Homosexuals: A Suspect Class?

The struggle for minority protection by lesbians and gay men has moved to the center of American life at the outset of the 1990's. It is almost certain that lesbian and gay issues will be a more eminent aspect of the public consciousness and American political scene in the coming decade than in any other time in American history. Policy changes early in Bill Clinton's administration created a heated debate over the military presence of gays and lesbians, several states have passed amendments prohibiting laws that protect homosexuals from discrimination, and nearly every religious organization in the nation is facing tough questions ranging from the ordination of homosexuals to homosexual marriages. Furthermore, the homosexual community is more prominent than ever: Lesbians and gay men are fighting for civil rights in the courtroom and in Congress, there are gay characters on prime-time television shows, well-known public figures openly discussing their homosexuality, and there is virtually no one who can claim that they have never had contact with a homosexual. In the middle of all this publicity, there lingers a pending Supreme Court case in which the fate of the homosexual lies: Romer v. Evans, a case that dominated Colorado that has come to "symbolize the controversy over gay legal rights" throughout the nation. This paper will trace the elements behind that case, and attempt to focus on the steps the Supreme Court will follow to determine whether homosexuality must be legally considered a "suspect class" for the purposes of "quota preferences, protected status or claim of discrimination" as outlined by Colorado's now-famous Amendment 2.

Amendment 2 does away with any attempt to protect homosexuals as a group that needs special rights because of discrimination. It was enacted after a statewide referendum, in which 53% voted for the measure. Richard Evans sued the state and Governor Romer (who, ironically, opposed the amendment) under the Fourteenth Amendment's Equal Protection Clause, saying that Amendment 2 infringes upon the homosexual's "fundamental right to participate in the democratic process." Romer v. Evans has had amicus curiae or "friend of the court" briefs filed for both sides--briefs that have pitted state against state and church against church. Colorado officials are quick to say that their state is not acting out of hate, but merely deciding in a democratic fashion whether homosexuals need to be singled out for protection against discrimination. The Colorado Supreme Court, however, struck down the amendment, saying:

[Amendment 2] bars gay men, lesbians and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. The United States Supreme Court must now determine whether or not to uphold the Colorado Supreme Court's decision, despite the results of the referendum that was basically a public affirmation of orthodox Christian beliefs.

For hundreds of years homosexuality has been uniformly condemned by traditional Christian societies as immoral. On that ground, it was never contested that sodomy should remain illegal and unprotected by any legislation--homosexuals were considered unnatural sexual deviants, and were treated as such. In recent years, however, startling new research has indicated that homosexuality is possibly inherited and determined by chromosomes. A 1992 study directed by neuroscientist Simon LeVay showed that a tiny area believed to control sexual activity known as the hypothalamus was less than half the size in gay men as in heterosexual men. This study raises an interesting question: If homosexuality is hereditary, is there any basis for societal discrimination against something innate?

The reactions of the homosexual community have been mixed. As many see it, looking for a "cause" of homosexuality suggests that it is an abnormality, and implies that it is deviant from a "normal" heterosexuality. On the other hand, history has shown that society's perception of gay activities can be threatening, if not deadly. Over the centuries they have either been merely "intolerated" or,

more often, detested. After a 13th century sermon from Saint Thomas Aquinas, society began to view gays as "not only unnatural but dangerous." A genetic component in sexual orientation would tell homosexuals and the world that homosexuality is not a fault, and not the fault of anyone other than nature.

Society's traditional stance on homosexuality has often subjected homosexuals to a horrifying list of "cures" at the hands of psychiatrists and psychologists--usually aimed at heterosexual reorientation. Treatments like these have almost invariably involved a "negative value judgment concerning the inherent character" of homosexuality. Among these "cures" have been such surgical measures as castration, hysterectomy, and vasectomy; others have included electric and chemical shock treatment, aversion therapy, and drugs. As recent as 1967, hypnosis was still being used to treat "deviant behavior." Now, in the shadow of the aforementioned studies, psychiatrists and psychologists alike are taught that they should help homosexuals to feel more comfortable with themselves and their sexual orientation. It is hoped that such treatment will not only help homosexuals feel more at ease with their sexuality, but also give society a different, more "educated" view of the gay community and lifestyle.

