the intellectually disabled as quasi-suspect, conceding that it may well have satisfied the traditional suspect class criteria but nevertheless worrying that recognizing that fact would open the floodgates to too many other groups who could make similar showings.[40] One can quite reasonably interpret that conclusion as a near-definitive rejection of the methodology itself.[41]

Perhaps adding insult to injury, four years after *Cleburne*, a plurality of the Court rejected the argument that a city's race-based affirmative action contracting set-aside should be reviewed under a less-than-strict scrutiny standard because the burdened group (white persons) was not a "discrete and insular" minority.[42] The plurality reasoned simply (and simplistically) that because Black persons occupied five of the nine city council seats when the set-aside was enacted, white persons burdened by the affirmative action plan were indeed a minority in need of judicial protection.[43] After *Cleburne*, the Court never again performed a serious suspect class analysis.[44] By

process and substantive rationales in the Court's suspect class doctrine, with the relevance of the characteristic reflecting the latter rationale).

38. 473 U.S. 432 (1985).

39. *See id.* at 442 (rejecting suspect or quasi-suspect class status for the group); *id.* at 450 (concluding nevertheless that the classification was irrational).

40. *See id.* at 445–46 ("Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.").

41. To be sure, the Court did continue to apply previously decided heightened scrutiny standards. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533–34 (1996) (applying intermediate scrutiny to a state university's sex discrimination policy).

42. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989) (plurality opinion).

43. *See id.*; *see also id.* at 553–55 (Marshall, J., dissenting) (disagreeing with this approach to suspect class analysis).

44. *But see* United States v. Virginia, 518 U.S. at 533–34 (explaining how the Court continued to apply previously-decided heightened scrutiny standards); *infra* note 239 (noting how in recent years lower courts have accorded such scrutiny to both sexual orientation and transgender discrimination).

1996, the prospect of the Court according suspect class status to sexual orientation, while embraced by scholars[45] and a few courts,[46] did not appear to be a likely prospect.[47]

The other obvious option was rational basis review.[48] Indeed, *Moreno* and *Cleburne*, the "animus" cases which *Romer* was eventually fated to join,[49] were explained by the Court as cases in which the challenged government action failed rational basis scrutiny.[50] Moreover, in the same year as *Cleburne*, the Court decided three cases, all involving state discrimination against out-of-staters, in which the discrimination was held to fail rational basis scrutiny.[51] Finally, as late as 1989, the Court had struck down two state actions on rational basis equal protection grounds.[52]

45. *See, e.g.*, Mark Strasser, *Unconstitutional? Don't Ask. If it Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 403 (1995).

46. *See* Watkins v. U.S. Army, 847 F.2d 1329, 1352–53 (9th Cir. 1988), *aff'd on different grounds*, 875 F.2d 699, 711 (9th Cir. 1989) (en banc).

47. Since *Romer*, scholars have continued to express skepticism about the prospect of the Court expanding the categories of suspect classes. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57 (2011) ("Litigants still argue that new classifications should receive heightened scrutiny. Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, this canon has closed." (footnotes omitted)). *But see infra* note 239 (citing cases that accord heightened scrutiny to sexual orientation discrimination and a scholar citing analogous cases dealing with transgender discrimination).

48. Of course, yet another option—one taken by the Court in 2003—would have been simply to overrule *Bowers* and find substantive due process protection for same-sex intimacy. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling *Bowers*). Still, such a decision focused on that particular conduct would not have automatically and necessarily provided broad-spectrum protection for LGB persons.

49. *See, e.g.*, Carpenter, *supra* note 6, at 203 (identifying those three cases as animus cases).

50. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (concluding that the challenged action was the result of "*irrational* prejudice" (emphasis added)); Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) ("[T]he classification here in issue is not only 'imprecise,' it is wholly without any rational basis.").

51. *See* Metro. Life Ins. v. Ward, 470 U.S. 869, 881–83 (1985); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 619 (1985); Williams v. Vermont, 472 U.S. 14, 27 (1985).

52. *See* Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n, 488 U.S. 336, 343 (1989) (striking down, as failing the rational basis standard, a county's property valuation for tax purposes that resulted in large disparities in tax liabilities for the owners of otherwise-similar property); Quinn v. Millsap, 491 U.S. 95, 107, 109 (1989) (striking down, as failing the rational basis standard, a state law limiting membership on a county board to owners of real estate).

Nevertheless, in the eleven years between *Cleburne* (and the other rational basis cases decided that same year[53]) and *Romer*, in only those two 1989 cases did the Court strike down a law as failing rational basis review.[54] By contrast, in some cases during those eleven years, the Court embraced an extremely deferential understanding of rational basis review or otherwise discounted the impact of those earlier rational basis strike downs.[55] For example, in *FCC v. Beach Communications*,[56] the Court added a very deferential gloss on the rational basis standard.[57] That same year (1993), the Court, deciding another case involving intellectual disability discrimination, rejected the argument that *Cleburne* had applied a more stringent version of rational basis review.[58] Thus, similarly to the option of applying explicitly heightened scrutiny to sexual orientation discrimination, the prospect of applying a more muscular version of rational basis review would have required the Court to reverse its recent doctrinal direction. Moreover, the prospect of more muscular rational basis review would have stood in at least some

53. *See* cases cited *supra* note 51.

54. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 416–17 (1999) (citing, in an appendix, the Supreme Court's cases during this period when the plaintiff succeeded on a rational basis theory).

55. *See id.* at 407 ("After 1989, . . . for seven years [the Court's] rational basis opinions took on a tone of deference that was so extreme that it seemed quite certain that heightened rationality was henceforth of historical interest only.").

56. 508 U.S. 307 (1993).

57. *See id.* at 314–15:

> On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of "'legislative facts'" explaining the distinction "[o]n the record" has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. . . . These restraints on judicial review have added force "where the legislature must necessarily engage in a process of line-drawing."

(citations omitted) (first quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973); then quoting Beach Commc'ns, Inc. v. F.C.C., 959 F.2d 975, 986 (D.C. Cir. 1992); and then quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

58. *See* Heller v. Doe, 509 U.S. 312, 321 (1993); *see also* Farrell, *supra* note 54, at 399–402, 407–08 (discussing, respectively, *Heller* and *Beach Communications*).

tension with the Court's assumption, present in its jurisprudence since its seminal opinion in *United States v. Carolene Products Co.*,[59] that the Court should stay its hand when legislation burdened a group that was able to protect its interests in the democratic political process.[60]

To be sure, as *Romer* loomed, the Court's "animus" cases remained as a potential doctrinal path for the Court. However, just like suspect class analysis and muscular rational basis review, the outlook for the Court's animus jurisprudence was not necessarily promising in 1996. Other than in *Cleburne*, *Moreno* had largely laid fallow since it had come down in 1973, with its "bare … desire to harm" language cited only to be distinguished[61] or in dissents.[62] Indeed, cases in 1987 and 1993 described, respectively, *Moreno* and *Cleburne* as cases reflecting nothing more unusual than traditional rational basis review.[63]

One final doctrinal path existed as a method for ruling in favor of at least a particular type of gay rights equality claim. That path involved the Court employing its line of political process restructuring cases that originated with the 1969 case *Hunter v. Erickson*.[64] That line of cases found constitutional problems with laws that made it

59. 304 U.S. 144, 152 (1938).

60. *See id.*:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Justice Stone, the author of *Carolene Products*, appended to this statement a footnote (the famous "Footnote 4") that suggested situations in which such deference would not be appropriate. *See id.* at 152–53 n.4; *see also* Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

61. *See, e.g.*, Weinberger v. Salfi, 422 U.S. 749, 772 (1975); Johnson v. Robison, 415 U.S. 361, 383 n.18 (1974).

62. *See, e.g.*, N.Y.C. Transp. Auth. v. Beazer, 440 U.S. 568, 609 n.15 (1979) (White, J., dissenting); Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 485 U.S. 360, 375–76 (1988) (Marshall, J., dissenting); *see also id.* at 370 n.8 (majority opinion) (describing *Moreno* as a traditional rational basis case). *International Union* is discussed later in this Article. *See* text accompanying *infra* notes 225–29.

63. *See International Union*, 485 U.S. at 370 n.8 (describing *Moreno* as a traditional rational basis case and explaining that standard in very deferential terms); Heller v. Doe, 509 U.S. 312, 321 (1993) (describing *Cleburne* in similar terms).

64. 393 U.S. 385 (1969).

more difficult for a minority group to use the political process to obtain desired legislative changes.[65] Of course, that theory would only apply to particular types of sexual orientation discrimination. To be sure, as *Romer* was litigated in the Colorado courts, the political process restructuring idea arose as a viable doctrinal solution to the constitutional problem posed by Amendment 2.[66] Nevertheless, as explained below,[67] this approach also posed difficulties for a Court that had largely moved away from the assumptions that underpinned that theory.

Thus, by the mid-1990s, no obvious doctrinal path presented itself to the Supreme Court should it wish to rule in favor of sexual orientation discrimination plaintiffs. *Romer* would require it to find one. The state court opinions in *Romer* offered several.

II. *ROMER* IN THE STATE COURTS

On election day 1992, the people of Colorado voted, by a 53.4% to 46.6% margin,[68] to include in the state constitution an initiative known as Amendment 2. Amendment 2 reads as follows:

> 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.[69]

Amendment 2 did not arise in a vacuum. The early 1990s was a period in which the culture wars familiar today took on their modern

65. *See id.* at 391 (noting that the challenged law "places special burden on racial minorities within the governmental process"); *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470 (1982) (noting the challenged law "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities").

66. *See* Romer v. Evans, 517 U.S. 620, 625 (1996) (recognizing that the Colorado Supreme Court relied on Supreme Court "precedents involving discriminatory restructuring of governmental decisionmaking" in finding that "Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process").

67. *See* text accompanying *infra* notes 108–15.

68. Evans v. Romer (*Evans I*), 854 P.2d 1270, 1272 (Colo. 1993) (en banc).

69. *Id.*

cast.[70] The gay rights movement, powered both by mainstream political groups and more marginalized groups who had organized highly visible direct actions against those seen as complicit in the nation's halting and reluctant response to the AIDS crisis,[71] had grown beyond its urban strongholds and was making equality claims across the nation. The backlash that the movement generated intersected with more traditional forces' activism on a host of other social issues, including violent music lyrics[72] and federal funding of allegedly-obscene artwork,[73] to create a tense atmosphere in which the two sides clashed in something close to equipoise.[74] The pro-Amendment 2 campaign was part of that backlash: materials promoting Amendment 2 spoke of a militant, anti-traditional values movement that, not content with mere "equality," insisted on aggressively promoting what that campaign characterized as a deviant and destructive lifestyle—what its campaign materials referred to as demands for "special rights," not "equal rights."[75]

A state trial court granted a preliminary injunction against the implementation of Amendment 2, concluding that the plaintiffs had shown a likelihood of success on their claim that the law violated their federal equal protection rights by enacting private biases into law.[76] For that reason, the court concluded that the state would have to satisfy strict scrutiny in order to defend Amendment 2's constitutionality successfully.[77]

70. Indeed, it has been suggested that the term "culture wars" was popularized in the early 1990s. *See* Bobby Duffy & Kirstie Hewlett, *How Culture Wars Start*, KINGS COLL. LONDON: NEWS CTR. (May 24, 2021), https://www.kcl.ac.uk/news/how-culture-wars-start.

71. *See* Colin Ashley, *Gay Liberation: How a Once Radical Movement Got Married and Settled Down*, 24 NEW LAB. F. 28, 30–31 (2015) (discussing the tension between mainstream and more radical gay rights factions).

72. *See* Theresa Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40 SOCIO. PERSP. 265, 276–79 (1997) (analyzing rap lyrics of the late 1980s and early 1990s).

