

ROMER HAS IT

A quick scan of LGBTQ¹-rights victories from the last two decades paints an indisputable picture of progress, a triumphant string of Supreme Court decisions that neatly illustrates the maxim that “the arc of the moral universe is long, but it bends toward justice.”² But the real story is far more complicated. In 2022 alone, hundreds of anti-LGBTQ bills were introduced in state legislatures³ — many of which became law⁴ — compared to fewer than fifty in 2018.⁵ The sheer volume of these new measures indicates a substantial backsliding in an arena of political debate that many Americans might have assumed was settled.

What is the reason for this backsliding, and more importantly, what can be done about it? This Note will attempt to explore some of these questions through the lens of the 1996 case *Romer v. Evans*,⁶ which invalidated an anti-LGBTQ law under the Equal Protection Clause⁷ for the first time⁸ and affirmed that a “bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁹ Ultimately, this Note argues that *Romer*’s holding is broader and more applicable to modern circumstances than the conventional wisdom assumes. *Romer* thus offers a powerful alternative framework, grounded in equal protection, to challenge anti-LGBTQ laws in an era where substantive due process rights appear increasingly vulnerable.

Some litigants might understandably be hesitant to breathe new life into *Romer* and the Equal Protection Clause more broadly — at least as applied to LGBTQ people — for fear of setting undesirable precedent in the face of a staunchly conservative federal judiciary.¹⁰ But what

¹ The initialism “LGBTQ” stands for “lesbian, gay, bisexual, transgender, and queer.” *Glossary of Terms: LGBTQ*, GLAAD: MEDIA REFERENCE GUIDE, <https://www.glaad.org/reference/terms> [<https://perma.cc/W8UM-HHKS>]. This Note uses “queer” interchangeably with “LGBTQ.”

² Martin Luther King, Jr., *Our God Is Marching On!* (Mar. 25, 1965), <https://youtu.be/hAmM7mSdgzM> [<https://perma.cc/KG77-ZZRQ>]; see also *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶ 404 (per Chandrachud, J., concurring) (India) (quoting the same in an opinion striking down India’s colonial-era antisodomy law).

³ Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC NEWS (Mar. 20, 2022, 6:00 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418> [<https://perma.cc/SH8W-YUFA>].

⁴ See *infra* notes 59–65 and accompanying text.

⁵ Priya Krishnakumar & Devan Cole, *2022 Is Already a Record Year for State Bills Seeking to Curtail LGBTQ Rights, ACLU Data Shows*, CNN (July 17, 2022, 5:57 PM), <https://www.cnn.com/2022/07/17/politics/state-legislation-lgbtq-rights/index.html> [<https://perma.cc/A7M4-CGD8>].

⁶ 517 U.S. 620 (1996).

⁷ U.S. CONST. amend XIV, § 1.

⁸ See Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 67–68, 68 n.3 (1997).

⁹ *Romer*, 517 U.S. at 634 (omission in original) (internal quotation marks omitted) (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

¹⁰ See generally, e.g., Rebecca R. Ruiz et al., *Trump Stamps G.O.P. Imprint On the Courts*, N.Y. TIMES, Mar. 16, 2020, at 1.

makes the Equal Protection Clause a particularly attractive constitutional avenue for challenging contemporary anti-LGBTQ laws is that the Supreme Court still recognizes and applies the clause's tier-based framework.¹¹ This is true even as the Court continues to cast doubt on the tenability of substantive due process claims.¹² *Romer's* vision of equal protection may also be of use at the state level, where courts have been charting their own paths on questions of personal liberty.¹³

This Note begins in Part I with a survey of the legal and societal progress made over the last several decades in the realm of LGBTQ rights in order to provide context for the current state of affairs. It traces this trajectory to the present day, moving from the AIDS crisis in the 1980s, to the 2016 election, and, most recently, to the 2022 midterm elections, which were driven by culture-war debates over the visibility of queerness, particularly transgender people, in American life. Part II follows with a review of *Romer* and an analysis of the equal protection framework underlying the decision, particularly with regard to the Court's application of its novel "rational basis with bite"¹⁴ standard. That Part then seeks to challenge the common wisdom that *Romer* was "a ticket good only for one day"¹⁵ by tracing how the Court has cited to and framed *Romer* as precedent in subsequent cases. Lastly, Part III uses this analysis to trace *Romer's* potential application to challenges against recent state-level anti-LGBTQ laws.

I. BACKGROUND

A. *One Step Forward . . .*

Because HIV is no longer "a certain death sentence,"¹⁶ some seem to have forgotten the existential threat that faced the queer community in the 1980s and '90s. The epidemic "gutted [a] generation"¹⁷ and resulted in widespread hostility and fear directed at queer Americans¹⁸ — due in

¹¹ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46 (2022).

¹² See, e.g., *id.* at 2257–61 (cabining the substantive due process framework); *id.* at 2301 (Thomas, J., concurring) (questioning substantive due process altogether). For a discussion of the doctrinally distinct concept of procedural due process, see generally Note, *Dialectical Due Process*, 136 HARV. L. REV. 1958 (2023).

¹³ Cf. Duncan Hosie, Opinion, *With the Supreme Court Lurching Right, State Courts Offer Liberals Hope*, WASH. POST (Dec. 27, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/12/27/with-supreme-court-lurching-right-state-courts-offer-liberals-hope/> [<https://perma.cc/7A9M-L39C>] ("As the Supreme Court retrenches, state courts can be bulwarks of liberty . . .").

¹⁴ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011).

¹⁵ *Id.* at 778.

¹⁶ Peter Staley, Opinion, *Fauci Quietly Shocked Us All*, N.Y. TIMES, Jan. 4, 2023, at A20.

¹⁷ Erin Allday, *Last Men Standing*, S.F. CHRON. (Mar. 2016), <https://projects.sfchronicle.com/2016/living-with-aids/story> [<https://perma.cc/8BBY-GVU3>].

¹⁸ See Justin McCarthy, *Gallup Vault: Fear and Anxiety During the 1980s AIDS Crisis*, GALLUP (June 28, 2019), <https://news.gallup.com/vault/259643/gallup-vault-fear-anxiety-during-1980s-aids-crisis.aspx> [<https://perma.cc/JU39-Q6P9>] ("Between 43% and 44% of Americans in 1987 and 1988 believed that AIDS might be God's punishment for immoral sexual behavior.").

no small part to intentional federal inaction.¹⁹ These negative attitudes were reflected in opinion polling²⁰ and permeated both judicial decisions and legislation: At the peak of the AIDS crisis in 1986, the Supreme Court decided *Bowers v. Hardwick*,²¹ which found no “right [for] homosexuals to engage in acts of consensual sodomy”²² and allowed states to ban sodomy between consenting adults in private.²³ Then, in the 1990s, Congress enacted “Don’t Ask, Don’t Tell” (DADT), forbidding gay individuals from openly serving in the military,²⁴ and the Defense of Marriage Act²⁵ (DOMA), preventing legally married same-sex couples from obtaining federal benefits or recognition.²⁶

But there were glimmers of hope as well, demonstrating that progress was possible (even if it was not inevitable). In 1996, the Supreme Court decided *Romer*, which held that an amendment to the Colorado Constitution that blocked the state and its local governments from providing antidiscrimination protections based on sexual orientation was unconstitutional.²⁷ Then, in 2003, the Supreme Court decided *Lawrence v. Texas*,²⁸ which reversed *Bowers* and declared antisodomy laws unconstitutional as violative of the fundamental due process right to privacy and personal liberty.²⁹ Only a year later, in 2004, Massachusetts became the first state in the nation to perform and recognize same-sex marriages after a favorable ruling from the state’s highest court.³⁰ Then, in 2010, Congress repealed DADT,³¹ and in 2013 and 2015, respectively, the Supreme Court struck down DOMA in *United States v. Windsor*³² and legalized same-sex marriage nationwide in *Obergefell v. Hodges*.³³ Several years later, a landmark ruling from the Supreme Court in *Bostock v. Clayton County*³⁴ extended Title VII protections to prohibit employment discrimination on the basis of gender identity and sexual

¹⁹ See JENNIFER BRIER, *INFECTIOUS IDEAS* 80 (2009) (“Reagan failed to act on AIDS because of his commitment to . . . a moralistic stance against gays and lesbians and drug users . . .”).

²⁰ McCarthy, *supra* note 18.

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

²² *Id.* at 192.

