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One of the most commonly posed questions about the Supreme Court's decision in Romer v. Evans involves its relationship to Bowers v. Hardwick. "If Bowers said it was constitutional to criminalize homosexual conduct," so the argument goes, "how can Evans, without even discussing Bowers, find unconstitutional the lesser step of simply prohibiting anti-discrimination provisions that protect homosexuals?" One response to this would be to try draw a distinction between homosexual status and conduct. However, Justice Scalia in his dissent contends that even if there is a coherent distinction between homosexual orientation and same-sex sexual behavior, Bowers resolves Evans:

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

This essay will focus on this statement, rather than entering the status/conduct debate that has been ably addressed elsewhere. The essay will take issue with three premises of the statement: first, that denying access to legislative protection against discrimination is necessarily a lesser burden to bear than the criminalization of particular sexual acts; second, that the group burdened by Amendment 2 (the Colorado constitutional provision at issue) consists exclusively of those with a tendency to engage in same-sex sexual activity; and finally that the provisions barred by Amendment 2 bestow "special favor and protection" on anyone. The connecting theme of the three discussions will be that Justice Scalia's dissent demonstrates fundamental misunderstandings of how anti-discrimination legislation works. By contrast, one of the strengths of Justice Kennedy's majority opinion is that it does understand civil rights legislation and the role it plays in American society.

I. In his dissent, Justice Scalia made use of what he referred to as the "greater-includes-the-lesser rationale": that because under Bowers states can criminalize same-sex sexual behavior, states obviously can take the lesser step of merely prohibiting anti-discrimination protections based on sexual orientation. This argument has some surface appeal. After all, Bowers allows criminal sanctions, an extremely great intrusion by the state into people's lives. By contrast, Amendment 2 does not require any state activity aimed at gay men and lesbians; arguably its primary effect simply is to allow some private individuals to act in accordance with their own moral codes by refusing to do business with those they believe to be gay. The state is simply forbearing from interfering in those private decisions. Justice Scalia refers to this action by the state as "the smallest conceivable" degree of hostility toward "homosexual conduct." To him, it obviously is a "lesser" burden than criminalizing sodomy.

The reality of gay peoples' lives belies this superficial logic. In practice, sodomy statutes are rarely enforced, but people often are denied access to jobs, housing, and public accommodations on account of their sexual orientation. More importantly, even if the statutes criminalizing same-sex sexual behavior represented a serious constraint on the lives of the lesbians and gay men who are subject to them, the assumption that these statutes necessarily represent a greater burden than Amendment 2 is unwarranted and insulting. In the face of sodomy statutes, people who wish to engage in same-sex sexual behavior can alter their sexual behavior to
avoid any acts that the state specifically prohibits.10 This might be annoying and frustrating, but seems unlikely to wreck the lives of those so affected. By contrast, after Amendment 2, gay people can lose their jobs or their apartments on account of their sexual orientation. For most people, these losses would constitute much more serious disruptions of their lives. Moreover, although they can lobby the legislature to repeal the sodomy statute, under Amendment 2, gay people cannot lobby any legislative body to provide protections for their jobs and homes. This inability to access the political process with regard to the most basic aspects of life in society surely represents a much more significant burden for most people than foregoing particular sexual behaviors. 11

Underlying the "greater-includes-the-lesser rationale" is the standard non- gay assumption that lesbians and gay men are defined by obsessive sexuality.12 What sort of person would rather lose a job or an apartment than give up a particular sexual practice? The stereotypical "homosexual" whose life is consumed by sex. Indeed, Justice Scalia's opinion indicates that he has trouble conceiving of a lesbian or gay man who does not have sex. In his discussion of the possible existence of "individuals of homosexual `orientation' who do not engage in homosexual acts,"13 he says,

So far as the record indicates, none of the respondents is such a person. See App. 4-5 (complaint describing each of the individual respondents as a either "a gay man" or "a lesbian."). 14

His apparent conclusion that these descriptions presumptively exclude people who do not have sex seems consistent with the logic of his argument.15 "Gay men" and "lesbians," necessarily engaging in "homosexual acts," would be burdened more by the prohibition of "the conduct that defines the class"16 then by the exercise of this "smallest conceivable" degree of hostility from the state.