73. *See* Karen Kowalski, National Endowment for the Arts v. Finley*: Painting a Grim Picture for Federally Funded Art*, 49 DEPAUL L. REV. 217, 220–21 (1999).

74. *See, e.g.*, Gary Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 134 (2003) ("It appears that the pro-gay and anti-gay forces have fought to a stalemate in the post-*Bowers* era.").

75. *See*, *e.g.*, Sharon E. Debbage Alexander, Romer v. Evans *and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination*, 6 TEX. F. ON C.L. & C.R. 261, 274 (2002) (recounting that argument). *See also* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW, 1097–1105 (3d ed. 2011) (reprinting those campaign materials).

76. *See* Evans v. Romer, No. 92 CV 7223, 1993 WL 19678, at *11 (Colo. Dist. Ct. Jan. 15, 1993).

77. *Id.* at *12.

On appeal, the state supreme court affirmed the lower court, but on a different ground. According to that court, the plaintiffs "have argued . . . that the right identified by the trial court, when 'read in light of the arguments actually presented to [it] . . . is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation.'"[78] Thus, the state supreme court understood the plaintiffs' argument as not based on animus, or even on conventional equal protection means-ends scrutiny, but instead on the asserted fundamental right to equal participation in the political process.

The state supreme court embraced that argument. Synthesizing U.S. Supreme Court cases dealing with a wide variety of political equality issues, from the size of legislative districts[79] to minority parties' rights[80] to direct restrictions on voting,[81] the majority discerned a fundamental federal constitutional right to equal access to the political process.[82] In discerning the existence of that right, it found most important a line of Supreme Court cases starting with *Hunter v. Erickson*.[83] The court described the *Hunter* line as "cases involving attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes."[84] *Hunter* and its progeny involved challenges to laws that required higher levels of official approval before certain policies (for example, in *Hunter*, a fair housing policy) could be enacted or amended.[85] One can easily see the intuitive analogy between the *Hunter* line and Amendment 2, which withdrew lower government-level protections against sexual orientation discrimination and required proponents of gay equality rights to succeed at the level of amending the state constitution. Distilling these distinct lines of cases, the court drew the following lesson: "When considered together,

78. Evans v. Romer (*Evans I*), 854 P.2d 1270, 1274 (Colo. 1993) (en banc).

79. *See id.* at 1276 (first citing Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964); then citing Reynolds v. Sims, 377 U.S. 533 (1964); and then citing Wesberry v. Sanders, 376 U.S. 1 (1964)); *see also id.* at 1277–78 (discussing those cases).

80. *See id.* at 1276 (citing Williams v. Rhodes, 393 U.S. 23 (1969)); *see also id.* at 1278–79 (discussing Williams and Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)).

81. *See id.* at 1276 (first citing Dunn v. Blumstein, 405 U.S. 330 (1972); then citing Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); and then citing Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966)); *see also id.* at 1276–77 (discussing those cases).

82. *See id.* at 1282.

83. 393 U.S. 385 (1969).

84. *Evans I*, 854 P.2d at 1276; *see also id.* at 1276 (first citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); then citing Gordon v. Lance, 403 U.S. 1 (1971); and then citing *Hunter*, 393 U.S. 385); *see also id.* at 1280–82 (discussing those cases).

85. *See Hunter*, 393 U.S. at 386.

these cases demonstrate that the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny."[86]

Applying this rule, the court concluded that LGB persons constituted the sort of identifiable group that came within the parameters of the rule announced above.[87] It then concluded that Amendment 2 targeted LGB persons for such denial of equal political access, thus distinguishing other state constitutional provisions that also required that certain policy decisions be made at higher governmental levels (and thus were harder to change).[88] Thus, because Amendment 2 transgressed the fundamental right the court discerned from Supreme Court precedents, it affirmed the lower court's conclusion that the government had to proffer a compelling interest warranting infringing on that right. As the government did not proffer any such interest at this early stage of the litigation, the state supreme court ruled for the plaintiffs and affirmed the lower court's preliminary injunction.[89]

That decision sent the case back down to the state trial court for a final decision based on the state supreme court's holding that Amendment 2 was subject to strict scrutiny.[90] The lower court held a trial to determine whether that standard was met.[91] At trial, the government offered six interests it claimed were compelling:

> 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; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of our children.[92]

86. *Evans I*, 854 P.2d at 1276.

87. *See id.* at 1285 ("Amendment 2 expressly fences out an independently identifiable group."); *see also id.* at 1282–84 (rejecting the defendants' argument that the *Hunter* rule applied only to race cases or, at most, to cases involving the political burdening of suspect classes).

88. *See id.* at 1283–84 (distinguishing generally-applicable laws requiring higher-level government approval); *id.* at 1285 ("Amendment 2 expressly fences out an independently identifiable group.").

89. *See id.* at 1286.

90. *Id.*

91. Evans v. Romer, No. 92 CV 7223, 1993 WL 518586, at *2 (Dist. Ct. Colo. 1993).

92. *Id.* As Part IV explains, it was these six interests that Justices O'Connor and Breyer proposed be evaluated and rejected in their draft concurrence.

Other than the fourth and sixth interests, the court found none of these interests to be compelling.[93] While the court concluded that the fourth interest was compelling and it assumed the sixth was, it held that Amendment 2 was not narrowly tailored to promote them, as is required under strict scrutiny.[94] The court concluded its analysis by considering, as the plaintiffs had requested, whether sexual orientation was a suspect or quasi-suspect classification.[95] It concluded that it was not.[96]

On appeal, the state supreme court again affirmed the trial court.[97] Echoing the lower court's analysis, it rejected most of the defendants' proffered interests as not compelling, and, for the interests it either found or assumed were compelling, it concluded that Amendment 2 was not narrowly tailored to achieve them.[98]

Thus, as *Romer* reached the U.S. Supreme Court, the state court opinions provided several theories justifying striking down Amendment 2. The state supreme court's original decision in *Evans I* embraced the equal political participation theory.[99] The trial court on remand from *Evans I* and the state supreme court in *Evans II* rejected the defendants' reliance on a variety of interests the defendants claimed were compelling and that Amendment 2 was alleged to have promoted in a narrowly tailored way.[100] (Of course, that same proffer of interests could have provided a vehicle for evaluating and potentially striking down Amendment 2 on a conventional rational basis theory.) The trial court on remand also considered the possibility that sexual orientation was a suspect or

93. *Id.* at *9.

94. *See id.* at *6–8 (rejecting the fourth interest); *id.* at *9 (rejecting the sixth interest).

95. *See id.* at *9–12.

96. *Id.* at *12.

97. Evans v. Romer (*Evans II*), 882 P.2d 1335, 1338 (Colo. 1994) (en banc).

98. *See id.* at 1342–45 (holding that Amendment 2 was not narrowly tailored to protect religious, family, and associational privacy interests); *id.* at 1345–46 (holding that preserving the state's law enforcement resources for protecting other equality rights was either not a compelling interest or, if it was, that Amendment 2 was not narrowly tailored to promote it); *id.* at 1346–47 (holding that promotion of morality is not a compelling interest and that, if it were, Amendment 2 was not narrowly tailored to promote it); *id.* at 1348 (holding that "prevent[ing] government from supporting the political objectives of a special interest group" was not a compelling government interest); *id.* at 1348–49 (holding that "deter[ring] factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government,'" *id.* at 1348 (quoting the defendants' argument), is not a compelling interest); *id.* at 1349 (rejecting the argument that aggregating these interests rendered them compelling even if none was compelling in isolation). On appeal to the Colorado Supreme Court in *Evans II*, the defenders of Amendment 2 did not assert the children's protection interest. *See id.* at 1340 n.2.

99. *See supra* notes 79–89 and accompanying text.

100. *See supra* notes 90–98 and accompanying text.

quasi-suspect class, thus triggering heightened judicial scrutiny even if Amendment 2 had not been held to burden the fundamental equal protection right to equal access to the political process.[101] And finally, the trial court in its original preliminary injunction decision embraced the theory that Amendment 2 was invalid because it enacted private biases into law.[102] Perhaps ironically, it was a version of this last theory—the first one a state court offered as a justification for striking down Amendment 2—that the Supreme Court embraced.[103]

III. *ROMER* IN THE SUPREME COURT

A. The Court's Options—and Their Difficulties

As suggested by Part I's discussion of the doctrinal landscape confronting the Court in 1996, *Romer* presented a difficult question.[104] Assuming that at least some of the Justices voting to grant certiorari did so because they wished to strike down Amendment 2,[105] the most obvious path for doing so—via the

101. *See* Evans v. Romer, No. 92 CV 7223, 1993 WL 518586, at *9, *12 (Dist. Ct. Colo. 1993); *see also id.* at *13 (declining to apply rational basis review to Amendment 2, in light of the state supreme court's holding that Amendment 2 was subject to strict scrutiny.)

102. Evans v. Romer, No. 92 CV 7223, 1993 WL 19678, at *11 (Colo. Dist. Ct. Jan. 15, 1993).

103. Romer v. Evans, 517 U.S. 620, 632, 635–36 (1996) (noting that the breadth of Amendment 2 "is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects" before holding that the statute violated the Equal Protection Clause).

104. *See* Letter from Stephen Breyer, J., Sup. Ct., to Anthony M. Kennedy, J., Sup. Ct. (Jan. 23, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7 [hereinafter Breyer January 23 Letter] (describing *Romer* as "a very difficult case").

105. Recall that before the case got to the U.S. Supreme Court, it was litigated exclusively in state courts. Thus, the state courts' decision to strike down a state law as unconstitutional, while surely falling within the Supreme Court's jurisdiction due to the federal ground for that holding, presented a less compelling justification for granting certiorari. In turn, this observation increases the initial plausibility of an explanation that deals with the Justices' views—one way or the other—about Amendment 2's constitutionality. Nevertheless, this speculation about the Justices' motives for granting certiorari are not fully borne out by the documentary evidence. Justice Stevens's docket sheet for *Romer* indicates that the votes for granting certiorari did not perfectly match the Justices' votes on the merits, either at conference or ultimately. In particular, while the dissenters in *Romer* (Chief Justice Rehnquist and Justices Scalia and Thomas) voted to grant certiorari, conduct consistent with a motivation to reverse the lower court, three members of the ultimate majority affirming the lower court decision (O'Connor, Kennedy, and Breyer) also voted to grant *cert.* (The three other members of the ultimate majority—Stevens, Souter, and Ginsburg—voted to deny certiorari). *See* Sup. Ct. Docket Sheet from Romer

application of heightened scrutiny following a holding that sexual orientation was a suspect or quasi-suspect classification—appeared doubtful by 1996, given the Court's apparent abandonment of the project of creating new suspect classes.[106] The other obvious alternative—finding Amendment 2 to fail rational basis scrutiny—presented its own problems. Again, as noted earlier, that conclusion, while potentially supportable by the smattering of 1980s cases in which the Court struck down laws based on rational basis review, was also potentially inconsistent with more recent doctrine, which had adopted a more deferential version of that review.[107]

The state supreme court's equal political access rationale, set forth in its *Evans I* opinion, presented its own challenges. It is true that the Court reaffirmed *Hunter* at least once, using it to strike down another state law in 1982.[108] Nevertheless, the Court's turn throughout the 1980s toward a classification rather than a subordination-based understanding of equal protection,[109] described by two scholars as an understanding that reflects "formally symmetrical [race discrimination] rules,"[110] raised questions about the viability of a theory that turned, as *Hunter* did, on identifying when a policy decision impacted minority interests. Indeed, those two scholars, writing around the time *Romer* arrived at the Court, questioned "whether the Supreme Court would embrace such a context-sensitive doctrine if *Hunter* or *Seattle* [the 1982 case] arose for the first time today."[111]

Indeed, looking forward 18 years past *Romer*, in *Schutte v. Colation to Defend Affirmative Action*[112] the Court eventually gave *Hunter* a decidedly mixed reception.[113] But, even by the mid-1990s, with the coalescing of a conservative Court majority oriented toward

v. Evans, 517 U.S. 620 (1996) (No. 94-1039), *in* Stevens Papers, *supra* note 9, at Folder 6 [hereinafter Docket Sheet]. The fact that the Court ultimately affirmed the lower court on a different, innovative ground adds weight to any tentative conclusion that not much can be gleaned from the Justices' certiorari votes.