²³ *Id.* at 196. Antisodomy laws — typically vestiges of British colonial rule — tend to be one of the first obstacles toward achieving LGBTQ equality because they directly criminalize the existence of queer people. See generally ALOK GUPTA, HUM. RTS. WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM* (2008), https://www.hrw.org/sites/default/files/reports/lgbt1208_web.pdf [<https://perma.cc/QCW6-ALXQ>].

²⁴ National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (1993) (repealed 2010).

²⁵ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022).

²⁶ See *id.* §§ 2-3.

²⁷ *Romer v. Evans*, 517 U.S. 620, 623-24, 626 (1996).

²⁸ 539 U.S. 558 (2003).

²⁹ *Id.* at 578.

³⁰ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

³¹ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

³² 570 U.S. 744, 751-52 (2013).

³³ 135 S. Ct. 2584, 2599 (2015).

³⁴ 140 S. Ct. 1731 (2020).

orientation.³⁵ Most recently, in December 2022, Congress passed the bipartisan Respect for Marriage Act,³⁶ which formally repealed DOMA and required the states to recognize all marriages, regardless of gender, validly entered into in another state.³⁷ In addition, the Biden Administration has expanded upon the Obama Administration’s efforts “to protect LGBTQ people from discrimination in employment, health care, housing, and education, and other key areas of life.”³⁸

As popular support for LGBTQ rights has reached new heights, even many conservative politicians have begun to dodge the issue, and some have debuted a noticeably softened message.³⁹ But while this may paint a rosy picture of American attitudes toward LGBTQ rights, there have been worrying signs of backsliding in recent years. Minutes after President Trump’s inauguration, the new Administration entirely scrubbed government websites of references to LGBTQ issues.⁴⁰ A month later, the Administration rescinded Obama-era protections prohibiting discrimination on the basis of gender identity in schools⁴¹ and spent the rest of the year fighting against transgender students’ efforts to gain access to school bathrooms that matched their gender identity.⁴² Later that year, President Trump announced — via Twitter — that his Administration would seek an immediate ban on transgender people from serving in “any capacity” in the military.⁴³ The Administration later sought to remove protections for LGBTQ people in a breathtaking array of settings, including homeless shelters, workplaces, foreign-aid initiatives, public and private health-insurance programs, adoption and foster-care programs, classrooms, school sports, and federal prisons.⁴⁴ On the public health front, the Administration continuously sought to defund HIV-related public health initiatives and research programs⁴⁵ —

³⁵ *Id.* at 1737.

³⁶ Pub. L. No. 117-228, 136 Stat. 2305 (2022).

³⁷ *Id.* §§ 3–5. Congress feared that the Court might reverse its same-sex and interracial-marriage precedents in the wake of *Dobbs*. See Kaitlyn Radde, *What Does the Respect for Marriage Act Do? The Answer Will Vary by State*, NPR (Dec. 8, 2022, 12:27 PM), <https://www.npr.org/2022/12/08/1140808263/what-does-the-respect-for-marriage-act-do-the-answer-will-vary-by-state> [https://perma.cc/4EA7-84EX].

³⁸ Press Release, Hum. Rts. Campaign, President Biden Issues Most Substantive, Wide-Ranging LGBTQ Executive Order in U.S. History (Jan. 20, 2021), <https://www.hrc.org/press-releases/president-biden-issues-most-substantive-wide-ranging-lgbtq-executive-order-in-u-s-history> [https://perma.cc/CBC4-U7J4] (discussing Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021)).

³⁹ See, e.g., Annie Karni, *Prominent Gay Republicans Helped Smooth Way for the Marriage Bill*, N.Y. TIMES, Dec. 11, 2022, at 28.

⁴⁰ GLAAD ACCOUNTABILITY PROJECT, *Donald Trump*, GLAAD, <https://www.glaad.org/gap/donald-trump> [https://perma.cc/C5BJ-3Y6E].

⁴¹ Letter from Sandra Battle, Acting Assistant Sec’y for C.R., U.S. Dep’t of Educ. & T.E. Wheeler, II, Acting Assistant Att’y Gen. for C.R., U.S. Dep’t of Just. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [https://perma.cc/S275-DKEL].

⁴² GLAAD ACCOUNTABILITY PROJECT, *supra* note 40.

⁴³ See *Karnoski v. Trump*, 926 F.3d 1180, 1188 (9th Cir. 2019).

⁴⁴ GLAAD ACCOUNTABILITY PROJECT, *supra* note 40.

⁴⁵ *Id.*

despite the ongoing epidemic that still disproportionately affects queer people.⁴⁶ Meanwhile, the Department of Health and Human Services “erase[d] all mentions of the LGBTQ community and their health needs in its strategic plan” and created a “new department that shield[ed] healthcare workers [with faith-based objections] who refuse[d] to treat LGBTQ patients or those living with HIV.”⁴⁷ By the end of 2017, the Administration had “forbidden” officials at the Centers for Disease Control and Prevention from using the words “vulnerable,” “diversity,” “transgender,” “evidence-based,” and “science-based” in official documents for the 2018 budget.⁴⁸

B. A New Wave of State-Level Anti-LGBTQ Laws

Many commentators pinpoint the advent of the new anti-LGBTQ culture wars to Republican Glenn Youngkin’s victory in the 2021 gubernatorial election in blue-leaning Virginia.⁴⁹ Then-candidate Youngkin centered his campaign on giving parents “more control” over their children’s education, particularly on topics of race,⁵⁰ and openly opposed same-sex marriage, inclusive bathroom policies for transgender people, and books in schools featuring queer characters.⁵¹ Hoping to mirror Governor Youngkin’s victory, other conservative politicians emulated his playbook in the 2022 midterm elections⁵²: they “push[ed] near-total bans on abortion . . . and rail[ed] against the alleged ‘woke indoctrination’ of public-school students on matters of gender, sexuality, and race.”⁵³ In Texas, for example, the state Republican Party adopted an official platform with new antiqueer language, calling “[h]omosexuality . . . an

⁴⁶ See Akash N. Desai et al., *Interdisciplinary HIV Sentinel Case Review: Identifying Practices to Prevent Outbreaks in Philadelphia*, 61 AM. J. PREVENTIVE MED. S151, S151–52, S154 (2021).

⁴⁷ GLAAD ACCOUNTABILITY PROJECT, *supra* note 40; see 45 C.F.R. pt. 88 (2020).

⁴⁸ Sheila Kaplan & Donald G. McNeil Jr., *Uproar Grows over a Reported Word Ban at the Centers for Disease Control*, N.Y. TIMES, Dec. 17, 2017, at A20.

⁴⁹ See, e.g., Paul Bond, *Can GOP’s Culture War Gamble Help It Win in 2024?*, NEWSWEEK (Feb. 9, 2023, 2:52 PM), <https://www.newsweek.com/can-gops-culture-war-gamble-help-it-win-2024-1775914> [<https://perma.cc/8CLH-3D6Y>].

⁵⁰ See Hannah Natanson, *Parental Say in Schools, Resonant in Va. Governor’s Race, Bound for GOP National Playbook*, WASH. POST (Nov. 3, 2021, 7:27 PM), https://www.washingtonpost.com/local/education/parent-control-schools-republican-virginia/2021/11/03/313e8a68-3cc3-11ec-a493-51b0252deaoc_story.html [<https://perma.cc/W8ST-ZJWV>].

⁵¹ See James Factora, *Virginia’s New Governor Is an Anti-LGBTQ+ Nightmare*, THEM (Nov. 3, 2021), <https://www.them.us/story/virginia-new-governor-glenn-youngkin-anti-lgbtq-nightmare> [<https://perma.cc/CE5L-ARPE>].

⁵² See Rachel M. Cohen, *How Education Culture Wars Have Shaped the Midterms*, VOX (Nov. 4, 2022, 7:30 AM), <https://www.vox.com/policy-and-politics/2022/11/4/23436470/education-crt-parents-schools-midterms-desantis> [<https://perma.cc/Q6Y9-P7MH>].