By contrast, the majority seems to recognize protections regarding jobs, housing, and public accomodations are very important. It spends a considerable part of its opinion describing the history and place of anti-discrimination laws in American law.17 It also recognizes that permanently restricting a group of people from getting help from the legislature to ensure access to these protections represents a large degree of hostility. The majority refers to Amendment 2 as creating a "sweeping and comprehensive" "change in legal status"18 and repeatedly refers to the anti-gay animus it saw as the basis for its enactment.19 The opinion implicitly rejects the "greater-includes-the-lesser rationale" by emphasizing the extent of the burden created by Amendment 2, thus dismissing the attempt to minimize the benefits anti-discrimination laws confer.

II. A second problematic assumption made by Justice Scalia is that the only people likely to be affected by Amendment 2 are those who either engage in homosexual conduct or who profess their own homosexuality. This in turn is based on the common misapprehension that the anti-discrimination laws operate by protecting members of particular groups. In fact, most anti-discrimination laws operate by prohibiting the use of certain characteristics as a basis for decision-making by employers, housing providers, etc.20 For example, a landlord does not violate the Fair Housing Act by refusing to rent to an African-American, but rather by refusing to rent to anyone on the basis of their race.21 Thus, although there are few cases on point, a decision made on the basis of incorrect beliefs about the victim's race or religion should be forbidden by the statutes.22 Firing someone because you incorrectly believe them to be Jewish ought to be illegal, even if the person is not a member of the "protected class" of Jews.

In his dissent, Justice Scalia argued, "under Bowers, Amendment 2 is unquestionably constitutional as applied
to those who engage in homosexual conduct."23 However, a more correct version of his point would be that "Amendment 2 is unquestionably constitutional as applied to decisions based on the belief that the affected individual engages in homosexual conduct."24 But this correction in turn reveals a new issue. Employers and landlords are unlikely to have first hand information about the sexual behavior of employees and tenants. So what sort of persons trigger the belief that they engage in homosexual conduct? One obvious group is those who are open about their sexual orientation.25 A second is those who engage in cross-gender behavior, that is, who do not conform to traditional gender-role norms in their public behavior.

One of the most powerful stereotypes about gay people is that all homosexuals engage in cross-gender behavior and all those who engage in cross-gender behavior are homosexuals.26 In fact, studies show that these generalizations are wildly overbroad.27 Yet effeminate men and masculine women are likely to be among those most harmed by Amendment 2. If sexual orientation is an acceptable basis for decision-making by employers and landlords, many will be denied jobs and housing because of the belief that they are gay. It is hard to see how this result is mandated by Bowers. Although there is some overlap, the connection those who engage in same-sex sodomy and those who engage in public cross-gender behavior is surely not strong enough to support using the latter as a proxy for the former. Thus, when Justice Scalia focuses on protected classes rather than on the decision-making process, he obscures an important aspect of the operation of Amendment 2: it will allow employers and landlords to discriminate against a large group of people whom they have no legitimate reason to connect with the conduct Bowers allows the state to prohibit.28

III. Justice Scalia's focus on the victims rather than the decision-makers results in another problem with his analysis. He repeatedly refers to the anti-discrimination laws forbidden by Amendment 2 as creating "preferential treatment" or "special protections" of "homosexuals."29 What does this mean? Both he and the state of Colorado contrast anti-discrimination laws with "generally applicable laws,"30 suggesting that they believe the protections provided by anti-discrimination laws are "special" because they only apply to lesbians and gay men and not to other people. But this simply isn't true. Like most anti-discrimination provisions, the Colorado municipal ordinances affected by Amendment 2 prohibit all decisions based on sexual orientation in employment, housing, etc.31 Thus, they would protect a heterosexual employee from being fired by a gay employer because of perceived heterosexual orientation.

Of course, provisions preventing the use of particular characteristics are more likely to be invoked by people who are in the minority with regard to that particular characteristic. Thus, we would expect more lawsuits regarding race by people of color, more suits regarding religion by members of non-mainstream religions, and more suits regarding sexual orientation by people who are (or are perceived to be) gay, lesbian or bisexual. Banning these suits is likely to hurt the minority categories more; the Supreme Court has acknowledged as much in the context of race.32 But the fact that most race-based suits are brought by people of color does not change the fact that anti-discrimination provisions protect all citizens of all races. Sexual orientation anti-discrimination provisions are laws of general applicability in the sense that they protect all citizens, regardless of their sexual orientation, against any decision-making based on sexual orientation, treating alike decisions resting on the perception that the victim is gay and those resting on the perception that she is not.