The traditional moral view of homosexuality is legally irrelevant, however. The thing that truly hampers the homosexual's case in Romer v. Evans is a previous Supreme Court decision, Bowers v. Hardwick. In this case, Michael Hardwick, the plaintiff, was "charged with violating the Georgia statute criminalizing sodomy by committing that act with another male in the bedroom" of his home. His suit was based on his belief that the law violated his fundamental right to homosexual activity because it is "a private and intimate association beyond the reach of state regulation" by reason of the Ninth Amendment, which states "the enumeration in the Constitution, of certain rights, shall not be construed to deny of disparage others retained by the people", and by the Due Process Clause of the Fourteenth Amendment. The Supreme Court ruled against Hardwick in a 5-4 decision, saying that the Constitution did not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy." In a concurring opinion, Chief Justice Warren Burger, quoting an old English statute, describes homosexuality as: "The infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature" and "a crime not fit to be named" . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Since the Court found that private acts of sodomy are not constitutionally protected, Georgia was permitted to bar homosexuality on merely "rational" grounds--a far cry from the "compelling state interest" it would have had to meet if the sodomy had been protected. The rational reason, the Supreme Court said, was that:

The law . . . [was] constantly based on notions of morality . . . if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.

The new evidence of inherited genes for homosexuality, however, will force the Supreme Court to reexamine the way it looked at Bowers v. Hardwick. In order to determine the legality of discriminating against certain individuals, the Court must examine factors that will possibly identify that group as a "suspect class." If the Court recognizes those individuals as a suspect class, it makes any discrimination (such as that contained in Colorado's Amendment 2 statute) very difficult on the part of the state.

The first factor the Supreme Court generally considers is whether the group at issue has suffered a history of purposeful discrimination. In the case of homosexuality, there is no question that homosexuals have historically been the objects of vicious and sustained hostility, as outlined earlier in this paper. Homosexuals have been the frequent victims of "gay-bashing," and have been excluded from jobs, schools, housing, churches, and even families; with this evidence it is plain that homosexuals in our society have faced as much hatred as other suspect

classes such as blacks or people of a particular national origin.

The second factor the Supreme Court considers when analyzing suspect classes is "whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious." The interpretation of this factor can be further broken down into three separate terms. The Court considers first whether the group is defined by a trait that frequently bears no relation to ability to perform or contribute to society. It is evident, by the powerful and responsible positions of many gay men and women in America, that sexual orientation plainly has no relation to a person's ability to perform in society--thus, homosexuals meet this standard. The second thing the Court considers is whether negative societal concepts stem from inaccurate stereotypes. The homosexual is rarely, as widely believed to the contrary, a threat to all people of their sex or immature children; in fact, the majority of the homosexual population remains quietly in their homes--thus, homosexuals meet the second term as well.

It is the third term of this second factor that will be called into question by the Court when deciding Romer v. Evans. The Court must determine whether homosexuality is immutable, or, at a minimum, requiring a major physical change or a traumatic change of identity. If only five out of the nine Supreme Court justices determine that the aforementioned studies conclusively show that homosexuality is an inherent trait, the Colorado Supreme Court decision that Amendment 2 is unconstitutional will be upheld.

The third and final factor the Supreme Court considers in suspect class analysis is whether the discriminated group lacks the political power necessary to redress the government. Even when homosexuals are able to pursue their rights openly in the political arena, society's view of them probably makes their efforts ineffective. Elected officials, sensitive to their constituents' opinions may be swayed to vote against legislation that even has the appearance of condoning homosexuality. Undoubtedly, homosexuals meet this third and final factor.

It is possible, but not certain, that homosexuals are a suspect class, and as such Amendment 2 will be subject to much greater judicial scrutiny. If this proves to be the case, it is highly probable that Romer v. Evans will be upheld and it is also possible that there will be legislation in Congress to include homosexuals on the growing list of those entitled to be considered minorities, receive quota preferences, and be protected from discrimination by law.