⁵³ Ed Kilgore, *Why Republicans Are Turning an Easy Election Into a Culture War*, N.Y. MAG. (Apr. 14, 2022), <https://nymag.com/intelligencer/article/republicans-midterms-culture-war.html> [<https://perma.cc/Q5XB-TVJX>]; see also Bradley Devlin, *The Culture War Still Wins*, AM. CONSERVATIVE (Nov. 9, 2022, 2:30 PM), <https://www.theamericanconservative.com/the-culture-war-still-wins> [<https://perma.cc/YD8J-JC2X>].

abnormal lifestyle choice,”⁵⁴ opposing “all efforts to validate transgender identity,”⁵⁵ and supporting conversion therapy for minors.⁵⁶ The platform also provided that “[n]o one should be granted special legal status based on their LGBTQ+ identification,”⁵⁷ a rationale the Supreme Court explicitly rejected a quarter-century earlier in *Romer*.⁵⁸

This rhetoric soon yielded lawmaking, forming the basis for a host of new laws targeting LGBTQ people — primarily in the spheres of education and healthcare — which this Note will revisit in Part III. These laws tend to fall within several buckets: (1) bans on transgender-related healthcare coverage in Medicaid and/or state-employee health insurance policies (eighteen states),⁵⁹ (2) bans on “best practice medical care for transgender youth” (twelve states),⁶⁰ (3) bans “preventing transgender youth from participating in school sports” (nineteen states),⁶¹ (4) “Don’t Say Gay or Trans” policies “that censor discussions of LGBTQ people or issues in school” (seven states) and schemes “allowing parents to opt children out of LGBTQ-inclusive curricula” (five states),⁶² and (5) policies forbidding “transgender students from using school facilities consistent with their gender identity” (seven states).⁶³ In total, twenty-four states have passed at least one of these laws, affecting approximately forty percent of the estimated LGBTQ population in the United States.⁶⁴

This new wave of laws is notable for its focus on rolling back protections for transgender people, particularly in the health and education

⁵⁴ REPUBLICAN PARTY OF TEX., REPORT OF THE PERMANENT 2022 PLATFORM & RESOLUTIONS COMMITTEE ¶ 143 (2022); see also Eric Neugeboren, “*We Failed*: Gay Republicans Who Fought for Acceptance in Texas GOP See Little Progress,” TEX. TRIB. (July 24, 2022, 5:00 AM), <https://www.texastribune.org/2022/07/24/texas-log-cabin-republicans> [https://perma.cc/2FGF-NE7A] (“[S]imilar language had been stripped from the platform just four years earlier . . .”).

⁵⁵ REPUBLICAN PARTY OF TEX., *supra* note 54, ¶ 144.

⁵⁶ See *id.* ¶ 146. The platform seems to endorse “Reintegrative Therapy,” *id.*, which is a form of conversion therapy, see Djordje Alempijevic et al., Indep. Forensic Expert Grp., *Statement on Conversion Therapy*, 30 TORTURE 66, 66 (2020). Conversion therapy does not work. *Id.* at 68–69. It increases suicide rates and “can cause intense psychological pain and suffering.” *Id.* at 70.

⁵⁷ REPUBLICAN PARTY OF TEX., *supra* note 54, ¶ 143.

⁵⁸ *Romer v. Evans*, 517 U.S. 620, 631 (1996) (rejecting the rationale that a statewide prohibition on antidiscrimination protections “does no more than deprive homosexuals of special rights”).

⁵⁹ See *Medicaid Coverage of Transgender-Related Health Care*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/equality-maps/medicaid> [https://perma.cc/72U4-SRFT]; *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies/state_employees [https://perma.cc/5U2Q-GHRK].

⁶⁰ See *Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans/youth_medical_care_bans [https://perma.cc/UZW3-DBTV].

⁶¹ *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans [https://perma.cc/JC33-HUSQ].

⁶² *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [https://perma.cc/ZB3G-XTC8].

⁶³ *Safe Schools Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/safe_school_laws/discrimination [https://perma.cc/7HW3-Y7HK].

⁶⁴ See *LGBT Populations*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/lgbt_populations [https://perma.cc/2XT5-K93W]; sources cited *supra* notes 59–63.

realms. For decades, activists had admonished the dominant gay-rights legal apparatus for ignoring the needs of transgender and gender-nonconforming members of the queer community in order to achieve mainstream acceptance on gay rights issues like marriage equality.⁶⁵ It is clear that the United States is now facing some of the consequences of ignoring these activists' calls as the "culture wars" have begun to dominate political discourse with transgender rights caught in the crossfire.

II. WHY *ROMER*?

A. *Substantive Due Process on the Lam*

Only a decade or so ago, it seemed as if the Supreme Court had "moved away from group-based [equal protection] claims" and toward due process "individual liberty claims."⁶⁶ Not only did substantive due process offer the Court a robust alternative to equal protection as a means to "protect[] . . . subordinated groups,"⁶⁷ but it also allowed the Court to address equality claims without fear of worsening the country's burgeoning "apprehension of and about its demographic diversity."⁶⁸ In other words, the Court had found a way to repackage its equality-based jurisprudence without dispensing with it altogether.⁶⁹ Substantive due process, rather than the Equal Protection Clause, had thus become the primary vehicle for challenging and striking down anti-LGBTQ laws.

For a while, this new approach seemed to work well, particularly in high-profile cases like *Windsor*⁷⁰ and *Obergefell*.⁷¹ However, not all members of the Court were so happy with this shift. In *Windsor*, Justice Scalia called the Court's due process approach to equality cases "confusing"⁷² and "scatter-shot,"⁷³ suggesting that the Court should have assessed DOMA "only for its rationality" under the Equal Protection Clause alone.⁷⁴ Justice Alito also dissented to express his strong

⁶⁵ See generally Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y. L. SCH. J. HUM. RTS. 589 (2000); Monica Roberts, *Why the Transgender Community Hates HRC*, TRANSGRIOT (Oct. 8, 2007, 2:58 PM), <https://transgriot.blogspot.com/2007/10/why-transgender-community-hates-hrc.html> [<https://perma.cc/8328-J47Y>].

⁶⁶ Yoshino, *supra* note 14, at 748.

⁶⁷ *Id.*; see *id.* at 748–50.

⁶⁸ *Id.* at 751; see *id.* at 792–97.

⁶⁹ *Id.* at 787 ("[E]quality norms ha[d] not been evicted from constitutional jurisprudence altogether, but ha[d] rather been relocated to collateral areas of doctrine.")

⁷⁰ *United States v. Windsor*, 570 U.S. 744, 774 (2013) ("The liberty protected by the . . . Due Process Clause contains within it the prohibition against denying [equal protection] to any person . . .").

⁷¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–605 (2015) (reasoning that the "synergy," *id.* at 2603, between the "interlocking" Due Process and Equal Protection Clauses, *id.* at 2604, "compels the conclusion that same-sex couples may exercise the right to marry," *id.* at 2599).

⁷² *Windsor*, 570 U.S. at 793 (Scalia, J., dissenting).

⁷³ *Id.* at 799.

⁷⁴ *Id.* at 793; see also *id.* at 793–94 (elaborating on his reasoning).

opposition to expanding substantive due process, while still recognizing the ongoing validity of the Court's "equal protection framework."⁷⁵ Likewise, in *Obergefell*, Chief Justice Roberts described the majority's due process approach as "indefensible as a matter of constitutional law," invoking both *Dred Scott* and *Lochner* to illustrate his point.⁷⁶

But now that Justice Kennedy is gone,⁷⁷ so too are his expansive conceptions of liberty and equality under the Due Process Clause.⁷⁸ Indeed, the Court has recently embarked on the path of walking back its substantive due process precedents altogether. Beginning with *Dobbs v. Jackson Women's Health Organization*,⁷⁹ the Court overturned *Roe v. Wade*⁸⁰ by returning to a stricter vision of substantive due process grounded in "history and tradition."⁸¹ With the power of substantive due process waning, *Romer* offers a useful constitutional alternative for litigants seeking to challenge anti-LGBTQ laws in a manner that more closely resembles the Court's "usual framework for deciding equal protection cases."⁸² Because *Romer* is a "pure equal protection" decision, it may seem somewhat retro.⁸³ It certainly feels less romantic, with no waxing prose on the meaning of human dignity. But *Romer* stands on its own two feet without the aid of the Due Process Clause. As Professor Kenji Yoshino has explained, "[t]here will be times when [a liberty-based due process] strategy will not be possible, and in these instances," litigants "should fight out their claims on traditional equal protection grounds."⁸⁴

What's curious about *Romer* is that some commentators have treated it as if it were "a ticket good only for one day."⁸⁵ As the argument goes,

⁷⁵ *Id.* at 811 (Alito, J., dissenting); *see id.* at 808–09.

⁷⁶ *Obergefell*, 135 S. Ct. at 2616–17 (Roberts, C.J., dissenting); *see also id.* at 2623 ("[T]he majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its [holding] . . .").

⁷⁷ *See generally In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 1 (2018).

⁷⁸ *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.").

⁷⁹ 142 S. Ct. 2228 (2022).

⁸⁰ 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

⁸¹ *Dobbs*, 142 S. Ct. at 2244; Yoshino, *supra* note 14, at 779.

⁸² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting).