Why then are sexual orientation anti-discrimination laws "special protections?" Could it be because the characteristic "sexual orientation" is not one already recognized by the Supreme Court as suspect? That is, could the argument be that giving statutory protection to a class not already constitutionally protected creates "special rights"? Justice Scalia himself apparently rejects that view. He argues that Amendment 2:
does not, to speak entirely precisely, prohibit giving favored status to people who are homosexuals; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct......

Thus, he apparently believes that even anti-discrimination laws focused on race are special protections.

The real meaning of his use of "special" becomes clear in the final section of the dissent, when he excoriates the majority for siding with academic elites in the "culture wars." He points out that a legal employer when hiring:

may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the

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Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. 34

Thus, to Justice Scalia, the "special protection" that "homosexuals" receive from anti-discrimination laws is the right to force employers (and landlords, hoteliers, etc.) not to take account of a trait that is likely to make some of them uncomfortable. Unlike snail-eaters, lucky "homosexuals" protected by anti-discrimination laws are free to flaunt their status without fear of retribution. Employers and landlords are not free to exercise their "right" to exclude people with whom they would prefer not to associate. Thus, anti-discrimination laws in general represent a barely-tolerable interference with associational rights at the best of times, and are not appropriate for a group like "homosexuals" who incur moral disapproval from many people.

Of course, this characterization of the position suggests the response: the point of anti-discrimination laws is to combat systematic prejudice and there is no evidence of systematic prejudice against snail-eaters. In the U.S., there is no cultural understanding that snail-eaters are unfit to perform certain jobs nor an understanding that eating snails tells you anything about a person's morals or character. Although on rare occasions, a person might lose a job over an indiscreetly gobbled mollusk, in general we have no reason to believe that the snail-eaters will be left jobless and homeless on account of their escargot habit. By contrast, many people operate in fear of being denied job and housing opportunities on account of their sexual orientation.

The majority in Evans sharply refutes Justice Scalia's characterization of anti-discrimination laws as "special protections." Section II of Justice Kennedy's opinion provides a history and defense of these laws that demonstrates that the majority does not see them as a barely-tolerable interference with the rights of employers, landlords and providers of public accommodations. The ringing peroration to the section demonstrates a comprehension of the role of anti-discrimination laws that may stand as the most important contribution of the decision:

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society. 35
IV. In the end, thinking about how anti-discrimination laws work demonstrates that Bowers does not resolve Evans. Laws that prevent decision-making on the basis of a person's sexual orientation apply to everyone, not just to those who engage in same-sex sexual activity. Among those most likely to be affected by these laws are people who are gender non-conformists, a group with only a very mild correspondence to those who engage in "homosexual sodomy." Moreover, given the importance of the kinds of transactions protected by anti-discrimination laws, Amendment 2 cannot fairly be characterized as a "lesser" burden necessarily pre-approved by Bowers. The state's ability to prohibit the choice of particular sexual practices does not implicitly sanction "exclusion from ordinary civic life in a free society" for those people who might be presumed to prefer those practices.

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2 116 S.Ct. 1620 (1996). Following the lead of University of Denver Professor Julie Nice, I will refer to the case as Evans, to associate this remarkably gay-friendly case with the plaintiffs, who included gay and lesbian individuals and gay-friendly municipalities, rather than with Roy Romer, the governor of Colorado who chose to expend state resources taking the case to the U.S. Supreme Court.


4 This was one of the arguments made by the attorneys for respondents in the case. See Evans, 116 S.Ct. at 1632 (Scalia, J. dissenting).

5 Id.


7 Evans, 116 S.Ct. at 1632 (Scalia, J. dissenting).

8 See id. at 1631-32.

9 Id. at 1633.

10 The affected individuals also presumably can travel to one of the many jurisdictions without a sodomy statute if their need to indulge in prohibited activity becomes overpowering.