106. *See* text accompanying *supra* note 40.

107. *See* text accompanying *supra* note 55.

108. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486–87 (1982). *But see* Crawford v. Bd. of Educ., 458 U.S. 527, 540–42 (1982) (distinguishing *Hunter* to reject a political restructuring claim in a case decided the same day as *Seattle*).

109. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507–11 (1989).

110. Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1028 (1996).

111. *Id.* at 1027. The "*Seattle*" in this quote refers to *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). *See supra* note 84 (referencing *Seattle*).

112. Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291 (2014).

113. *See* Steve Sanders, *Race, Restructuring, and Equal Protection Through the Lens of* Schuette v. BAMN, 81 BROOK. L. REV. 1393, 1395–96 (2016) (discussing the lineup in *Schuette* and explaining how a majority gave *Hunter* at best a limited reading).

an anti-classificationist approach to equal protection,[114] one can understand why those two scholars, publishing their work the same year as *Romer*, expressed doubt about whether *Hunter* would have come out the same had it been decided at that point in history.[115] At the very least, then, for the Court confronting *Romer*, expanding the *Hunter* doctrine beyond race—and in particular to a classification that was not already suspect—was not an obviously attractive path.

The unavailability of other obvious and palatable paths forward in *Romer*, a phenomenon that perhaps prompted Justice Breyer to describe *Romer* as a "very difficult case,"[116] might make it understandable why Justice Kennedy ultimately adopted the approach he did when writing the *Romer* majority opinion. But that path itself was not without difficulties, as this Article now explains.

B. The Evolution of the Opinion

1. The Court's Initial Encounters With Amendment 2

The Court's initial deliberations in *Romer* revealed an immediate concern with Amendment 2's unusual (and troubling) features. The oral argument featured significant discussion between the Justices and the advocates about Amendment 2's breadth, in particular, about whether it disallowed the use of generally-applicable laws to prohibit and remedy discrimination against LGB persons.[117] In turn, that concern about Amendment 2's breadth triggered concern about Amendment 2's novelty,[118] and, by extension, its lack of amenability to the means-ends review that constitutes the stuff of conventional

114. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223, 224 (1995) (stating, as one of "three general propositions with respect to governmental race classifications" the proposition of "consistency: '[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification'" (alteration in original) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989))).

115. *See* Amar & Caminker, *supra* note 110, at 1027.

116. Breyer January 23 Letter, *supra* note 104.

117. *See, e.g.*, Transcript of Oral Argument at 6, 26–27, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039) (raising this issue); *see also* Kevin G. Walsh, *Throwing Stones: Rational Basis Review Triumphs Over Homophobia*, 27 SETON HALL L. REV. 1064, 1072 n.56 (1997) ("Much of the discussion at oral argument [in *Romer*] centered on whether generally applicable laws would continue to apply to lesbians and gay men."). This issue was closely related to the question, also debated at oral argument, whether Amendment 2 merely denied LGB persons "special rights." *See* Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 L. & INEQ. 117, 143 (2012) ("The 'special rights' argument prominently resurfaced in oral arguments [in *Romer*]—the term was used in some variation numerous times.").

118. *See* Transcript of Oral Argument, *supra* note 117, at 4, 8.

equal protection scrutiny.[119] As one advocate and scholar concluded, "It was the extreme overbreadth of Amendment 2—not the identity of the class of persons covered by the Amendment—that concerned Justice Kennedy and his colleagues in the *Romer* majority. … The concerns raised by the Justices during oral argument became the rationale for the Court's facial invalidation of Amendment 2."[120]

As noted immediately above,[121] the concerns raised by Amendment 2's unusual breadth found their way into the final opinion in *Romer*. They also appeared in the Justices' discussions at their post-oral argument conference. Justice Stevens's conference notes in *Romer*, while difficult to decipher,[122] provide fragmentary evidence of those concerns. Most notably, Justice Kennedy, who ultimately authored the majority opinion, was apparently reported by Justice Stevens as urging affirmance, not on the ground that Amendment 2 lacked a rational basis, but instead on the ground that it constituted a "paradigmatic" violation of equal protection to make a particular group an "outcast."[123]

Other Justices' thoughts are harder to decipher from Stevens's notes, but some indications nevertheless appear. Justice O'Connor apparently voted to affirm the judgment of the Colorado Supreme Court,[124] but was apparently reported as suggesting "disavow[ing]" its rationale; in particular, she appeared to argue that "*Akron*" (presumably *Hunter v. Erickson*, which involved a decision made by

119. *See* Romer v. Evans, 517 U.S. 620, 632 (1996) ("[E]ven 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 . . . .").

120. Richard F. Duncan, *The Narrow and Shallow Bite of* Romer *and the Eminent Rationality of Dual-Gender Marriage*, 6 WM. & MARY BILL RTS. J. 147, 150 (1997). In addition to being an academic, Professor Duncan participated in *Romer* as a co-author of an amicus brief supporting the state's position. *See id.* at 149 & n.14; *see also* Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory for Gay Rights?*, 35 CAL. WEST. L. REV. 275, 287–88 (1999) ("Justice Kennedy's majority opinion [in *Romer*] concentrated on the peculiar aspects of Amendment 2. In his words, Amendment 2 was a '[s]weeping and comprehensive' change in the law. In oral arguments, the Justices expressed the same concern over Amendment 2." (alteration in original) (footnotes omitted)).

121. *See* text accompanying *supra* note 120.

122. The author wishes to acknowledge the assistance of Saul Amezcua, Samuel Axelrod, and Aisha Iftikhar in attempting to read those notes.

123. Sup. Ct. Conference Notes following Romer v. Evans, *in* Stevens Papers, *supra* note 9, at Folder 6 [hereinafter Conference Notes]. A notation that appears to have been connected to these comments from Justice Kennedy appears to have drawn a contrast between "outcast" and "classification." *Id.* Another such notation appears to read that "Leg[islature] may not 'outlaw' a class." *Id.*

124. *See id.*; *see also* Docket Sheet, *supra* note 105 (noting her vote at conference).

the people of the City of Akron[125]) "does not control."[126] Justice Ginsburg was apparently reported to have stated that Amendment 2 "creates an unprotected class" and renders LGB persons "lesser peoples."[127] Justice Stevens himself apparently recorded himself as stating, among other things, that Amendment 2 was "creating [a] favored class."[128] Perhaps notably, given his eventual co-authorship of the proposed concurrence that this Article discusses, Justice Breyer called for affirming the state supreme court's judgment, but "narrowly."[129] Justice Souter appears to have been reported to state that there was no "need" for a "fundamental right" and that it was "not [a] permissible government objective by making just one group ineligible for leg[islative] protection."[130]

These tentative, fragmentary, and incomplete[131] reports of the views of the Justices in the tentative *Romer* majority suggest that the concerns expressed at oral argument about Amendment 2's problematically unusual characteristics carried over into the Justices' discussion at the conference. That tentative conclusion finds support in Justice Kennedy's statement months later, referring to "the sense of the Conference that it almost would be disingenuous on our part to

125. *See* Hunter v. Erickson, 393 U.S. 385, 386 (1969) (identifying the City of Akron as the defendant).

126. *See* Conference Notes, *supra* note 123 (appearing to read, in the box reserved for Justice O'Connor's comments, "Akron does not cont").

127. *See id.*

128. *Id.* This is significant language for Justice Stevens, who generally understood equal protection scrutiny as simply requiring government to pursue a public purpose, rather than a private motivation. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring) ("In my own approach to [equal protection] cases, I have always asked myself whether I could find a 'rational basis' for the classification at issue. The term 'rational,' of course, include a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring in the judgment) ("There is only one Equal Protection Clause. It requires every State to govern impartially."); Nordlinger v. Hahn, 505 U.S. 1, 34 (1992) (Stevens, J., dissenting) ("A *legitimate* state interest . . . must have a purpose or goal independent of the direct effect of the legislation and one 'that we may reasonably presume to have motivated an impartial legislature.'" (quoting *Cleburne*, 473 U.S. at 452 n.4 (Stevens, J., concurring))).

129. *See* Conference Notes, *supra* note 123.

130. *Id.*

131. This presentation of Justice Stevens's notes does not purport to be comprehensive, even for the Justices in the majority whose views are partially recounted in the prior two text paragraphs, in light of the difficulty in deciphering some of his handwriting.

ignore that something more dangerous is abroad [in Amendment 2] than is encountered in the usual rational basis case."[132]

Given both his and the majority's tentative views, one might expect Justice Kennedy's early drafts of *Romer* to focus on Amendment 2's unusual characteristics. The next Subpart examines an early draft of *Romer* and reveals that to indeed be the case.

2. The Early Insignificance of Conventional Rational Basis Review

This emphasis on Amendment 2's uniquely problematic features was reflected in an early draft of Justice Kennedy's opinion.[133] After laying out the Court's understanding of Amendment 2, particularly its suspicion that it did more than simply repeal explicit statutory

132. Kennedy May 6 Letter, *supra* note 9, at 1.

133. Except where otherwise noted, this discussion pertains to Justice Kennedy's third draft, which appeared to have been circulated in January 1996. *See* text accompanying *infra* note 146 (discussing the date of that draft). This Article focuses on the third draft as its starting point because, as Part IV explains, most of the significant changes relevant to this Article appeared in the transition from the third to the fourth draft.

With two possible exceptions, for current purposes, there were no relevant substantive changes between the first draft and the third. The first exception deals with a change from the first to the second drafts. When the first draft turned to apply the equal protection scrutiny it had just finished laying out, it stated as follows:

> Amendment 2 defies this conventional inquiry. First, the Amendment has the peculiar property of redefining the legal status of a single, named group without attaching the redefinition to any particular public-regarding purpose; it is an undifferentiated imposition on a narrow class of persons, an exceptional form of disentitlement.

First Draft Opinion at 10, Romer v. Evans, No. 94–1039 (drft. Jan. 19, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7 [hereinafter First Draft].

The second draft changed this language to read as follows, with the changes identified in italics:

> Amendment 2 defies 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 Draft Opinion at 10, Romer v. Evans, No. 94–1039 (drft. Jan. 22, 1996) (emphasis added), *in* Stevens Papers, *supra* note 9, at Folder 7 [hereinafter Second Draft].

This appears to be a relatively small substantive change, but a substantive change nonetheless. If anything, it moved the opinion further away from conventional rational basis review by removing the reference to the lack of "any particular public regarding purpose." First Draft, *supra*, at 10. This change lasted into the final version of the opinion. *See* Romer v. Evans, 517 U.S. 620, 632 (1996).

The second substantive change deals with an issue Justice Ginsburg raised again toward the end of the Justices' deliberations on *Romer*. That issue is discussed later in this Article. *See infra* note 214 and accompanying text.

protections for LGB persons,[134] the draft explained that a basic feature of rational basis review was its inquiry into whether the discrimination it visited on the burdened group was justified by a legitimate government interest.[135] Even though that review demanded neither that the discrimination be precisely tailored to that interest or that the interest be compellingly important, the draft explained that "[b]y 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."[136] That explanation set the stage for Justice Kennedy's analysis of Amendment 2.