⁸³ Daniel J. Crooks III, *Toward "Liberty": How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 273 (2013). *But see* Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1450 (2004) (arguing that *Romer* "undermines the traditional tiers of scrutiny" and "[g]ay rights cases 'just can't be steered readily onto . . . ' the equal protection/status track" (quoting Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1993))).

⁸⁴ Yoshino, *supra* note 14, at 802–03. The *Romer* Court might have "resort[ed] to the Equal Protection Clause" because it believed that substantive due process was a "blocked" legal avenue for resolving the matter. Seidman, *supra* note 8, at 70.

⁸⁵ *E.g., Yoshino, supra* note 14, at 778. Notably, however, some contemporaneous writings expressed more optimism. *See, e.g., Seidman, supra* note 8, at 81 (arguing that the "potential scope" of *Romer*'s holding was "breathtaking").

the Colorado law at issue was “unprecedented,” rendering *Romer* easily distinguishable.⁸⁶ Even when it was decided, *Romer* was considered to be of limited value by some scholars due in part to its “missing pages”⁸⁷ — the Court “required only six-and-one-half pages to establish the unconstitutionality of a law that it acknowledged was ‘unprecedented in [American] jurisprudence.’”⁸⁸ But such understandings are unduly limiting. *Romer*’s missing pages — its “silences, omissions, and absences”⁸⁹ — might simply have been a product of the cautious milieu of the 1990s with regard to sexual otherness, leading to analytical gaps that scholars like Professor Janet Halley argued at the time were not quite suitable for resolution yet.⁹⁰ Now that more time has passed since *Romer* was penned, new opportunities have arisen to fill in some of the opinion’s conspicuous silences.⁹¹ In order to better understand what this might look like, this Part will offer a brief overview of *Romer* and identify some potential component parts of its “more searching” form of rational basis review⁹² — often referred to as rational basis with bite⁹³ — which flipped the usual rational basis presumption of a law’s constitutionality.⁹⁴ The Court’s later invocations of *Romer*, however infrequent, have demonstrated that it was not so much a one-off case limited to its facts but rather an important source of doctrine to guide courts as they embark on equal protection analyses. It is through these later cases and interpretations that one can begin to identify the underlying doctrine hidden behind *Romer*’s analytical silences.

True, the Court’s most staunchly conservative members would likely resist such a shift back to equal protection — both Justices Thomas and

⁸⁶ Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387, 408 (1997); Yoshino, *supra* note 14, at 778 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

⁸⁷ See generally Baker, *supra* note 86.

⁸⁸ *Id.* at 388 (alteration in original) (quoting *Romer*, 517 U.S. at 633); cf. Seidman, *supra* note 8, at 69 (“[The opinion] contain[ed] not a single footnote, and a bare minimum of legal analysis.”).

⁸⁹ Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 433 (1997).

⁹⁰ *Id.* at 452; see also *id.* at 433 (“[I]f we fill in the gaps in *Romer* too quickly, we will become unable to see how they . . . make their own distinctive contributions to the range of meanings the text can sustain . . .”). That said, many scholars vigorously sought to fill these gaps. See, e.g., Akhil Reed Amar, Essay, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 203 (1996) (arguing that the Attainder Clause, U.S. CONST. art. I, § 10, cl. 1, “clarifies and supports the majority’s theory” in *Romer*).

⁹¹ See Karlan, *supra* note 83, at 1462 (suggesting that equal protection jurisprudence regarding sexual orientation might develop “incremental[ly]”); Seidman, *supra* note 8, at 68 (“[I]t remains too early to know what future Justices will make of *Romer*. It is (barely) possible to read the opinion so narrowly as to change very little.”); cf. Amar, *supra* note 90, at 222 (“[W]e must read Justice Kennedy’s opinion with special care, to tease as much meaning as possible out of his words.”).

⁹² See Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

⁹³ See, e.g., Yoshino, *supra* note 14, at 759; see also Flack v. Wis. Dep’t of Health Servs., 328 F. Supp. 3d 931, 951–53 (W.D. Wis. 2018) (recognizing but not applying *Romer*’s rational-basis-with-bite review); United States v. Wilde, 74 F. Supp. 3d 1092, 1096–97 (N.D. Cal. 2014) (same).

⁹⁴ See FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 314 (1993) (citing *Lyng v. Int’l Union, UAW*, 485 U.S. 360, 370 (1988)).

Alito have consistently opposed recognition of LGBTQ rights under *any* framework.⁹⁵ But other conservative Justices have shown a willingness to let the law evolve to protect the rights of queer people in at least some contexts, with *Bostock* serving as one obvious example.⁹⁶ Even Chief Justice Roberts acknowledged that an equal protection approach might have been tenable in *Obergefell* had the Court been faced with “a more focused challenge to the denial of certain tangible benefits.”⁹⁷ So too did Justice Alito briefly recognize in *Dobbs* that “invidiously discriminatory animus” could pose an equal protection problem.⁹⁸ And even if the Court might not yet be ready for new equal protection challenges to anti-LGBTQ laws, *Romer* has not been overruled and its framework remains good law, making it an attractive option for litigants to pursue in the lower courts.⁹⁹ So while *Romer* may be dormant, it is certainly not dead. It “clear[ed] away obstacles and open[ed] up possibilities”¹⁰⁰ and “forged a foundation for future equal protection challenges to laws borne out of animosity.”¹⁰¹ That future has simply not yet been pursued.

B. A *Romer* Refresher

In *Romer v. Evans*, the Supreme Court struck down a referendum, known as Amendment 2, that amended Colorado’s constitution to prohibit “action at any level of state or local government designed to protect . . . homosexual [and bisexual] persons” and repealed all such existing protections at the local level.¹⁰² Because the amendment created a classification (one based on sexual orientation), the Court analyzed the law under the Equal Protection Clause; to withstand equal protection scrutiny, a law must, at minimum, “bear[] a rational relation to some legitimate end.”¹⁰³ In *Romer*, the “primary rationale” for

⁹⁵ See, e.g., *United States v. Windsor*, 570 U.S. 744, 811, 815 (2013) (Alito, J., dissenting). Justice Thomas joined Justice Alito’s dissent.

⁹⁶ See *supra* notes 34–35 and accompanying text; see also Jeannie Suk Gersen, *Could the Supreme Court’s Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, NEW YORKER (June 27, 2020), <https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action> [<https://perma.cc/JLM5-DDV9>] (“[T]extualism leads to acutely different consequences in the hands of different interpreters . . .”).

⁹⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting).

⁹⁸ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274 (1993)).

⁹⁹ *Romer* continues to be cited in the lower courts, including by conservative jurists, for the notion that laws motivated by a “bare desire to harm a politically unpopular group” often fail rational basis scrutiny. See, e.g., *Jones v. Governor of Fla.*, 975 F.3d 1016, 1034 (11th Cir. 2020) (en banc) (Pryor, C.J.) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018)).

¹⁰⁰ Seidman, *supra* note 8, at 73 (“[T]he time to think seriously about the advantages and disadvantages of the future that *Romer* opens for us is now, before its meaning becomes fixed.”).

¹⁰¹ Amy D. Ronner, *When Courts Let Insane Delusions Pass the Rational Basis Test: The Newest Challenge to Florida’s Exclusion of Homosexuals from Adoption*, 21 U. FLA. J.L. & PUB. POL’Y 1, 31 (2010).

¹⁰² *Romer v. Evans*, 517 U.S. 620, 624 (1996).

¹⁰³ *Id.* at 631.

Amendment 2 was “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”¹⁰⁴

Ultimately, the Court rejected these justifications, holding that the amendment could not withstand even rational basis review, the most deferential standard. While the majority acknowledged that rational basis review is generally quite forgiving — a law can survive “even if [it] seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous”¹⁰⁵ — it still found Amendment 2 “at once too narrow and too broad” because it “identifie[d] persons by a single trait and then denie[d] them protection across the board.”¹⁰⁶ The Court reasoned that such laws are “so far removed from [their] justifications”¹⁰⁷ that they “raise the inevitable inference that the disadvantage imposed is born of animosity toward the [affected] class,”¹⁰⁸ thus making it “impossible to credit” the State’s purported rationale.¹⁰⁹ These “constitutional difficulties”¹¹⁰ were further amplified by the fact that queer Coloradans faced a unique political disadvantage: in order to protect themselves against discrimination, they would be forced to pursue a new constitutional amendment by appealing to the very statewide group of voters that denied them protection in the first place.¹¹¹

Admittedly, the *Romer* opinion was brief, and the Court spent little time sorting through the State’s justifications. But even Justice Scalia seemed to agree with the majority’s inference that the law was motivated by animus, although he saw no constitutional infirmity with a state law justified by “animus” toward “reprehensible” conduct, so long as one defines animus as “moral disapproval.”¹¹² He emphasized that *Bowers* — which allowed states to criminalize sodomy — was still good law and reasoned that “surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in [criminalized] conduct.”¹¹³ Justice Scalia also added that he believed voters were “entitled to be hostile toward homosexual conduct”¹¹⁴ and

¹⁰⁴ *Id.* at 635.