11 In addition, people who know an openly gay person are more likely to favor civil rights protections for
lesbians and gay men. Amendment 2, by discouraging people from coming out in public settings like the workplace, thus has the additional effect of hindering an effective form of political action that makes further gay civil rights gains possible.


13 Evans, 116 S.Ct. at 1633 (Scalia, J. dissenting).

14 Id.

15 This is not the only misunderstanding of gay lives exhibited in the dissent. Elsewhere, Justice Scalia treats as equivalent the "life partner of a homosexual" and the "long time roommate of a nonhomosexual." Id. at 1630. This parallel entirely negates any connections of love, care, support and sharing that might be expected to distinguish a "life partner" from a "long time roommate." This also is consistent with the common non-gay presumption that gay relationships consist of sex rather than love and support. See Fajer, supra note 12, at 538-40.

16 See Evans, 116 S.Ct. at 1631, quoting Padula v. Webster, 822 F.2d 97, 103 (1987). The idea that sodomy is the defining characteristic of gay people is echoed by Ronald Rotunda, who place the Evans case in his textbook under the heading "Consensual Sodomy." RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW (4th ed. 1996 Supp.) at 76. One wonders whether under the same reasoning, the cases involving the treatment of marriage under the Equal Protection Clause should fall under the heading, "State-Sanctioned Intercourse."

17 See Evans, 116 S.Ct. at 1625-26.

18 See id. at 1625.

19 See id. at 1628-29.

20 See id. at 1626 (anti-discrimination laws "set forth an extensive catalogue of traits which cannot be the basis for discrimination")

21 See 42 U.S.C. 3604(a) (unlawful "to refuse to sell or rent ... or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race ...") (emphasis added).

22 See Perkins v. Lake County Dept. of Utilities, 862 F. Supp. 1262, 1277 (N.D. Ohio 1994) (plaintiff entitled to Title VII protection if employer reasonably believed him to be member of a protected class, regardless of actual ancestry). The anti-discrimination protections for the disabled explicitly prohibit differential treatment on the basis of perceived "handicap." See, e.g., 42 U.S.C. 3602(h); 3604(f). In addition, in one housing case, the Sixth Circuit held that the defendant need not actually have known that the plaintiffs were members of the protected class; a mere suspicion would have been enough. Sanders v. Dorris, 873 F.2d 938, 942 (6th Cir. 1989). If it is illegal to deny a housing opportunity to people because of a correct suspicion that they are African-Americans, it is hard to see why the same action would be legal if the suspicion proved unfounded.
23 Evans, 116 S.Ct. at 1632-33 (Scalia, J. dissenting).

24 At least one federal case already has involved a refusal to hire based on an erroneous belief that the applicant was gay. See Jantz v. Muci, , (D.Kan. 1991), rev'd 976 F.2d 623 (10th Cir. 1992), cert. denied, 508 U.S. 952 (1993).

25 As noted in the introduction, the question of whether it is reasonable to assume that someone engages in "homosexual conduct" from their statements about their sexual orientation is beyond the scope of this essay.

26 See Fajer, supra note 12, at 607-11.

27 See id. at 611-14 (collecting sources).

28 A related effect of eliminating employment discrimination protection for sexual orientation is likely to arise from the relation between sexual orientation and cross-gender behavior. Employers who wish to discriminate on the basis of lack of adherence to gender norms currently may be accused of sex discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 237, 251 (1989). Without sexual orientation protections, these employers might simply accuse the relevant employee of being a lesbian, a category that they would be allowed to use as a ground for termination. See Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975) (claim that Title VII prohibited discrimination against effeminate men rejected because discrimination based on affectional or sexual preference" is not covered by statute." ) aff'd, 529 F.2d 325 (5th Cir. 1978).

29 See Evans, 116 S.Ct. at 1629 (Scalia, J. dissenting) ("preferential laws"); id. at 1630 ("special treatment"); id. at 1631, 1632, 1634 ("special protection"); id. at 1630, 1637 ("preferential treatment").

30 See id. at 1630.

31 See Evans, 116 S.Ct. at 1623 (describing coverage of ordinances)

32 See Hunter v. Erickson, 393 U.S. 385, 391 (1969)