This early draft's application of that analysis differed from the final version appearing in the U.S. Reports in a small but nevertheless significant way. The third draft read as follows:

> Amendment 2 defies this conventional inquiry [required by rational basis review]. 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

134. *See* Third Draft Opinion at 4–9, Romer v. Evans, No. 94-1039 (drft. Jan. 23, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7 [hereinafter Third Draft].

135. *Id.* at 10–11.

136. *Id.* at 11. One might already begin to discern in this explanation a slight shift away from conventional, nearly toothless rational basis review. Justice Kennedy's explanation that rational basis review requires a connection to an "independent" justification, *id.*, suggests at least some discomfort with the approach the Court took in a 1980 equal protection rational basis case, *Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980). In *Fritz*, a seven-Justice majority upheld a statutory classification, with six of those Justices, speaking through Justice Rehnquist, appearing to suggest that the purpose underlying the statute could be discerned from the classification itself. *See id.* at 176 (for purposes of performing means-ends review, "the plain language of [the challenged statute] marks the beginning and end of our inquiry"); *id.* at 186–87 (Brennan, J., dissenting) (arguing that this approach reduces equal protection scrutiny to a tautological inquiry that necessarily concludes that the legislature intended to do what it in fact did); *id.* at 180 (Stevens, J., concurring in the judgment) (agreeing with Justice Brennan's assessment). In response, Justice Stevens, who agreed only with the majority's result, argued that rational basis review required testing what the legislature did against either "the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature." *Id.* at 181. Justice Kennedy's requirement that even rational basis review required testing the law against "an independent and legitimate" legislative end, Third Draft, *supra* note 134, at 11, reflects Justice Stevens's more rigorous understanding of rational basis scrutiny—a conclusion buttressed by the fact that Justice Kennedy's draft cited Justice Stevens's *Fritz* concurrence. *See id.*

> Amendment cannot be explained by anything but animus toward the class that it affects.[137]

By contrast, the final version of the opinion reads as follows, with the following quote's italics identifying the added substantive[138] language:

> 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 it affects*; it lacks a rational relationship to legitimate state interests*.[139]

The added language italicized above suggests that the final opinion moved, ever so slightly, in the direction of conventional rational basis review. As explained later in this Article,[140] that move may well have been prompted by the O'Connor/Breyer concurrence.

The same subtle shift appears later in the opinion. After explaining the significance of Amendment 2's odd quality of imposing a broad disability on a particular class,[141] the final opinion then moved immediately to what it described as its more "conventional"[142] flaws, inserting the following language that was absent from the Third Draft: "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."[143] As with the opinion's earlier reference to conventional rational basis review,[144] this additional mention of traditional means-ends review was also absent from the third draft.[145] Its inclusion again suggests a subtle shift in the opinion toward more conventional means-ends scrutiny.

137. See Third Draft, *supra* note 134, at 10.

138. This portion of the final version of the opinion also differs from the third draft with regard to capitalization and stylistic choices.

139. Romer v. Evans, 517 U.S. 620, 632 (1996) (emphasis added).

140. *See infra* Subpart IV.B.

141. *See Romer*, 517 U.S. at 635 ("Amendment 2 . . . 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.").

142. *Id.*

143. *Id.* (citation omitted).

144. *See* First Draft, *supra* note 133, at 10.

145. *See* Third Draft, *supra* note 134, at 12.

3. The Return of Conventional Rational Basis Review

The draft described in the previous Subpart was marked as circulated on January 23, 1995.[146] The year identifier is surely wrong, as the Court heard arguments in *Romer* on October 10, 1995.[147] But assuming the correctness of the month and date,[148] Justice Stevens's papers indicate that the Justices' discussion of Justice Kennedy's opinion receded until early May, over three months after the assumed January 23, 1996 circulation date.[149] However, a flurry of activity in early May appears to have led Justice Kennedy to make one and then another additional set of changes to the opinion. This Subpart identifies those changes. The next Part examines how those changes were likely prompted by Justices O'Connor and Breyer's proffer of a concurring opinion and, in turn, by other Justices' reactions to that first set of changes in early May.[150]

At some point—quite possibly May 6[151]—Justice Kennedy circulated a fourth, undated draft of the opinion.[152] For current purposes, the most important changes involved giving increased prominence to more conventional equal protection review.[153] The prior Subpart explained the shift in this direction between the Third Draft and the final opinion.[154] As explained immediately below, most—although not all—of the changes that Subpart identified occurred between the Third and Fourth Drafts.

First, the second paragraph of its equal protection analysis, quoted earlier and explaining Amendment 2's unusual nature, now ended with a statement shifting its focus toward a more conventional means-ends analysis. [155] In the fourth draft, the concluding sentence

146. Circumstantial evidence for the correctness of the month and day identifiers for that draft appears in the form of Justice Breyer's note to Justice Kennedy, joining his opinion. That note is dated January 23, 1996; its timing is consistent with a timeline in which he joined the opinion upon reading the third draft. *See* Breyer January 23 Letter, *supra* note 104.

147. *See* Romer v. Evans, 517 U.S. 620, 620 (1996).

148. *See* Breyer January 23 Letter, *supra* note 104.

149. *See id.* (providing circumstantial evidence of the correctness of that date).

150. *See infra* Subpart IV.B.

151. *See id.* (explaining the basis for that likelihood).

152. *See* Undated Fourth Draft Opinion at 1, Romer v. Evans, No. 94-1039 (drft. May 1996), *in* Stevens Papers, *supra* note 9, at Folder 7 [hereinafter Fourth Draft].

153. The Fourth Draft also both included a discussion of a Nineteenth Century case, *Davis v. Beason*, 133 U.S. 333 (1890), and provided a longer, more detailed discussion of Amendment 2's scope. *See id.* at 12. This latter issue is discussed later in this Article. *See* text accompanying *infra* notes 200–07.

154. *See supra* Subpart III.B.2.

155. *Compare* Third Draft, *supra* note 134, at 10 ("Second, its sheer breadth is so discontinuous with the reasons offered for it that the Amendment cannot be explained by anything but animus toward the class that it affects."), *with* Fourth

of that paragraph now read, with the added language italicized: "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*."[156]

Second, in the fourth draft, Justice Kennedy added language to a paragraph that appeared later in the opinion and focused on the Court's animus rationale.[157] That paragraph had previously ended with the following sentence, which reflected the animus rationale: "Amendment 2, [] in making a general announcement that gays and lesbians shall not have the general 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."[158] Justice Kennedy's fourth draft added to that paragraph the following sentence that again pointed instead to a more conventional means-ends review: "We conclude that, in addition to the far-reaching deficiencies 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."[159]

The third and final relevant change concerned the specification of the interests Colorado offered in defense of Amendment 2. The third draft of the opinion referred to those interests in general terms—as relating to protecting citizens' freedom of association and conserving the state's law enforcement resources to combat other types of discrimination.[160] By contrast, the fourth draft quoted the state supreme court's recitation, in *Evans II*, of the six interests the state had proffered before the trial court.[161] The fourth draft then rejected those interests, explaining as follows:

> The state does not explain, though, how these interests can justify preventing homosexuals from seeking any and all protections against discrimination, no matter how drawn or justified. The interests the state cites are not at stake in most

Draft, *supra* note 152, at 11 ("Second, its sheer breadth is so discontinuous with the reasons offered for it that the Amendment cannot be explained by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.").

156. Fourth Draft, *supra* note 152, at 11 (emphasis added). At this point, the language that ultimately appeared at the start of that paragraph—that Amendment 2 "*fails, indeed* defies, even this conventional inquiry," *Romer v. Evans*, 517 U.S. 620, 632 (1996) (emphasis added)—remained as it had been in the January 23 draft; that is, the fourth draft lacked the statement that Amendment 2 "fails" rational basis scrutiny. Fourth Draft, *supra* note 152, at 11.

157. *See id.* at 15.

158. Third Draft, *supra* note 134, at 12.

159. Fourth Draft, *supra* note 152, at 15.

160. *See* Third Draft, *supra* note 134, at 12.

161. Fourth Draft, *supra* note 152, at 15.

> of the range of matters the amendment covers, from laws governing the pricing of insurance to ordinary public accommodations laws.[162]

These three changes all refocused the fourth draft toward a more conventional rational basis means-ends review. However, the third of those changes did not survive into the final opinion. The reasons for that exclusion—and more generally, the reasons for the *inclusion* of the other changes noted above—are suggested in the next Part. That Part tells the story of a flurry of activity concerning *Romer* that erupted a mere two weeks before the final opinion was handed down.[163]

IV. THE PROPOSED CONCURRENCE

The existence of a draft concurrence in *Romer* is revealed, not (or at least not yet) by the presence of the concurrence itself, a copy of which is absent from Justice Stevens's files, but instead by a letter from Justice Kennedy, *Romer*'s author, to Justices O'Connor and Breyer, acknowledging and responding to those Justices' joint effort in drafting a concurrence.[164] That letter discussed several issues raised by the draft.[165] This Part identifies and discusses those issues as relevant to this Article, and explains Justice Kennedy's response and the other Justices' reactions to his response.

A. The May 6 Kennedy Letter

On May 6, Justice Kennedy wrote a letter to Justices O'Connor and Breyer, copying the other members of his six-Justice majority

162. *Id.* The fourth draft then added yet another paragraph, dismissing the dissent's citation of the preservation of sexual morality as an interest, both because the state had disclaimed that interest and also because, "even if [the Court] assumes [that interest] to be legitimate," *id.* at 16, that interest did not justify withdrawing "the protections of specialized, noncontroversial, often mundane laws, rules, and regulations covering areas like insurance and health care." *Id.* The draft's willingness only to "assume" the legitimacy of that interest is worthy of note, suggesting Justice Kennedy's early skepticism about the legitimacy of morality-based justifications for laws—a skepticism that eventually found expression in his opinion for the Court in *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (endorsing an earlier dissenting opinion's statement that the promotion of morality, by itself, is not a legitimate government interest). *See* Jonathan Amgott, *Post* Windsor *Prospects for Morals Legislation: The Case of Polygamous Immigrants*, 26 STAN. L. & POL'Y REV. 513, 521–24 (2015) (discussing *Lawrence*'s implications for morality-based legal regulation).

163. *Compare infra* Part IV (discussing conversations among the Justices occurring on May 6 and 7, 1996), *with* Romer v. Evans, 517 U.S. 620, 620 (1996) (identifying the date the opinion was handed down as May 20, 1996).

164. *See* Kennedy May 6 Letter, *supra* note 9, at 2 (noting Justices Stevens, Souter, and Ginsburg marked as recipients of a copy).

165. *Id* at 1–2.

(Justices Stevens, Souter, and Ginsburg).[166] That letter began by thanking those two Justices "for putting your ideas into a careful concurrence and offering it to me for inclusion in a revision of the circulating opinion."[167] He identified four concerns the concurrence raised and stated his belief that he had "accommodated all four."[168] Recognizing the stakes the potential concurrence raised, he observed that "an opinion is weakened when any of the members of the Court necessary to the majority write separately to adopt a different rationale."[169] In so doing, he acknowledged that the proposed concurrence indeed "adopt[ed] a different rationale"[170] from his own draft opinion. That fact renders his accommodation attempt worthy of careful consideration.

B. "Rational Basis Scrutiny in a Conventional Sense"[171]

The first point the Kennedy letter makes is to acknowledge the concurring Justices' view that "Amendment 2 fails rational basis scrutiny in a conventional sense."[172] The second point he makes, which he notes is connected with the first one,[173] acknowledges the would-be concurring Justices' desire "to recount all of the state's (and the dissent's) proffered reasons for the amendment and to refute each one."[174] Justice Kennedy concluded his discussion of these two related points by pointing to changes he made to the opinion, "us[ing] much of [Justices O'Connor's and Breyer's] language."[175]

What were those changes? Aside from a brief addition, tacked on to the previous draft's conclusion that Amendment 2 was based on animus, stating that that law "lacks a rational relationship to legitimate state interests,"[176] these additions appear to consist of a recitation and refutation of six interests that, according to the draft,

166. *See id.* at 1 (addressees); *id.* at 2 (listing the Justices who were copied).