¹⁰⁵ *Id.* at 632 (citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552 (1947)).

¹⁰⁶ *Id.* at 633.

¹⁰⁷ *Id.* at 635.

¹⁰⁸ *Id.* at 634.

¹⁰⁹ *Id.* at 635.

¹¹⁰ *Id.* at 630.

¹¹¹ *See id.* at 631; *see also id.* at 633 (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”); *id.* at 639 (Scalia, J., dissenting) (labeling this as the majority’s “central thesis”).

¹¹² *Id.* at 644 (Scalia, J., dissenting).

¹¹³ *Id.* at 642.

¹¹⁴ *Id.* at 644.

considered it “no business of the courts . . . to take sides in this culture war.”¹¹⁵

From these dueling opinions, one can ascertain several key factors that allowed the *Romer* Court to give less weight to Colorado’s purported interests and strike down Amendment 2 via rational basis review: (1) the fact that the targeted class was politically limited in its ability to challenge a law that “impose[d] a special disability upon [them] alone,”¹¹⁶ (2) evidence suggesting that the law was motivated by “animus”¹¹⁷ or “moral disapproval”¹¹⁸ of an unpopular class, and (3) the “unprecedented” nature of the law.¹¹⁹

C. *Treatment of Romer in Subsequent Supreme Court Caselaw*

This section will review the Court’s employment of *Romer* since the case was decided in 1996 in order to determine the scope and contours of its precedential value in contemporary challenges to laws creating classifications based on queer identity. Although the Court has nodded back to *Romer* only a handful of times — often in passing — each such instance offers a new gloss on the case, yielding new clues to help decipher its blurry doctrinal puzzle and fill in its silences. Building on the factors identified in the previous Part, this Note identifies three elements that subsequent invocations of *Romer* have reinforced when deeming an anti-LGBTQ law unconstitutional: (1) political-process dysfunction, (2) animus inferred from moral disapproval, and (3) discrimination of an unusual character. Commentators have often treated animus as *Romer*’s primary determinative inquiry,¹²⁰ but this factor alone was not what allowed the Court to flip the conventional presumption of rationality.¹²¹ The Justices’ subsequent references to *Romer* have demonstrated the continued relevance of all three elements, even if they may not be exhaustive or jointly necessary to compel a finding of animus.

i. Political-Process Dysfunction. — Shortly after the Court decided *Romer*, it had to confront the implications of its holding upon consideration of an appeal from the Sixth Circuit case *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.¹²² In that case, the court of appeals considered the constitutionality of an amendment to Cincinnati’s local charter that forbade the city from granting individuals “protected status, quota preference, or other preferential treatment” on

¹¹⁵ *Id.* at 652; see also Amar, *supra* note 90, at 228 (“[Justice Scalia’s] Kulturkampf reference reminds us of the highly charged nature of debates over gay rights . . .”).

¹¹⁶ *Romer*, 517 U.S. at 631.

¹¹⁷ *Id.* at 632; see also *id.* at 634.

¹¹⁸ *Id.* at 644, 646 (Scalia, J., dissenting).

¹¹⁹ *Id.* at 633 (majority opinion).

¹²⁰ See, e.g., Yoshino, *supra* note 14, at 763.

¹²¹ See *infra* notes 164–66 and accompanying text.

¹²² 128 F.3d 289 (6th Cir. 1997).

the basis of their sexual orientation.¹²³ On its initial review — before *Romer* had been decided — the Sixth Circuit upheld the law, but the Supreme Court vacated and remanded for reconsideration in light of *Romer*.¹²⁴ On remand, the court of appeals again upheld the amendment, explaining that the two cases involved “substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished [their] constitutional posture[s].”¹²⁵ Unlike the Colorado amendment, reasoned the court, the Cincinnati amendment did not have a “sweeping and conscience-shocking effect” because it was purely local in nature and merely eliminated preferential treatment on the basis of sexual orientation, “leaving untouched the application, to gay citizens, of any and all legal rights generally accorded by the municipal government to all persons as persons.”¹²⁶ Accordingly, the Sixth Circuit found it unnecessary to perform an “extra-conventional” *Romer*-style application of equal protection principles.¹²⁷ Subsequently, the Supreme Court denied certiorari, keeping the Sixth Circuit ruling in place.¹²⁸

The precedential value of certiorari denials is limited at best.¹²⁹ But even if one views the Court’s denial of certiorari as an indication that it agreed with the Sixth Circuit’s assessment of *Romer* as a narrow case limited to its facts, one can still read *Equality Foundation* as compatible with the idea that *Romer* was concerned with *statewide* deficiencies in the political process that make it more difficult for marginalized groups to advocate for or against laws that implicate them as a class.¹³⁰ What the *Romer* Court did *not* do, however, was adopt a strong version of the so-called political-process doctrine, which would require courts to apply strict scrutiny to laws that infringe on “the fundamental right to participate equally in the political process.”¹³¹ The majority appeared to “implicitly reject[.]” this test as advanced by the Colorado court below.¹³²

¹²³ *Id.* at 291 (quoting CINCINNATI, OHIO, CHARTER art. XII (1993)).

¹²⁴ *Id.*; *see also* Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 525 U.S. 943, 943 (1998) (mem.).

¹²⁵ *Equal. Found. of Greater Cincinnati*, 128 F.3d at 295.

¹²⁶ *Id.* at 296–97; *see also id.* at 297 (noting that unlike the Colorado amendment, the Cincinnati amendment did not “interfere[] with the expression of local community preferences in [the] state”).

¹²⁷ *Id.* at 297.

¹²⁸ *Equal. Found. of Greater Cincinnati*, 525 U.S. at 943.

¹²⁹ Denying certiorari “is not a ruling on the merits” and “sometimes . . . reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue.” *Id.* (Stevens, J., respecting the denial of the petition for a writ of certiorari).

¹³⁰ *See, e.g., Baker, supra* note 86, at 402–06 (considering the denial of “direct access to the political and judicial processes . . . for the purpose of seeking protection against discrimination” as one “characteristic[] that . . . render[ed] Amendment 2 both unique and unconstitutional,” *id.* at 402–03).

¹³¹ *Evans v. Romer*, 854 P.2d 1270, 1279 (Colo. 1993). As lower courts have observed, the “continued vitality” of this strong version of the doctrine remains “in question.” *E.g., Lewis v. Bentley*, No. 16-CV-690, 2017 WL 432464, at *13 (N.D. Ala. Feb. 1, 2017) (citing *Schuetz v. Coal. to Def. Affirmative Action, Integration & Immigr. Rts. & Fight for Equal. by Any Means Necessary* (BAMN), 572 U.S. 291, 371–72 (2014) (Sotomayor, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 623–24, 632 (1996)).

¹³² *Romer*, 517 U.S. at 640 n.1 (Scalia, J., dissenting).

But, as Justice Sotomayor later articulated, *Romer* still “resonates with the principles undergirding the political-process doctrine,”¹³³ even if the Supreme Court has rejected its strict scrutiny test.¹³⁴ In this way, *Romer* can be read as having considered statewide political-process dysfunction as one of several factors that indicate that a challenged law lacks “a rational relationship to a legitimate governmental purpose.”¹³⁵ *Romer*, therefore, could provide compelling support for a law’s lack of a rational basis where statewide political-process dysfunction may be implicated.