Even if homosexuals are not considered a suspect class by the Supreme Court, Amendment 2 may be struck down under the Fourteenth Amendment's Free Exercise Clause, which declares that a state may not "deny to any person within its jurisdiction the equal protection of the law." Jean E. Dubofsky, the lawyer for Richard Evans in the case, said "the Court need not rule homosexuals a specially protected class to find that Amendment 2 infringes upon their rights." Specifically, Dubofsky believes the amendment takes away the ability of homosexuals to urge their city councils to accord them the specific protection that other groups have the right to seek--denying them equal protection in the democratic process. If the Court agrees with that argument, Amendment 2 will be considered unconstitutional, whether homosexuals are a suspect class or not.

My personal opinion, however, is rooted in my belief in a natural law. I am a Christian, and have been taught all my life that homosexuality is a sin, and I still believe that. That does not change the fact that history is undeniably cruel to the homosexual--it is possible that "no single group of human beings has been subjected to greater injustice, persecution, and suffering than they." I find it personally appalling that homosexuality is treated by Christians as a sin that is "worse" than most other sins. Our society has been conditioned into an emotional revulsion so bitter that we even avow that we would rather see our children "dope addicts or murderers" than homosexuals. This is not right. Christianity is based on God's unconditional love for the sinner, despite his hatred of the sin. Our efforts to reach homosexuals should not be out of uneducated fear or inaccurate stereotypes, but founded in the same love for every man and woman that God has. Acceptance, not sermons, changes the homosexual. The New Catholic Encyclopedia

expresses my sentiments exactly:

It should be stressed that a homosexual is just as pleasing to God as a heterosexual, as long as he makes a sincere effort to control his [homosexuality] with the help of grace. Although the individual may feel certain that his inversion is so deep that he cannot redirect his tendencies, he must accept them and seek to fulfill some purpose in the world.

Although this sort of thinking bears little consequence on Romer v. Evans, I believe there is one other aspect to the case that must be dealt with. The studies of Simon LeVay are certainly inconclusive, regardless of how they are looked at. Although they showed without question that the hypothalamus is smaller in gay men, there are still many other things to be considered, chiefly: Could sexual orientation affect brain structure, instead of vice versa? Kenneth Klivington, an assistant to the president of the Salk Institute, points to a body of evidence revealing that "the brain's neural networks reconfigure themselves in response to certain experiences." For example, one study found that the area of the brain controlling the reading finger grew larger in people who read Braille after becoming blind. It is possible then, that the hypothalamus is affected in the reverse way--a lack of heterosexual activity may shrink that area of the brain. Even LeVay admits that "that's a distinct shortcoming" of his study, because he knew "regrettably little" about his subjects' sexual histories.

It seems more likely, then, that homosexuality would be a product of both genetics and learned behavior. As evidence of this, I submit my mother's side of the family, which contains many alcoholics. In my mind, the evidence overwhelmingly supports that a predisposition to alcoholism is hereditary. Yet, the Bible says "do not get drunk on wine, which leads to debauchery." I cannot explain why there is an inherited trait for something condemned as a sin, nor will I attempt to. My point is that if there are genes that sway people toward homosexuality, they are to be fought just like the predisposition to alcoholism I have inherited must be. Things that "feel" more natural are not always inevitable, and simply because I have the genes to make me more likely to be an alcoholic does not mean I will be an alcoholic.

If the Court interprets the genetic components of homosexuality the way I do, Romer v. Evans will be overturned because Bowers v. Hardwick will stand. In other words, if homosexuals are not considered a suspect class, then their activity can be made illegal in Colorado by legislation: Therefore, it would be ridiculous to have special rights that protect criminals, and Amendment 2 will be constitutional.

I am not a bigot, or a homophobe, or a right-wing religious zealot. Homosexuals should have just as much opportunity to participate in the political process as anyone else--that is a fundamental facet of our nation's democracy. Nevertheless, to place them in a class with other minorities like blacks, the disabled, or illegitimate children would be to sanction their behavior-- a behavior that appears to be as much learned as inherited. Until that debate is settled, I believe it is not necessary to protect homosexuals by quota preferences or protected status, and in my opinion, Amendment 2 is both legally and morally appropriate.