167. *Id.* at 1.

168. *Id.* at 1–2. This Part discusses three of those four concerns: a greater emphasis on conventional rational basis review, a more detailed recitation and refutation of the state's asserted interests justifying Amendment 2, and a deeper discussion of Amendment 2's applicability to generally applicable Colorado non-discrimination laws. *See id.* The fourth concern raised by Justices O'Connor and Breyer dealt with an unrelated matter—the possible relevance to the opinion of a Nineteenth Century case, *Davis v. Beason*, 133 U.S. 333 (1890). *See* Kennedy May 6 Letter, *supra* note 9, at 2. This Article omits discussion of that final issue because that discussion is not directly relevant to the aspects of the opinion this Article focuses on.

169. *Id.* at 1.

170. Kennedy May 6 Letter, *supra* note 9, at 1.

171. *Id.*

172. *Id.*

173. *See id.*

174. *Id.*

175. *Id.*

176. *See* Fourth Draft, *supra* note 152, at 11.

the state cited,[177] as recounted by the state court decision below,[178] as well as the dissent's proffered interest in "preserving traditional sexual mores."[179] Those six interests include versions of the two interests the final opinion cited: preserving the associational freedoms of Coloradans who did not wish to deal with LGB persons and conserving the state's anti-discrimination enforcement resources for other types of discrimination.[180] But they also included "deterring factionalism," "preserving the integrity of the state's political system," "preventing the government from subsidizing the political objectives of a special interest group," and "promoting the physical and psychological well being of Colorado children."[181] Recall that, with the exception of the final one,[182] these were all interests the Colorado Supreme Court had considered and rejected in *Evans II*.[183]

Despite his willingness to specify these interests and his more general willingness to acknowledge more traditional notions of rational basis review, Kennedy's response to O'Connor and Breyer also expressed concern about diluting what he apparently understood as "the sense of the Conference that it almost would be disingenuous . . . to ignore that something more dangerous is abroad [in Amendment 2] than is encountered in the usual rational basis

177. *See id.* at 15.

178. There is some ambiguity regarding the particular interests that the Court attributed to the state at this stage of its drafting work. Justice Kennedy's Fourth Draft, which likely was his response/accommodation to the O'Connor/Breyer concurrence, quoted *Evans II*'s recitation of the state's interests. *See* Fourth Draft, *supra* note 152, at 15 (quoting *Evans II*, 882 P.2d 1335, 1339–40 (Colo. 1994)). However, that quotation omitted *Evans II*'s caveat, expressed in a footnote, that "[t]he state has not reasserted the sixth interest [promoting children's well-being] on appeal" to the state supreme court. *Evans II*, 882 P.2d at 1340 n.2. Nor did the petitioners raise this interest explicitly in their briefing to the U.S. Supreme Court. *See* Brief for Petitioner at 39–48, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008429 (grouping the interests they asserted into "Maintain[ing] the Integrity of Civil Rights Laws," *id.* at 41, "Enhanc[ing] Individual Freedoms," *id.* at 43, and "Achiev[ing] Statewide Uniformity and Deter[ring] Factionalism," *id.* at 47).

179. *See* Fourth Draft, *supra* note 152, at 15.

180. *See Romer*, 517 U.S. at 635 ("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.").

181. Fourth Draft, *supra* note 152, at 15. *But see supra* note 178 (noting ambiguity about the state's presentation of the child protection interest before the Supreme Court).

182. *See supra* note 178.

183. *See supra* note 98.

case."[184] One can thus perceive the outlines of a struggle over the primary focus of the *Romer* majority opinion, between, on the one hand, Kennedy's clearly preferred emphasis on both animus and his theory that Amendment 2 constituted a literal violation of equal protection[185] and, on the other, O'Connor's and Breyer's preference for placing at least relatively more weight on a traditional rational basis rationale.

Still, as of May 6, it appeared as though Justice Kennedy was willing to include that longer list of proffered state interests, and more generally was moving the opinion in the direction of conventional rational basis review to the at least relative deemphasis of the draft opinion's animus focus. Indeed, putting together the date and content of his letter with the content of his fourth draft suggests that that draft was in fact his response to O'Connor's and Breyer's concurrence and his "accommodat[ion]"[186] to their preferences. This sequence would suggest a simple case of majority-coalition Justices suggesting changes to a draft majority opinion and the author of the opinion adopting those suggestions.

But that simple story does not fully explain what actually happened. The reasons go to the second major impact of the draft concurrence.

C. The Salerno *Issue*

One of the issues that arose in the majority coalition Justices' discussions during the crucial May 6-7 time period concerned the viability of a holding striking down Amendment 2 on its face. That question implicated the Court's then-relatively recent opinion in *United States v. Salerno*.[187] The coalition's discussion of the *Salerno* issue arose in two different contexts.

Begin with *Salerno* itself. *Salerno* is a 1987 case that upheld the constitutionality of a federal law requiring the pretrial detention of criminal defendants after a prescribed procedure yielded particular findings about an individual defendant's dangerousness.[188] However, because it involved a defendant's facial challenge to that law, *Salerno* has become particularly influential for its statement of the appropriate standard courts should apply when confronted with a

184. Kennedy May 6 Letter, *supra* note 9, at 1; *see also* text accompanying *supra* notes 123–30 (describing what appears to be the content of Justice Stevens's conference notes).

185. *See, e.g.*, Kennedy May 6 Letter, *supra* note 9, at 2 ("The point of this opinion is that this sort of legislation is illicit for the most fundamental of reasons.").

186. *Id.* at 1.

187. 481 U.S. 739 (1987).

188. *Id.* at 741.

facial, rather than an as-applied, challenge to a statute.[189] Writing for the Court in *Salerno*, Chief Justice Rehnquist explained that "[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."[190]

The first *Salerno* issue arising in *Romer* concerned Justice Kennedy's agreement to provide a detailed recitation of the state's proffered interests assertedly justifying Amendment 2.[191] In his May 6 response to Justice Kennedy's letter of earlier that day, Justice Stevens expressed concern with the Fourth Draft's provision of that detailed recitation. Stevens explained that "[the new draft's] identification of the [state] interests … suggests that some applications of this overly broad amendment would be valid."[192] After providing an example of a possibly valid application of a law allowing sexual orientation discrimination (a hypothetical ordinance granting a religious belief-based exemption from a law prohibiting sexual orientation discrimination in housing), Stevens then continued: "If such valid applications do exist, our holding [striking down Amendment 2 on its face] would seem to run afoul of *Salerno*."[193]

It is unsurprising that Justice Stevens raised the *Salerno* issue. While his dissent in *Salerno* itself focused on the underlying substantive legal issue and not the standard for facial statutory strike-downs,[194] nine years later—and only one week before he raised the *Salerno* issue in the *Romer* discussions—he expressed his disagreement with Chief Justice Rehnquist's stringent "no set of facts"[195] standard in *Janklow v. Planned Parenthood, Sioux Falls Clinic*.[196] Given that presumed coincidental timing, it is unsurprising

189. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 672 (2010) ("Federal appeals courts generally describe *Salerno*'s 'no set of circumstances' concept as the controlling test for resolving facial challenges across almost all constitutional doctrines."). The "no set of circumstances" language Professor Kreit quoted was set forth in *Salerno*, 481 U.S. at 745.

190. *Salerno*, 481 U.S. at 745.

191. Justice Kennedy's discussion of this issue was recounted in *supra* Subpart IV.B.

192. Letter from John Paul Stevens, J., Sup. Ct., to Anthony M. Kennedy, J., Sup. Ct. 1 (May 6, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7 [hereinafter Stevens May 6 Letter].

193. *Id.*

194. *See Salerno*, 481 U.S. at 767–69 (Stevens, J., dissenting).

195. *Id.* at 745 (majority opinion).

196. 517 U.S. 1174, 1175 (1996) (Stevens, J., opinion respecting the denial of certiorari) (describing *Salerno*'s statement as "unsupported by citation or precedent" and "also unnecessary to the holding in the case"); Washington v. Glucksberg, 521 U.S. 702, 740 (1997) (Stevens, J., concurring) ("I do not believe

that his contribution to the *Romer* discussion centered on the facial/as-applied issue.[197] In his response to Justice Kennedy's inclusion of the full set of state interests assertedly justifying Amendment 2, he urged Kennedy to use the opportunity presented by the potential constitutionality of some applications of Amendment 2 to "make perfectly clear"[198] that the existence of some potentially constitutional applications of a law did not prevent the Court from striking down the law on its face.[199]

The second *Romer* issue implicating *Salerno* dealt with Amendment 2's scope—that is, whether it extended beyond simply repealing laws that provided explicit protection to LGB persons and instead also prohibited applications of generally-applicable laws to the extent those applications protected LGB persons.[200] This question mattered because a broad understanding of Amendment 2 would simultaneously refute the argument that it merely denied LGB persons "special rights"[201] and strengthen the force of Justice Kennedy's argument that Amendment 2 imposed unusually broad burdens on those persons.[202] More immediately, it also mattered because Justices O'Connor's and Breyer's proposed concurrence apparently emphasized this point.[203]

In his May 6 letter responding to O'Connor and Breyer, Justice Kennedy explained that he had previously considered going into detail about that broad interpretation but worried about going beyond

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the Court has ever actually applied such a strict standard [as that set out in *Salerno*], even in *Salerno* itself . . . ."); *see also* Stevens May 6 Letter, *supra* note 192, at 1 (describing that statement as "extravagant dictum").

197. *See Janklow*, 517 U.S. at 1175; Steven Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1322 (2005) (describing *Janklow* as "one of the main debates between Justice Scalia and Justice Stevens over the meaning and applicability of the *Salerno* rule").

198. Stevens May 6 Letter, *supra* note 192, at 1.

199. *See id.* at 2 (offering language to that effect).

200. *See, e.g.*, Transcript of Oral Argument, *supra* note 117, at 38 (raising the question of whether after Amendment 2 generally applicable state non-discrimination laws could still be deployed to prohibit sexual orientation discrimination).

201. *See* Romer v. Evans, 517 U.S. 620, 626 (1996) (noting the state's "special rights" argument); *id.* at 638 (Scalia, J., dissenting) ("The amendment prohibits *special treatment* of homosexuals, and nothing more."); *id.* at 631 (majority opinion) (explaining Amendment 2's breadth); *id.* ("[W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights.").

202. *See id.* at 632 ("[T]he 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.").

203. *See* Kennedy May 6 Letter, *supra* note 9, at 1 ("You would like to stress the harms the Amendment would cause by depriving homosexuals of the ability to invoke the protections of laws or regulations forbidding arbitrary discrimination and the like.").

the state supreme court's authoritative construction of Amendment 2.[204] Justice Kennedy also expressed worry that accentuating this aspect of the analysis would have the unintended effect of raising the *Salerno* issue.[205] While not explicitly stated, his concern appeared to rest on the idea that such a detailed discussion of Amendment 2's effects would open the door for the dissent to argue that at least some applications of this now-broadly understood law would in fact be constitutional, thus precluding a facial strike-down.