2. *An Inference of Animus Based on Moral Disapproval.* — After *Romer*, the Court did not substantively address the case until *Lawrence* in 2003. In *Lawrence*, the Court overruled *Bowers* and invalidated a Texas law criminalizing only same-sex sodomy.¹³⁶ Although the Court cited *Romer* as a “principal case[.]” that militated against retaining *Bowers*,¹³⁷ the Court ultimately decided *Lawrence* on the basis of due process.¹³⁸ Writing for the majority, Justice Kennedy called the petitioners’ *Romer*-based equal protection argument “tenable” but explained that the Court chose the due process route to avoid the implication that “a prohibition [on sodomy] would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”¹³⁹ The Court also believed that due process principles better addressed the implications of the “stigma” wrought by the Texas law.¹⁴⁰

Although the *Lawrence* majority found it unnecessary to conduct an equal protection analysis, Justice O’Connor’s concurrence provides some insight into how the Court might have done so. Citing *Romer*, she emphasized that the Court has “applied a more searching form of rational basis review” when “a law exhibits . . . a desire to harm a politically unpopular group.”¹⁴¹ She understood *Romer* to hold that “[m]oral disapproval of a group cannot be a legitimate government interest” and that “the Equal Protection Clause prevents a State from creating ‘a classification of persons undertaken for its own sake.’”¹⁴² Although Texas argued that it was “not discriminat[ing] against homosexual persons” but rather “only against homosexual conduct,” Justice O’Connor believed that conduct and identity were so “closely correlated” that the law “‘raise[d] the inevitable inference that [it was] born of animosity’ . . .

¹³³ *Schuette*, 572 U.S. at 371–72 (Sotomayor, J., dissenting).

¹³⁴ See Margaux Poueymirou, Note, *Schuette v. Coalition to Defend Affirmative Action & the Death of the Political Process Doctrine*, 7 U.C. IRVINE L. REV. 167, 194 (2017) (“If the political process doctrine died with *Schuette*, [its] spirit . . . did not . . .”); Seidman, *supra* note 8, at 76–78, 81.

¹³⁵ *Romer*, 517 U.S. at 635.

¹³⁶ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

¹³⁷ *Id.* at 573.

¹³⁸ See *id.* at 574–75.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 575 (noting that laws criminalizing sodomy are “an invitation to subject homosexual persons to discrimination” and explaining that *Bowers* “demean[ed] the lives of homosexual persons”).

¹⁴¹ *Id.* at 580 (O’Connor, J., concurring in the judgment).

¹⁴² *Id.* at 583 (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

toward gay persons as a class”¹⁴³ and treated them as “presumpti[ve] . . . criminal[s].”¹⁴⁴

In this way, as expounded by Justice O’Connor, *Romer* is particularly powerful because the majority *inferred* animus rather than taking the state at its word.¹⁴⁵ This stands in stark contrast to traditional rational basis review — sans “bite” — wherein the “challenger of a law has the burden of proof,” meaning the law will be upheld even if the government offers a rationale that is not “the actual purpose of the legislation, but rather any conceivable legitimate purpose.”¹⁴⁶ This understanding of *Romer* could thus supply a powerful tool for inferring animus in future cases and also reinforces the plausibility of the hypotheses of scholars in the 1990s who suggested that Amendment 2’s “odd and obsessive singling out of all nonstandard sexual orientations” supplied “a subtle cue, a Freudian slip that old fashioned animus was afoot.”¹⁴⁷

3. *Discrimination of an Unusual Character.* — The Court did not substantively revisit *Romer* until a decade later, when it invalidated DOMA in *Windsor*. Even then, it was cited only briefly for the proposition that “[i]n determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration.”¹⁴⁸ Writing again for the majority, Justice Kennedy reasoned that “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage” was “strong evidence of a law having the purpose and effect of disapproval of that class.”¹⁴⁹ Harkening back to *Lawrence*’s emphasis on stigma, Justice Kennedy elaborated that the “avowed purpose and practical effect” of DOMA was “to impose a disadvantage” and “a separate status” on same-sex couples: Based on the law’s history and text, it was clear that this “interference with . . . equal dignity” was “more than an incidental effect of the federal statute. It was its essence.”¹⁵⁰ Although the Court ultimately decided the case on due process grounds (as in *Lawrence*), it still found that “the equal protection guarantee of

¹⁴³ *Id.* (quoting *Romer*, 517 U.S. at 634).

¹⁴⁴ *Id.* at 584 (citing *State v. Morales*, 826 S.W.2d 201, 202–03 (Tex. App. 1992), *rev’d*, 869 S.W.2d 941 (Tex. 1994)).

¹⁴⁵ See Andrew Koppelman, Essay, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 93 (1997) (“*Romer* is a case about impermissible purpose. . . . The missing pages can easily be filled in by the reader, who need only take note of the hatred and stereotyping of gays that has been ubiquitous in American culture for a long time.”); see also Halley, *supra* note 89, at 437 (noting that the *Romer* majority “attribute[d] animus without directly manifesting or engaging in it”); Raphael Holozyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2094 (2015).

¹⁴⁶ Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 402 (2016).

¹⁴⁷ E.g., Amar, *supra* note 90, at 208.

¹⁴⁸ *United States v. Windsor*, 570 U.S. 744, 770 (2013) (second alteration in original) (quoting *Romer*, 517 U.S. at 633).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

the Fourteenth Amendment makes [the] Fifth Amendment right all the more specific and all the better understood and preserved.”¹⁵¹

The next and most recent case in which the Court substantively addressed *Romer* was *Trump v. Hawaii*.¹⁵² In that case, decided in 2018, the Court upheld an executive order by President Trump — commonly referred to as the “Muslim ban”¹⁵³ — that barred foreign nationals from several Muslim-majority nations from entering the country for three months.¹⁵⁴ Notably, this case was the first in which the Court distinguished *Romer* to uphold a law. Quoting *Romer*, the Court explained that “[i]t [could not] be said” that the executive order was “‘inexplicable by anything but animus’ . . . because there [was] persuasive evidence that the entry suspension ha[d] a legitimate grounding in national security concerns, quite apart from any religious hostility.”¹⁵⁵ Justice Kennedy, the deciding vote and the original author of *Romer*, “join[ed] the Court’s opinion in full”¹⁵⁶ and offered a brief concurrence that reinforced *Romer*’s animus rationale: citing only to *Romer*, Justice Kennedy emphasized that, while the Executive is typically given “substantial deference . . . in the conduct of foreign affairs,” this “does not mean those officials [who are accorded broad discretion] are free to disregard the Constitution and the rights it proclaims and protects.”¹⁵⁷ This treatment in *Trump v. Hawaii* again demonstrates *Romer*’s potential to support inferences of animus in future cases over anti-LGBTQ laws.

D. Deriving a *Romer*-Based Equal Protection Framework

What does this handful of cases tell us about *Romer*’s lasting value? Scholars typically interpret *Romer* as having applied rational-basis-with-bite review, allowing the Court to apply a flavor of heightened scrutiny¹⁵⁸ without formally doing so.¹⁵⁹ Although there is not a

¹⁵¹ *Id.* at 774; see also Jeremiah A. Ho, *Queering Bostock*, 29 AM. U. J. GENDER SOC. POL’Y & L. 283, 333 (2021) (“*Windsor* framed the issue under equality principles, [so] Justice Kennedy’s import of *Romer*’s animus concept was central to [striking down DOMA] under rationality review.”).

¹⁵² 138 S. Ct. 2392 (2018).

¹⁵³ Vahid Niayesh, *Trump’s Travel Ban Really Was a Muslim Ban, Data Suggests*, WASH. POST (Sept. 26, 2019, 5:00 AM), <https://www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest> [<https://perma.cc/DMZ5-PDAB>].

¹⁵⁴ *Trump v. Hawaii*, 138 S. Ct. at 2403–04, 2417.

¹⁵⁵ *Id.* at 2420–21 (quoting *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996)) (“The [order’s] text sa[id] nothing about religion” and was reviewed by “multiple Cabinet officials and their agencies.” *Id.* at 2421.).

¹⁵⁶ *Id.* at 2423.

¹⁵⁷ *Id.* at 2424 (Kennedy, J., concurring).