Despite these two *Salerno*-based concerns, Justice Kennedy "nonetheless . . . made changes along the lines"[206] Justices O'Connor and Breyer suggested, both with regard to the recitation of the state's interests and the proper interpretation of Amendment 2.[207] At the same time, he argued against revisiting the *Salerno* issue, cautioning that doing so would "side-track" the majority, "require us to rely on a point that was not argued," and "would look as if to decide the case we had to reach out and clarify or create new procedural doctrine," something he described as "the last thing we ought to do."[208]

Justice Kennedy's tentative resolution—to make the changes Justices O'Connor and Breyer requested but not to consider those changes' implications for *Salerno*—prompted conflicting pushback from two other Justices in the majority. Justice Stevens, writing (apparently later) that same day, urged Justice Kennedy to grasp the mettle and take the opportunity *Romer* presented to challenge *Salerno*'s "no set of facts" limitation on facial strike-downs.[209] Perhaps unsurprisingly, given Stevens's apparent deep disagreement with that stringent limitation,[210] Stevens's letter indicated the importance with which he viewed the *Salerno* issue.[211]

Stevens's position immediately drew opposition from Justice Ginsburg, who was otherwise sympathetic to many of the suggestions Justice Stevens had made.[212] Her concern, expressed in a letter she

204. *See id.*

205. *See id.* at 2 ("This line of attack [accusing the majority of reading Amendment 2 more aggressively than the state supreme court had] also could draw us into the more specific problem of resolving the application of *Salerno* to this facial challenge.").

206. *Id.* at 2.

207. *See* Fourth Draft, *supra* note 152, at 8–10 (providing a more detailed discussion of examples of how Amendment 2 could impact the use of generally-applicable laws to protect LGB persons); *id.* at 15–16 (providing a more detailed list of the state interests assertedly justifying Amendment 2).

208. Kennedy May 6 Letter, *supra* note 9, at 2.

209. *See* Stevens May 6 Letter, *supra* note 192, at 2.

210. *See* text accompanying *supra* notes 194–99.

211. *See* Stevens May 6 Letter, *supra* note 192, at 2 ("My join in your opinion is firm, but I consider these points important.").

212. *See* Letter from Ruth Bader Ginsburg, J., Sup. Ct., to Anthony M. Kennedy, J., Sup. Ct (May 6, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7

sent to Justice Kennedy also that same day (May 6, and apparently after she received Justice Stevens's response), was that Kennedy's "long accommodation" to O'Connor's and Breyer's desire for a detailed recitation and refutation of the state's interests would open the door to "a string of 'particular context' exclusions that, taken together, would add up to something close to Amendment 2."[213] Presumably, Justice Ginsburg's concern was that that the majority's refutation of those interests would focus on Amendment 2's overbreadth in promoting them, thus all-but inviting governments to enact the more focused, piecemeal discriminatory provisions Justice Ginsburg worried about.[214] Even more to the current point, her letter's discussion of "[her] most grave reservation" to Kennedy's "accommodations" to O'Connor and Breyer began with an objection to using *Romer* "as a vehicle to deal with *Salerno*."[215]

Justice Kennedy's initial opposition to revisiting *Salerno*, fortified by Justice Ginsburg's endorsement of his position, led Kennedy to reject Justice Stevens's entreaty to revisit the *Salerno* controversy. Indeed, he obviated the entire *Salerno* issue by retreating from both O'Connor's and Breyer's proposed detailed description of Amendment 2's broad applicability and their proposed detailed recitation of the state's interests, both of which he had just agreed to insert.[216] Thus, in a "revised" Fourth Draft he circulated

[hereinafter Ginsburg May 6 Letter] ("Here, I part company with John and would not choose this case as a vehicle to deal with *Salerno*.").

213. *Id.*

214. *See id.* ("In my January 22 letter addressed just to you, I urged you to delete the second full sentence on page 13 of your first draft, which opened: 'Whatever force these interests may have in particular contexts . . . .' I thought that opening 'could be seized upon to justify enactment of a series of "particular context" exclusions that, together, would add up to something close to Amendment 2.' . . . I fear the long accommodation you have attempted would provide the very invitation you avoided when you accepted my suggestion.").
Justice Ginsburg's reference appears to be to language that appeared in the first draft of *Romer*, where, after citing Colorado's interest in associational privacy and law enforcement resource conservation, Justice Kennedy began his refutation by stating as follows: "*Whatever force these interests might have in particular contexts*, they cannot justify a flat ban prohibiting every level of state and local government from affording one class of citizens any specific protections from injury." First Draft, *supra* note 133, at 13 (emphasis added). That draft was dated January 19, *see id.* at 1, thus strengthening the suspicion that Ginsburg's January 22 letter, which she cited in her May 6 letter, was aimed at removing the caveat the start of that language seemed to concede. As her May 6 note observed, Justice Kennedy accepted her suggestion. *See* Second Draft, *supra* note 133, at 12 (removing that language).

215. Ginsburg May 6 Letter, *supra* note 212.

216. *See infra* note 217.

the next day (May 7), he removed both of those features.[217] With those changes, he requested his coalition's permission to circulate the yet-again revised opinion to the full conference.[218] He received that permission in a series of short notes received that same day.[219] The draft he circulated ended up being the one that, with only minor changes,[220] became the opinion that was eventually published as the opinion of the Court.

V. WHAT-IFS AND UNINTENDED CONSEQUENCES

A. The Future Course of Animus Doctrine

Would the concurrence have made a difference had it been published? Quite possibly. Most importantly, a two-Justice

217. *See* Revised Fourth Draft Opinion at 1, Romer v. Evans, No. 94-1039 (drft. May 7, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7 [hereinafter Revised Fourth Draft] (discussing Amendment 2's scope, lacking the more detailed discussion present in the Undated Fourth Draft); *id.* at 13–14 (discussing the state's interests, lacking the detailed recitation present in the Undated Fourth Draft).

218. Letter from Anthony M. Kennedy, J., Sup. Ct., to John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg & Stephen Breyer, JJ., Sup Ct. (May 7, 1996) [hereinafter Kennedy May 7 Letter], *in* Stevens Papers, *supra* note 9, at Folder 7.

219. *See* Letter from John Paul Stevens, J., Sup. Ct., to Anthony M. Kennedy, J., Sup. Ct. (May 7, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7; Letter from Sandra Day O'Connor, J., Sup. Ct., to Anthony M. Kennedy, J., Sup. Ct. (May 7, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7; Letter from David H. Souter, J., Sup. Ct., to Anthony M. Kennedy, J., Sup. Ct. (May 7, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7; Letter from Ruth Bader Ginsburg, J., Sup. Ct., to Anthony M. Kennedy, J., Sup. Ct. (May 7, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7; Letter from Stephen Breyer, J., Sup. Ct., to Anthony M. Kennedy, J., Sup. Ct. (May 7, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7.

220. One tantalizing change that occurred after the May 6–7 flurry of activity involved the possible status of sexual orientation as a suspect class. Throughout the drafting period, Justice Kennedy's only relevant reference to suspect classes came at the end of his discussion of rational basis review, where he simply stated that laws that burden neither fundamental rights nor suspect classes receive rational basis review. *See, e.g.*, Final Fourth Draft Opinion at 10, Romer v. Evans, No. 94-1039 (drft. May 7, 1996), *in* Stevens Papers, *supra* note 9, at Folder 7 [hereinafter Final Fourth Draft]. In the fifth draft, circulated May 8, he added the following language to that statement: "We have no reason to consider whether to apply heightened scrutiny in this case, for Amendment 2 fails, indeed defies, the conventional [rational basis] inquiry" he had just set forth. Fifth Draft Opinion at 10, Romer v. Evans, No. 94-1039 (drft. May 8, 1996), *in* Stevens Papers, *supra* note 9, at Folder 6 [hereinafter Fifth Draft]. That intimating language was removed in the following draft and remained absent when the final opinion was published. *See* Sixth Draft Opinion at 10, Romer v. Evans, No. 94-1039 (drft. May 10, 1996), *in* Stevens Papers, *supra* note 9, at Folder 6 [hereinafter Sixth Draft].

concurrence of the sort suggested by Justices O'Connor and Breyer, focusing on Amendment 2's failure to satisfy conventional rational basis review, would have splintered the rationale of Justice Kennedy's opinion. While nothing indicates that those two Justices would have declined to join his opinion and merely concurred in the judgment, the inevitable effect of any such concurrence, as Justice Kennedy recognized in his response to them,[221] would have been to dilute the force of the majority opinion's focus on what it saw as Amendment 2's more fundamental flaws.

That dilution could have had significant effects. As noted earlier,[222] animus doctrine was not particularly robust in 1996. *Moreno*'s and *Cleburne*'s "bare . . . desire to harm"[223] / "irrational prejudice"[224] rationale had not grounded a Court holding since *Cleburne* itself, eleven years earlier. Instead, the most extensive citation of that rationale during those years appeared in a dissenting opinion in *Lyng v. International Union, Aerospace and Agricultural Implement Workers of America*.[225] Interestingly, *International Union*, like *Moreno*, involved a provision of the federal food stamp law, this one denying additional food stamp assistance to households experiencing lower income because a family member was a worker out on strike.[226] Justice Marshall's dissent further connected *International Union* with *Moreno* by citing Congress's apparent dislike of striking workers (indeed, using language comparing those workers to the "hippies" targeted by the law in *Moreno*),[227] and comparing that dislike to the illegitimate animus the Court had condemned in *Moreno*.[228]

Nevertheless, *International Union* acknowledged *Moreno* only by characterizing it as reflecting the application of traditional rational

221. *See* Kennedy May 6 Letter, *supra* note 9, at 1 ("An opinion is weakened when any of the members of the Court necessary to the majority write separately to adopt a different rationale . . . .").

222. *See supra* text accompanying notes 61–63.

223. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

224. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (condemning the city's action as reflecting "irrational prejudice" against the intellectually disabled).

225. Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 485 U.S. 360, 383–85 (1988) (Marshall, J., dissenting).

226. *Id.* at 374.

227. *See id.* at 384–85 (quoting the legislative history).

228. *See id.* at 385 ("Our warning in *Moreno* that 'a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest' would seem directly applicable to the instant case." (citation omitted) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

basis review.[229] Its refusal to apply *Moreno*'s animus approach in a context where it could have easily fit, as well as its description of that analysis in a way that cabined its generative potential, suggests that approach's tenuous position. The same could have been said of *Cleburne*, which in 1993 received the same dismissive, limiting treatment from the Court.[230] Given the Court's seeming disinterest in developing the animus concept, *Romer*'s embrace of that idea may well have been critical in resurrecting it from the desuetude into which it had fallen. But the proposed O'Connor/Breyer concurrence would have blunted the impact of that resurrection.

Of course, we will never know whether that rebirth would have occurred later in the context of other cases. Still, it bears recalling that the next mention of the animus idea came not from a majority opinion but from Justice O'Connor's separate opinion in *Lawrence v. Texas*.[231] *Lawrence* overruled *Bowers v. Hardwick*[232] and found a due process right to same-sex intimacy.[233] Justice O'Connor had joined the *Bowers* majority, and in *Lawrence* she declined to join in its overruling. However, she agreed with the result striking down Texas's sodomy law, but on an equal protection ground, concluding that the state law reflected animus toward LGB persons. Her equal protection analysis relied heavily on the precedent set by *Moreno*, *Cleburne*, and *Romer*.[234]

229. *See id.* at 370 n.8 (majority opinion) ("We reject the proposition that strikers as a class are entitled to special treatment under the Equal Protection Clause. [*Moreno*] does not counsel otherwise. There we upheld an equal protection challenge to a provision of the Food Stamp Act and concluded that 'a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' This statement is merely an application of the usual rational-basis test: if a statute is not rationally related to any legitimate governmental objective, it cannot be saved from constitutional challenge by a defense that relates it to an *illegitimate* governmental interest. Accordingly, in *Moreno* itself we examined the challenged provision under the rational-basis standard of review." (citations omitted) (quoting *Moreno*, 413 U.S. at 534)).