¹⁵⁸ Under strict scrutiny, “classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Under intermediate scrutiny, a “classification must be substantially related to an important governmental objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

¹⁵⁹ See, e.g., Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1529 (2004); Yoshino, *supra* note 14, at 759–62, 759 n.83. Applying heightened scrutiny would require the Court to recognize a new suspect or quasi-suspect class, which it has not done since 1977. See *Trimble v. Gordon*, 430 U.S. 762, 766–76 (1977).

commonly agreed-upon definition of rational basis with bite — the Court has certainly remained vague¹⁶⁰ — some commentators have rightly understood *Romer* as an attempt to offer heightened protection for politically unpopular groups whose members are at risk of being “relegated to outcast status.”¹⁶¹ The reach of this kind of judicial protection has the potential to be quite sweeping — even Justice Scalia recognized the theoretical scope of *Romer*’s modified rational basis test, understanding it to “at least mean . . . that laws exhibiting ‘a desire to harm a politically unpopular group,’ are invalid *even though* there may be a conceivable rational basis to support them.”¹⁶² Similarly, shortly after *Romer* was decided, Professor Andrew Koppelman argued that the case stood for the proposition that “[l]aws that discriminate against gays will always be constitutionally doubtful . . . because they will always arouse suspicion that they rest on a bare desire to harm a politically unpopular group.”¹⁶³

Accordingly, *Romer* does more than offer a mere twist on the most lenient tier of review. Instead, it stands for the proposition that “government objectives steeped in animus” can never be legitimate.¹⁶⁴ This flips on its head the typical rational basis standard, which presumes rationality and “rarely invalidates legislation.”¹⁶⁵ *Romer* thus offers a potent tool for challenging anti-LGBTQ laws when animus might be afoot, even in the realms of health and education, where courts have traditionally afforded states significant lawmaking deference.¹⁶⁶

III. APPLYING *ROMER*

As gleaned from the analysis undertaken in the previous Part, this Note proposes three recurrent considerations that litigants might employ when pursuing a *Romer*-style argument to challenge an anti-LGBTQ law as presumptively irrational under the Equal Protection Clause: (1) Does the law implicate a classification based on a group’s identity or

¹⁶⁰ See *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

¹⁶¹ Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2783 (2005) (quoting Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 *HASTINGS L.J.* 175, 194 (1997)). See generally Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 *CONST. COMMENT.* 257 (1996) (exploring the “pariah principle” as applied to *Romer*).

¹⁶² *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (citation omitted) (quoting *id.* at 580 (O’Connor, J., concurring in the judgment)).

¹⁶³ Koppelman, *supra* note 145, at 89–90.

¹⁶⁴ See Jessica Mitten et al., *Equal Protection*, 23 *GEO. J. GENDER & L.* 267, 276 (2022).

¹⁶⁵ *Holoszyc-Pimentel*, *supra* note 145, at 2071; see also *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 459 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (citing *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 68–70 (1913)).

¹⁶⁶ See, e.g., *United States v. Lopez*, 514 U.S. 549, 564 (1995) (education); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022) (health).

conduct? (2) If so, is that group an unpopular one that lacks functional access to the political process? (3) Was the law explicitly or implicitly motivated by animus, or an attempt to classify for classification's sake? This Part will look at each of these factors in more detail, using the anti-LGBTQ laws discussed in Part I as guides where applicable. Importantly, this Note does not advocate for applying these three elements as part of an inflexible test, but rather as one possible formulation of a framework for litigants, scholars, and courts seeking to assess contemporary anti-queer laws under a more "traditional" equal protection inquiry.

A. Does the Law Create an Identity- or Conduct-Based Classification?

This first inquiry is not unique to *Romer* but is nonetheless essential: at its core, the Equal Protection Clause requires that the government "treat similarly situated individuals in a similar manner" when "classify[ing] persons or draw[ing] lines when creating and applying laws."¹⁶⁷ What makes recent anti-LGBTQ laws different from those of the past is that these new laws almost never explicitly use identifying terms like "transgender" or "homosexual," meaning that one must read between the lines to ascertain whether a law creates an impermissible classification. This, however, should not serve as a barrier to an equal protection argument. The *Windsor* Court recognized that DOMA created a classification based on sexual orientation¹⁶⁸ even though the law never used any such term.¹⁶⁹ It follows, then, that laws can classify based on queer identity without needing to be so explicit. Arkansas, for example, recently banned gender-affirming medical care for minors who "go[] from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex."¹⁷⁰ This clearly creates a classification based on gender identity even though the statute never uses the word "transgender."

Other laws, like Florida's "Don't Say Gay" law,¹⁷¹ are more atypical because they do not directly withhold some privilege or benefit from an LGBTQ population. Yet there is still an equal protection argument to make in this context because the Florida law singles out a group of people (the entire LGBTQ population) and prevents their stories and

¹⁶⁷ *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1559 (2022) (Sotomayor, J., dissenting).

¹⁶⁸ *See United States v. Windsor*, 570 U.S. 744, 775 (2013).

¹⁶⁹ DOMA only obliquely referenced "relationship[s] between persons of the same sex that [are] treated as [marriages] under the laws of [another] State." DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022). Compare this to DADT, which explicitly used the terms "homosexual," "gay," "lesbian," and "bisexual." National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1671-72 (1993) (repealed 2010).

¹⁷⁰ ARK. CODE ANN. § 20-9-1501(5) (2022).

¹⁷¹ FLA. STAT. § 1001.42 (2022).

histories from being taught or discussed in schools.¹⁷² This is roughly analogous to the federal district court case *González v. Douglas*,¹⁷³ in which the court found a race-based equal protection violation when the State of Arizona passed legislation to eliminate the Tucson Unified School District's Mexican-American Studies Program.¹⁷⁴

B. Does the Class Lack Functional Access to the Political Process?

This question starts to engage specifically with *Romer*'s conception of animus, which was core to its rational-basis-with-bite analysis. As explained above, political-process dysfunction likely contributed to the divergent results in *Equality Foundation* (assessing Cincinnati's ordinance) and *Romer* (assessing Colorado's amendment). One explanation is that when a group lacks adequate access to the political process (as was the case in Colorado), laws that expressly target the members of that group might constitute a violation of their right to equal protection.

While political-process dysfunction could take many forms, partisan gerrymandering is one example of a policy that clearly inhibits the ability of queer people to challenge discriminatory statewide laws through legislation. Although the Court deemed partisan-gerrymandering claims federally nonjusticiable in *Rucho v. Common Cause*,¹⁷⁵ it has still acknowledged that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust" and that are "incompatible with democratic principles."¹⁷⁶ Due to partisan redistricting over the last two decades, the number of competitive districts has continued to shrink.¹⁷⁷ After the 2020 redistricting in Texas, for example, there remained only three competitive districts in the entire state — out of thirty-eight.¹⁷⁸ Politicians in some states have gerrymandered themselves into sizeable majorities so effectively that in Wisconsin, for example, it seemed possible that Republicans could gain a veto-proof legislative supermajority in 2022 without breaking fifty-percent support statewide.¹⁷⁹ Of course,

¹⁷² Cf. Halley, *supra* note 89, at 450 (observing that discrimination takes place "out in the open for all to see or in the unobserved minute interactions that make up everyday life"); *id.* at 451 (noting "Foucault's notion of power as dispersed into and emerging from the most minute social locations").

¹⁷³ 269 F. Supp. 3d 948 (D. Ariz. 2017).

¹⁷⁴ *Id.* at 950, 972.

¹⁷⁵ 139 S. Ct. 2484 (2019).

¹⁷⁶ *Id.* at 2506 (internal quotation marks omitted) (alteration omitted in original) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)).

¹⁷⁷ Ashlyn Still, Harry Stevens & Kevin Uhrmacher, *Competitive House Districts Are Getting Wiped Off the Map*, WASH. POST (Nov. 23, 2021, 5:00 AM), <https://www.washingtonpost.com/politics/2021/11/23/gerrymandering-redistricting-competitive-house-districts> [<https://perma.cc/FE76-C4DS>].

¹⁷⁸ *What Redistricting Looks Like in Every State - Texas*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), <https://projects.fivethirtyeight.com/redistricting-2022-maps/texas> [<https://perma.cc/TB2Z-DY2H>].

¹⁷⁹ Reid J. Epstein, *Wisconsin Republicans Stand on the Verge of Total, Veto-Proof Power*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/us/politics/wisconsin-voting-republicans-supermajorities.html> [<https://perma.cc/92J9-MD79>].

both major parties partake in gerrymandering,¹⁸⁰ although LGBTQ people overwhelmingly identify as members of the Democratic party,¹⁸¹ and only Republican legislatures have pursued anti-LGBTQ legislation in recent years.¹⁸² The upshot of this is that gerrymandering presents a political-process issue for queer people only in states with gerrymanders that disadvantage Democratic voters. When mapmakers maximize the number of Republican seats in state legislatures at the expense of Democratic ones, queer people are deprived of a voice in the statewide legislative process for challenging laws that target them as a class.¹⁸³

C. Was the Law Explicitly or Implicitly Motivated by Animus?

Even if partisan-gerrymandering claims are themselves nonjusticiable, partisan mapmaking still has a measurable impact on the demographic composition of electorates in state legislative districts. Not only does this raise political-dysfunction questions, but it also “raise[s] the inevitable inference” of animus¹⁸⁴ due to the implication that culture-war laws like Florida’s were created not to further a legitimate state interest but rather to create “a classification of persons undertaken for its own sake”¹⁸⁵ based on a party base’s moral disapproval of a minority group. In noncompetitive districts, politicians face their most competitive races in primary elections,¹⁸⁶ resulting in little incentive to stake out moderate, widely popular positions. Instead, Republican candidates win primaries by appealing to their base, which tends to be less diverse¹⁸⁷ and more extreme¹⁸⁸ than the general electorate. Furthermore, although the number of Americans who identify as religious has continued to shrink, those who remain religious have been increasingly moving toward the Republican Party, thus increasing their influence in party

¹⁸⁰ See, e.g., Nathaniel Rakich & Tony Chow, *Illinois May Be the Worst Democratic Gerrymander in the Country*, FIVETHIRTYEIGHT (May 6, 2022), <https://fivethirtyeight.com/videos/illinois-may-be-the-worst-democratic-gerrymander-in-the-country> [<https://perma.cc/QAD2-PNSS>].