230. *See* Heller v. Doe, 509 U.S. 312, 321 (1993) (describing *Cleburne* as simply a case involving conventional rational basis review, which it had just finished describing in very deferential terms).

231. Lawrence v. Texas, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring in the judgment).

232. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

233. *See Lawrence*, 539 U.S. at 578; *id.* at 560 (The "[p]etitioners' right to liberty under the Due Process Clause gives them the full right to engage in [sexual] conduct without intervention of the government.").

234. *See id.* at 580 (O'Connor, J., concurring) ("We have consistently held . . . that some objectives, such as a 'bare . . . desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection

Without a then-recent majority opinion in *Romer* reaffirming the animus idea, one can wonder whether Justice O'Connor would have had as strong an argument as she did or whether the lack of a viable equal protection theory might have forced her either to disavow her vote in *Bowers* and join the majority's decision to overrule it or join the dissent's defense of that case. Fragmentary and highly circumstantial evidence suggests that *Romer*'s existence did in fact play a role in her adoption of the rationale her concurrence adopted.[235] Indeed, one can further wonder whether the publication of her and Justice Breyer's concurrence would have distanced herself from *Romer*'s animus theory sufficiently to dissuade her from using that theory to vote to strike down the Texas law. In turn, without a majority opinion in *Romer* resting squarely on an animus theory undiluted by an ambivalent concurrence joined by Justices necessary to that majority, and without Justice O'Connor's *Lawrence* concurrence distilling the lessons of the Court's animus opinions,[236] it is an open question whether the doctrine would have survived and thus remained available to the Court in subsequent cases.[237] Of course, we will never know whether a failure of the animus theory to gain unambiguous majority assent in *Romer* would have increased pressure on the Court to consider other paths toward ensuring equality for LGB persons, including explicit conferral of suspect class status on sexual orientation and acceptance of the argument that sexual orientation discrimination constitutes sex discrimination.[238]

Clause." (first quoting *Moreno*, 413 U.S. at 534; then citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985); and then citing Romer v. Evans, 517 U.S. 620, 632 (1996)).

235. That evidence appears in the form of Justice Stevens's notes at the Justices' post-oral argument conference in *Lawrence*. While again difficult to decipher, *see supra* note 122 and accompanying text, those notes appear to acknowledge that Justice O'Connor had joined the *Hardwick* majority and that she was not willing to vote to overrule that decision. But they also seem to provide the notation "EP?" and what appears to be "RvE," clearly suggesting (if this interpretation of Stevens's writing is correct) that she was at least considering voting to strike down the Texas law on an equal protection ground based on *Romer*. *See* Sup. Ct. Docket Sheet from Lawrence v. Texas, 539 U.S. 558 (1996) (No. 02-102), *in* Stevens Papers, *supra* note 9, at Box 886, File 8; *see also id.* (chart of the Justices' tentative votes on the merits, with Justice O'Connor noted as voting to reverse the lower court (and thus rule for the defendants)), but with a question mark instead of the checkmark that identified every other Justice's vote. Of course, an equal protection rationale based on *Romer*'s animus theory is the path she ultimately took. *See Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring).

236. *See Lawrence*, 539 U.S. at 579–81.

237. *See supra* note 6 (noting that survival and expansion).

238. Thanks to Eric Berger for suggesting this last possibility. Letter from Eric Berger, Professor of Law, Univ. of Neb., to author Dec. 1, 2023 (on file with the author).

But if so, then recent developments in those directions[239] might have occurred substantially sooner than they did, at least if they had happened before Justice O'Connor's replacement by Justice Alito in 2005 shifted the Court significantly to the right.[240]

Similarly, we will never know if the failure of an animus rationale to gain unambiguous majority assent in *Romer*—and, instead, the publication of a concurrence focusing on more traditional rational basis review—would have encouraged the Court to renew its halting experiment with making traditional rational basis review more meaningful, at least in some cases.[241] Indeed, to the extent that a distinct animus branch of equal protection partially displaces that more traditional review,[242] its failure in *Romer* (or at least its inability to gain unambiguous support) might have encouraged the Court to explore this alternate pathway.

Of course, this is all speculation. Nevertheless, Justice Kennedy was surely correct when he warned, in his May 6 response to the authors of the proposed concurrence, that "[a]n opinion is weakened when any members of the Court necessary to the majority write separately to adopt a different rationale."[243] Indeed, examples exist of opinions reflecting majority results, but minority rationales recognized as in need of reconsideration, even by Justices who

239. These developments include the Court's embrace of the argument that, for purposes of Title VII of the Civil Rights Act of 1964, discrimination on the basis of sexual orientation (or transgender identity) constitutes sex discrimination, *see* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020), and lower courts' increasing embrace of explicitly heightened constitutional scrutiny for both of these types of discrimination. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 483 (9th Cir. 2014) (adopting such scrutiny for sexual orientation discrimination); Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1424–31 (2023) (noting lower courts' increased embrace of such scrutiny for transgender discrimination); *id.* at 1426 (stating that arguments for heightened scrutiny of transgender discrimination only started succeeding after 2014). Of course, transgender discrimination was not at issue in *Romer*. Nevertheless, opinions such as *Bostock* equating both sexual orientation and transgender discrimination with sex discrimination suggest the connection between how courts analyze those two phenomena.

240. *See, e.g.*, Maxwell Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 877–78 & 878 n.6 (2008) (making this point and citing another scholar making the same one).

241. *See supra* note 51 (citing three cases from 1985 where the Court struck down state laws discriminating against out-of-staters based on a rational basis theory); Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down, as failing rational basis review, a state law denying a free public school education to undocumented immigrant children); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1317 (2018) (arguing that there exists a robust tradition of meaningful rational basis review at the modern Supreme Court).

242. *See* Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 215 (2019) (suggesting this dynamic).

243. Kennedy May 6 Letter, *supra* note 9, at 1.

ultimately favored those rationales.[244] In the case of animus doctrine, which in 1996 had not yet been firmly established as an equal protection principle,[245] it is reasonable to speculate that anything less than an unambiguous majority embrace of that idea in *Romer* might have made it much more difficult for it to survive, let alone thrive and expand into different doctrinal areas.

B. Salerno's *Role*

Ultimately, of course, the concurrence was not published. Indeed, not only was it not published, but important parts of Justice Kennedy's attempted accommodation of Justices O'Connor's and Breyer's concerns—his more detailed discussion of Amendment 2 and his insertion of the laundry list of proffered state justifications—also ended up on his chambers' cutting-room floor. Why? Part of the reason lies in the substantive objections to those additions.[246] But part of the reason also lies in the interrelationship between those objections and the procedural point raised by the implications of the *Salerno* case.

Recall that *Salerno* concerned, in part, the question of the appropriate standard for a facial strike-down of a statute. In language that Justice Stevens and some scholars have critiqued as *dicta*,[247] *Salerno* explained that, in a facial challenge to a statute, "the

244. *See, e.g.*, Florida v. Seminole Tribe of Fla., 517 U.S. 44, 63–64 (1996) (concluding that the Court's previous result in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), merited reconsideration given that the fifth member of the *Union Gas* majority disagreed with the plurality's rationale). The primary dissent in *Seminole Tribe* agreed with the majority's conclusion. *See id.* at 100 (Souter, J., dissenting); George C. Thomas III, Mapp v. Ohio*: Doomed From the Beginning?*, 12 OHIO ST. CRIM. L.J. 289, 292–93 (2014) (explaining how Justice Black's idiosyncratic concurring opinion in *Mapp v. Ohio*, as reflecting the views of the fifth member of the Court to join the majority opinion, "'undermined the legal standing of *Mapp*.'" (quoting TRACY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 103 (Oxford Univ. Press 2013)); *see also* Joseph Cacace, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 SUFFOLK L. REV. 97, 97 n.3 (2007) (citing scholarship examining the proper treatment of plurality opinions).

245. *See* text accompanying *supra* notes 222–28.

246. *See* Kennedy May 6 Letter, *supra* note 9, at 1 (worrying that a broader reading of Amendment 2 would conflict with the state supreme court's authoritative interpretation); Ginsburg May 6 Letter, *supra* note 212 (expressing concern that the inclusion of those justifications, and the Court's response to them, might suggest that narrower instances of sexual orientation discrimination might be acceptable).

247. *See* Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175 (1996) (Stevens, J., opinion respecting denial of certiorari) (stating that *Salerno*'s "no set of facts" statement was "unnecessary to the holding in the case"); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 372–75 (1998).

challenger must establish that no set of circumstances exists under which the Act would be valid."[248] As applied to *Romer*, this stringent requirement caused Justice Stevens to worry that an explicit reference to a wide variety of specific government interests would suggest that some applications of Amendment 2 might be constitutional—a suggestion that in turn implied that "our holding [striking down Amendment 2 on its face] might run afoul of *Salerno*."[249]

Of course, Justice Stevens was not trying to protect *Salerno*; recall that when he expressed that concern about *Romer*, he had very recently made clear his opposition to *Salerno*'s strict "no set of circumstances" language.[250] Indeed, his suggested solution to the problem he identified—explicitly recanting *Salerno*'s language[251]—suggests that he saw *Romer* as an opportunity to continue his campaign to limit *Salerno*.[252] Thus, it is not unreasonable to characterize his views about *Romer* as a stalking horse for his potentially greater concern about *Salerno*. That potentially larger agenda thus influenced his position on *Romer*—and with it, Justice Kennedy's ultimate decision-making about how to write *Romer*.

As noted earlier,[253] Justice Stevens's call to revisit *Salerno* in *Romer* elicited a stern objection from Justice Ginsburg, who endorsed Justice Kennedy's original skepticism about the wisdom of that course.[254] But that left Kennedy with the problem of what to do about the "accommodat[ions]"[255] he had made to Justices O'Connor and Breyer, in particular his inclusion of the detailed list of asserted state justifications for Amendment 2, that he had provided in order to head off their proposed concurrence.

His ultimate resolution of this quandary was to accede to Stevens's and Ginsburg's suggestion to delete that list and to replace it, as he wrote on May 7, with "a more abbreviated description"[256] of those justifications.[257] In the next paragraph, he also explicitly cast

248. 481 U.S. 739, 745 (1987).

249. Stevens May 6 Letter, *supra* note 192, at 1.

250. *See Janklow*, 517 U.S. at 1175.

251. *See* Stevens May 6 Letter, *supra* note 192, at 2.

252. *See Janklow*, 517 U.S. at 1175–76. Indeed, *Janklow* was released April 29, 1996, merely a week before the flurry of activity this Article recounts. *Id.* at 1174.

253. *See* text accompanying *supra* notes 212–13.

254. *See* Kennedy May 6 Letter, *supra* note 9, at 2; Ginsburg May 6 Letter, *supra* note 212.

255. Kennedy May 6 Letter, *supra* note 9, at 1.

256. Kennedy May 7 Letter, *supra* note 218.

257. At the same time Justice Kennedy communicated the decision about abbreviating that list of state interests he also communicated that he had "shortened the administrative law discussion," *id.*, presumably a reference to his shortening of his discussion of Amendment 2's impact on generally applicable

his lot with Justice Ginsburg in "avoiding *Salerno*."[258] To be sure, he spoke of "avoiding *Salerno at this point*,"[259] acknowledging that the coalition might have to "revisit this determination,"[260] "[d]epending on the treatment the dissent gives to the new [majority draft] circulation."[261] This caveat was presumably triggered by the fact that, in *Janklow*, it was Justice Scalia, the same Justice writing the *Romer* dissent, who wrote in defense of the broad understanding of *Salerno* in the case where Stevens had taken the opposite position.[262] Indeed, Justice Scalia's *Romer* dissent eventually included a *Salerno*-based argument against the Court's decision to strike down Amendment 2 on its face.[263] Despite Justice Scalia's taking up of the *Salerno* cudgel, Justice Kennedy did not ultimately join issue on that point, presumably still chary of further complicating what Justice Breyer acknowledged was already a "very difficult case"[264] by introducing the procedural complexity *Salerno* presented.[265]

As noted in the prior Subpart,[266] any decision reinforcing *Moreno*'s and *Cleburne*'s animus idea was significant, given that idea's tenuous status in 1996. Ultimately, the *Salerno* issue appeared to play at least a supporting, and perhaps a leading, role in reinforcing that emphasis. By contrast, Justice Kennedy's acceptance of the changes suggested by Justices O'Connor's and Breyer's proposed concurrence would have both diluted the opinion's focus on animus and implicated *Salerno*. As Kennedy recognized, that latter

laws. The revised Fourth Draft, circulated the same day as these messages were communicated, reflected these edits. *See supra* note 217 (noting these edits).