¹⁸¹ Brooke Migdon, *LGBTQ Voters Overwhelmingly Voted for Democrats, Says Human Rights Campaign*, THE HILL (Nov. 17, 2022, 3:55 PM), <https://thehill.com/homenews/campaign/3740690-lgbtq-voters-overwhelmingly-voted-for-democrats-says-human-rights-campaign> [<https://perma.cc/A7PR-5RFR>].

¹⁸² See, e.g., Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-transgender Bills*, N.Y. TIMES (Jan. 30, 2023), <https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html> [<https://perma.cc/3KFU-T8VP>].

¹⁸³ Cf. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019) (“Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them . . .”).

¹⁸⁴ *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring in the judgment) (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

¹⁸⁵ *Id.* (quoting *Romer*, 517 U.S. at 635).

¹⁸⁶ Lee Drutman, *What We Lose When We Lose Competitive Congressional Districts*, FIVETHIRTYEIGHT (June 23, 2022, 6:00 AM), <https://fivethirtyeight.com/features/what-we-lose-when-we-lose-competitive-congressional-districts> [<https://perma.cc/C8MY-3HTX>].

¹⁸⁷ See Frank Newport, *Democrats Racially Diverse; Republicans Mostly White*, GALLUP (Feb. 8, 2013), <https://news.gallup.com/poll/160373/democrats-racially-diverse-republicans-mostly-white.aspx> [<https://perma.cc/S2VS-AY5A>].

¹⁸⁸ See Jane Mayer, *Goodbye, Columbus*, NEW YORKER, Aug. 6, 2022, at 22, 27.

primaries.¹⁸⁹ At the same time, the reduction in religiously affiliated adults overall has meant that the Republican Party has had to increasingly rely on “broader culture war issues” that appeal not only to religious conservatives but also to cultural conservatives regardless of religiosity.¹⁹⁰ These factors together suggest that many anti-LGBTQ laws rest upon moral disapproval of LGBTQ Americans, rather than some legitimate state interest such as education or public health; this runs against *Romer*’s express rejection of the notion that a law can be justified purely on the basis of “personal or religious objections” to a particular group and its practices.¹⁹¹

Several other factors might augment such an inference. As one scholar has put it, “*Romer* endorses the proposition that insane delusions are precisely those things that do not and cannot survive rational basis review.”¹⁹² Accordingly, an inference of animus or moral disapproval might be supported by a law’s lack of support from legitimate medical or pedagogical sources. Antitransgender healthcare bans, for example, are at odds with the medical consensus that has been “forcefully affirmed by the country’s leading medical organizations, from the American Medical Association . . . to the American Psychiatric Association . . . to the American Academy of Pediatrics.”¹⁹³ Likewise, educational organizations such as the National Education Association have mobilized against anti-queer curriculum bans.¹⁹⁴ When a law purports to legislate on the basis of public health or education but has no support from the literature or experts in those fields, it becomes easier to infer that a law is “inexplicable by anything but animus.”¹⁹⁵

Comments by lawmakers and other officials might also support such an inference, given that many such figures have recently couched their lawmaking rhetoric in terms of moral disapproval. For instance, Florida

¹⁸⁹ Ronald Brownstein, *How Religion Widens the Partisan Divide*, CNN (Oct. 22, 2019, 5:59 AM), <https://www.cnn.com/2019/10/22/politics/religion-gap-republican-democratic-voters-polling/index.html> [<https://perma.cc/X2XB-BK76>].

¹⁹⁰ See generally Nate Hochman, Opinion, *The Doctrine of the Irreligious Right*, N.Y. TIMES, June 5, 2022, at SR4 (“[A]nti-transgender laws and parental rights bills . . . in recent years . . . reflect[] a broad shift in conservatism’s priorities . . . [given that] [t]he conservative political project is no longer specifically Christian.”); Danielle Kurtzleben, *How Is the GOP Adjusting to a Less Religious America?*, NPR (June 4, 2021, 8:00 AM), <https://www.npr.org/2021/06/04/1002841048/how-is-the-gop-adjusting-to-a-less-religious-america> [<https://perma.cc/S4NQ-W9P6>].

¹⁹¹ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

¹⁹² Ronner, *supra* note 101, at 68; see also *id.* at 9 (“In the law of wills, insane delusion or monomania, which is a legal, not a psychiatric, concept, is typically defined as a false conception of reality to which a testator adheres despite all evidence and reason to the contrary.”).

¹⁹³ Recent Statement, *Texas Anti-transgender Policy: Medically and Constitutionally Unsound A.G. Opinion Wields Trans Youth as Political Pawns*, HARV. L. REV. BLOG (Mar. 24, 2022), <https://blog.harvardlawreview.org/texas-anti-transgender-policy> [<https://perma.cc/RV2R-QU7R>].

¹⁹⁴ See, e.g., Brenda Álvarez, *Educators Mobilize Against Anti-LGBTQ+ Laws*, NEA (Oct. 28, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/educators-mobilize-against-anti-lgbtq-laws> [<https://perma.cc/ZD4Q-KQA9>].

¹⁹⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (quoting *Romer*, 517 U.S. at 635).

Governor Ron DeSantis’s press secretary tweeted that anyone who opposed the state’s “Don’t Say Gay” bill is “probably a groomer or at least [doesn’t] denounce the grooming of 4–8 year old children,”¹⁹⁶ playing on the decades-old homophobic trope that “gay people somehow are molesting kids, or after kids, or predatory.”¹⁹⁷ True, the text of most recent anti-LGBTQ laws make no mention of morality, purporting to rely on other findings grounded in public health and education. But *Romer* was unique in how the Court inferred animus even when it was not a rationale offered by the state. Since *Romer* flips the presumption of rationality, a Court need not take a state at its word and can find that animus, or a classification for classification’s sake, was an anti-LGBTQ law’s primary motivator; this is true regardless of a state’s other purported justifications, even if they lie in traditional state domains.¹⁹⁸

CONCLUSION

This Note seeks to encourage a renewed look at *Romer* and its unique conceptions of equality and rationality in order to revive a lively conversation about queer rights and the Equal Protection Clause that was cut short by a fruitful but short-lived detour down the path of substantive due process. As novel iterations of laws targeting queer identity make their way through state legislatures, an alternative constitutional avenue for challenging them would be to identify and apply the factors that allowed the *Romer* Court to infer animus and flip the presumption of rationality to strike down a class-based law without applying a heightened form of scrutiny, factors that might include signs of political-process dysfunction, moral disapproval, and novelty. Against the conventional wisdom, this Note argues that *Romer* was not merely a one-off case but rather a fork in the road, a preview of what might have been had the courts and litigants decided to pursue equal protection over substantive due process in the fight for queer rights. By taking the time to revisit *Romer* and its implications for the future of equal protection, we make possible a return to the Court’s promise that a “classification of persons undertaken for its own sake” is “something the Equal Protection Clause does not permit”¹⁹⁹ and that a “bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”²⁰⁰ In the meantime, let us hope that the requiems for *Romer* were written far too soon.

¹⁹⁶ Christina Pushaw (@ChristinaPushaw), TWITTER (Mar. 4, 2022, 6:33 PM), <https://twitter.com/ChristinaPushaw/status/1499890719691051008> [<https://perma.cc/Q6MM-24FB>]

¹⁹⁷ See Melissa Block, *Accusations of “Grooming” Are the Latest Political Attack — With Homophobic Origins*, NPR (May 11, 2022, 5:27 AM), <https://www.npr.org/2022/05/11/1096623939/accusations-grooming-political-attack-homophobic-origins> [<https://perma.cc/E3G6-6DW3>].

¹⁹⁸ See *supra* note 166 and accompanying text.

¹⁹⁹ *Romer*, 517 U.S. at 635.

²⁰⁰ *Id.* at 634 (internal quotation marks omitted) (omission in original) (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).