258. Kennedy May 7 Letter, *supra* note 218 ("I follow Ruth's suggested course in avoiding *Salerno* at this point.").

259. *Id.* (emphasis added).

260. *Id.*

261. *Id.*

262. *See* Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1181 (1996) (Scalia, J., dissenting from denial of certiorari) (defending *Salerno*); *id.* at 1175 (Stevens, J., respecting the denial of the petition for certiorari) (critiquing *Salerno*).

263. *See* Romer v. Evans, 517 U.S. 620, 643 (1996) (Scalia, J., dissenting) ("Moreover, even if [Amendment 2's] 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* [*v. Hardwick*], Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct, the facial challenge cannot succeed." (citation omitted) (quoting *Salerno*, 481 U.S. at 745)).

264. Breyer January 23 Letter, *supra* note 104.

265. *See* Kennedy May 6 Letter, *supra* note 9, at 2 (cautioning against raising the *Salerno* issue in *Romer*).

266. *See supra* Subpart V.A.

result would have required him to engage in tricky opinion-writing that might have weakened the opinion's persuasiveness. That concern apparently played a role in leading Kennedy ultimately to refuse to provide the full measure of accommodation he had tentatively promised them on May 6.

Given these dynamics, the majority coalition's *Salerno* discussion teaches us that an opinion's focus, and thus its ultimate influence, can sometimes be contingent on the Justices' other goals or agendas. To put it bluntly, judicial doctrine is not always created via a straight-line process focused solely on the issues explicitly before the Justices.

CONCLUSION: DOES ANY OF THIS MATTER?

At this point, a reader may respond by asking, "So what?" Regardless of the process by which *Romer* took the shape it ultimately did, the fact remains that it did in fact take that shape. This reality requires considering the usefulness of the exercise in which this Article has engaged.

To be sure, placing on the scholarly record the story of the Supreme Court's engagement with *Romer* is valuable in itself. That story is also useful as an illustration of the well-known truth that the fifth vote in any Supreme Court case is crucial for the influence a prevailing opinion might ultimately enjoy, thus giving the holder of that fifth vote an unusually influential role in shaping that opinion's contours.[267]

But when one turns to the implications of that story for actual constitutional law, the issue becomes muddier. Indeed, one might argue that that story has little to tell us about constitutional law itself. Rather, one might agree with Mark Tushnet that what matters for constitutional *law* is the judicial opinion itself, not the processes—the negotiations and compromises—that led to its drafting and acceptance by a Court majority.[268] But assume that those processes

267. *See supra* note 169 (quoting a letter from Justice Kennedy to Justices O'Connor and Breyer as part of their deliberations in *Romer*, acknowledging the weakened influence an opinion has when members crucial to the opinion's majority status write separately to offer a distinct rationale). Of course, as reflected in *Romer*, the influence the fifth vote enjoys over an opinion may be counteracted by the prospect of other Justices in the tentative majority rebelling at the prospect of accommodating that Justice. *See* text accompanying *supra* notes 209–15 (recounting this dynamic in the majority coalition Justices' deliberations on *Romer*). This dynamic simply reflects the reality that the status of being "the crucial fifth vote" can migrate from Justice to Justice, depending on the demands they make of the opinion's author.

268. *See* Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 WM & MARY L. REV. 473, 473 (1995) ("Lawyers and historians agree that almost everything we need to know about constitutional law is found in the Supreme Court's published opinions.

might, under some circumstances, be relevant to inquiries into an opinion's meaning.[269] Even so, critiques of that relevance might carry added force when the ultimate payoff of any such historical examination consists of speculation about what might have been had the Justices taken a different path. In that case, one might think that the question on the table is not even how the law we have came to be, but instead, what the law might have looked like had those negotiations and compromises taken a different turn. Alternative legal history might be fun, but one might object that it is not law or even history.

Nevertheless, an exercise such as the one this Article has performed can still yield useful lessons for those studying law. The story of *Romer*'s heretofore-unknown concurrence reminds us that the process of law-creation does not follow a straight line. Rather, it is rife with contingencies, the imperatives of coalition-building and coalition-maintenance, and the distracting influence of cross-cutting and sometimes inconsistent agendas. To the extent legal scholars attempt to draw such straight lines, as a matter of either pedagogy or creating a satisfying historical narrative that itself stakes some claim to being "law,"[270] those contingencies, imperatives, and cross-cutting influences should caution us against any construction and subsequent unquestioning embrace of such narratives.

Constitutional law is full of winding paths featuring unexpected turns. Consider the fate of *Reed v. Reed*.[271] That 1971 case, the first modern case to rule in favor of a sex equality claim, struck down the challenged sex discriminatory law upon application of rational basis

Internal Court documents . . . tell us something about the dynamics within the Court but relatively little about constitutional law."). To be sure, other scholars have offered arguments for the appropriateness of using such internal documents to determine the meaning of judicial texts. *See, e.g.*, Vermuele, *supra* note 20, at 1311–12.

269. *See* Vermuele, *supra* note 20, at 1313–14 (offering arguments for this position).

270. *See, e.g.*, David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 148–49 (2002) (referring to the use of history in Religion Clauses opinions "an integral part of the opinions and the constitutional doctrines that they embody, not merely as a rhetorical flourish"). More distantly, this idea shares at least a passing resemblance with Ronald Dworkin's theory of coherence. *See* Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375, 1375 (1999) ("Crudely put, Dworkin's view is that a purported proposition of law is valid if it follows from the most coherent set of principles that explains and justifies the settled, black-letter law."). To be sure, Dworkin's view is not based on a notion of historical "coherence"; nevertheless, his idea, like the one referenced in the text, focuses on an aspiration to understand law based on a proposition's place in a larger structure, whether based on morality or the historical progression of a given doctrine.

271. 404 U.S. 71 (1971).

review.[272] Nevertheless, two years later, Justice Brennan, building an argument for explicitly according heightened scrutiny to sex discrimination, cited Chief Justice Burger's opinion in *Reed* as evidence that the Court had already begun doing just that.[273] That use of *Reed* surprised Burger himself, who was said to have remarked that when he drafted *Reed*, he "never remotely contemplated such a broad concept" as strict scrutiny triggered by a suspect classification.[274] He continued, "[b]ut then, a lot of people sire offspring unintended."[275]

The *Reed* example demonstrates one type of doctrinal contingency, reflecting the reality that the author of an opinion loses control over that opinion once it is published. *Romer* itself reveals another type. After *Romer*'s publication, scholars remarked on the potential parallel between it and *Reed*. They suggested that, just as *Reed* had ruled for a sex equality plaintiff on a rational basis ground and had then become a supporting precedent for explicitly heightened scrutiny, so too might *Romer* play that same generative role in the gay rights context.[276] But that did not happen (or at least has not yet happened, at least at the Supreme Court[277]): after *Romer*, the Court has continued to decline opportunities to identify sexual orientation as a quasi- or fully suspect classification,[278] and indeed has not even broached the question,[279] despite lower court opinions that could have provided the Court with models.[280] Instead, *Romer* became understood as an animus case—indeed, the animus case that resurrected a doctrine that had arguably fallen into desuetude since

272. *See id.* at 76.

273. *See* Frontiero v. Richardson, 411 U.S. 677, 682–84 (1973) (plurality opinion).

274. Fred Strebeigh, *Standard Bearer*, LEGAL AFFAIRS (Sept./Oct. 2003), https://www.legalaffairs.org/issues/September-October-2003/feature_strebeigh_sepoct03.msp.

275. *Id.*

276. *See* Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 269–70 (2004) (noting this possible progression); Tobias Barrington Wolff, *Principled Silence*, 106 YALE L.J. 247, 250 (1996) (noting the parallel between *Reed* and *Romer*).

277. *But see supra* note 239 (citing an example of this development coming to pass in lower courts).

278. *See* United States v. Windsor, 570 U.S. 744, 769 (2013) (ruling for a gay rights plaintiff on a rational basis/animus theory); Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (same); *id.* at 578 (majority opinion) (ruling on a due process rather than equal protection ground).

279. *But see supra* note 220 (describing a draft in *Romer* raising the heightened scrutiny issue but concluding that it was not necessary to confront it).

280. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009) (holding that sexual orientation discrimination merits heightened scrutiny under the Iowa Constitution); SmithKline Beechum v. Abbott Lab'ys, 740 F.3d 471, 481 (9th Cir. 2014) (reaching the same result under the U.S. Constitution).

Cleburne in 1985. Thus, the parallel some scholars had predicted between the *Reed-Frontiero* sequence and a possible sequence starting with *Romer* ended up not coming to pass.

Of course, we know what happened with the *Reed-Frontiero* sequence and what happened, or didn't happen (or hasn't happened yet), with *Romer*. Specifically, we know the actual doctrinal results that flowed from those cases: respectively, an influential argument for heightened scrutiny for sex and the creation of a roadmap for suspect class analysis over the next decade, and, conversely, continued silence about the suspect status of sexual orientation and instead a revival of animus doctrine. The fact that we know the doctrinal paths those cases ultimately took makes it tempting to create, after the fact, clean, coherent narratives suggesting a straight-line journey. But the story of *Romer*'s unpublished concurrence reminds us that the creation of those narratives depends on the existence of the opinions that form those narratives' source material. When that source material itself depends on contingencies, as the *Romer* opinion ultimately did, we introduce a second level of doubt about the logical necessity or coherence of the paths ultimately taken.

One scholar's words nicely sum up the lessons these examples teach: "The path of constitutional law is determined by contingency, not teleology."[281] That is not to say that efforts to create order in the Court's doctrinal evolution, or, as with *Romer*, efforts to predict that evolution,[282] are worthless or misguided. At the very least, it may be useful and even necessary to legal pedagogy for professors to impose some order on a body of cases in order to allow students to begin to understand the material, much as simplified (though not distorted)[283] versions of history might be appropriate for students just beginning to understand the past. As long as those simplified versions are not passed off as fully accurate, and as long as scholars themselves maintain a critical, questioning attitude toward them, there may be value in such efforts. But even if so, exercises such as the one this Article has performed may play a salutary role in reminding those instructors not to fully believe their own lectures and to make sure that their scholarship transcends such simple, but potentially misleading, stories of straightforward doctrinal evolution. As the

281. Neil Siegel, *Federalism as a Way Station:* Windsor *as an Exemplar of a Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 127 n.125 (2014).

282. *See* text accompanying *supra* notes 276–80 (discussing scholars' predictions about *Romer*'s impact).

283. Of course, a great difference separates presenting simplified versions of history and versions whose simplifications distort the historical record. For example, recent controversies about high school instructional standards that arguably whitewash the country's experience with slavery reflect this distinction. *See, e.g.*, Sarah Mervosh, *Who's Writing New Rules For Teaching Black History?*, N.Y. TIMES, July 29, 2023, at A12 (discussing this controversy).

story of *Romer*'s unpublished concurrence reminds us, things could have easily come out differently.