

# Case Notes

## A Treasure Not Worth Salvaging

*Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244 (9th Cir.), cert. granted, 116 S. Ct. 1415 (1994).

Following on the heels of last Term's landmark decision in *Seminole Tribe v. Florida*,<sup>1</sup> the Supreme Court will wade, yet again, into the murky waters of Eleventh Amendment jurisprudence when it hears *Idaho v. Coeur d'Alene Tribe*. In *Coeur d'Alene*, the Supreme Court will reexamine the legal fiction of *Ex parte Young*,<sup>2</sup> which interprets the Eleventh Amendment to bar suits for injunctive relief against the state as state, while at the same time permitting such suits against state officials. Although one decision cannot resolve entirely the numerous doctrinal inconsistencies within current Eleventh Amendment law, *Coeur d'Alene* presents the Court with an ideal opportunity to continue its efforts to redefine the balance of power in federal-state relations,<sup>3</sup> while at the same time clarifying *Ex parte Young*'s application to suits seeking adjudication of a state's interest in real property.

*Coeur d'Alene* arises from a dispute between the Coeur d'Alene Tribe and the State of Idaho over ownership of the waters, banks, and beds [hereinafter "submerged lands"] within the 1873 boundaries of the Tribe's reservation.<sup>4</sup> In 1991, the Tribe filed suit in federal district court<sup>5</sup> against the State and

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1. 116 S. Ct. 1114 (1996). For a discussion among legal scholars of *Seminole Tribe*'s importance to the ongoing "federalism wars," see *Suing the State Gets Tough*, LEGAL TIMES, July 29, 1996, at S-40

2. 209 U.S. 123 (1908).

3. The Court has begun to reverse the trend of increasing federal power at the expense of state sovereignty. See, e.g., *Seminole Tribe*, 116 S. Ct. at 1128 (eliminating Congress's ability to abrogate state sovereign immunity when exercising Commerce Clause powers), *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority).

4. The Coeur d'Alene Reservation was created by President Ulysses S. Grant's Executive Order on November 8, 1873. See 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 837 (1904) As originally constituted, the reservation included Lake Coeur d'Alene, one of the largest lakes in Idaho. The reservation's size was dramatically reduced by Congress 18 years later, however, and most of the submerged lands in question, including the northern two-thirds of Lake Coeur d'Alene, no longer rest within the reservation's boundaries. See Act of March 3, 1891, ch. 543, 26 Stat. 989, 1027

5. The Tribe claimed that President Grant's Executive Order, see *supra* note 4, conveyed ownership of the submerged lands to the Tribe. See *Coeur d'Alene Tribe v. Idaho*, 798 F. Supp. 1443, 1451 (D. Idaho 1992). To terminate the State's possession, the Tribe sought four remedies. First, the Tribe asked the court

numerous state agencies and officials, seeking to gain possession of the submerged lands. In response, the State contested the merits of the Tribe's claims and moved to dismiss the complaint on Eleventh Amendment grounds.<sup>6</sup> The district court granted the State's motion to dismiss in its entirety.<sup>7</sup> On appeal, however, the Ninth Circuit affirmed the district court's opinion in part and reversed in part.<sup>8</sup> While the panel agreed that the Eleventh Amendment granted immunity to the State and state agencies,<sup>9</sup> it held the Eleventh Amendment did not provide similar immunity to state officials.<sup>10</sup>

Applying the three-prong test endorsed by a plurality of the Supreme Court in *Florida Department of State v. Treasure Salvors, Inc.*,<sup>11</sup> the court concluded that the Eleventh Amendment did not bar the Tribe's claims for declaratory and injunctive relief.<sup>12</sup> The *Treasure Salvors* test asks:

(a) Is this action asserted against officials of the State or is it an action brought directly against the State . . . itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (c) Is the relief sought by [plaintiffs] permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?<sup>13</sup>

The Tribe passed the first prong of the test because it alleged state officials were exercising control over the submerged lands in violation of federal law. According to *Ex parte Young*, any violation of federal law by state officials cannot be attributed to the state for Eleventh Amendment purposes.<sup>14</sup> The

to quiet title to the submerged lands in the Tribe. Second, it asked the court for a declaratory judgment that the lands are for the exclusive use, occupancy, and enjoyment of the Tribe. Third, it asked for a judgment declaring all Idaho statutes and ordinances regulating or claiming ownership of the lands invalid. Finally, it asked for injunctive relief preventing the State and its officials and agencies from "taking any action to regulate or in any way affect the Tribe's right to these lands and waters." *Id.* at 1445.

6. *See id.* The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by Citizens of another state, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Amendment has been interpreted to bar suits by Indian tribes against any state that does not consent to such a suit. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

7. *See Coeur d'Alene*, 798 F. Supp. at 1446. The court found that the Eleventh Amendment barred all claims against the State and its agencies and prevented the Tribe from "suing the state officials to quiet title, and for declaratory judgment." *Id.* at 1448. The court also dismissed the Tribe's bid for injunctive relief, finding that the State was in rightful possession of the submerged lands. *See id.* at 1452. In a discussion which confused the issue of immunity with the merits of the case, the court reasoned that the *Ex parte Young* distinction did not apply because the State was not violating federal law. *See id.* at 1449.

8. *See Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244, 1247 (9th Cir.), cert. granted, 116 S. Ct. 1415 (1994).

9. *See id.* at 1250.

10. *See id.* at 1254. The Ninth Circuit also found that the Tribe had stated a plausible basis for ownership of the submerged lands and remanded the case for future proceedings. *See id.* at 1257.

11. 458 U.S. 670 (1982).

12. *See Coeur d'Alene*, 42 F.3d at 1254.

13. 458 U.S. at 690 (quoting *Quern v. Jordan*, 440 U.S. 332, 346-47 (1979)).

14. *See Coeur d'Alene*, 42 F.3d at 1251 ("[T]he state's claim of ownership cannot clothe the Officials

Tribe also clearly passed the second prong: Allegations that state officials were denying the Tribe rights given to them by the federal government in 1873 were more than sufficient to constitute an ultra vires or unconstitutional withholding of property.<sup>15</sup> The court had the greatest difficulty in applying the third prong of the test. While federal courts are allowed to grant prospective relief requiring state officials to conform their future conduct to federal law, they cannot grant relief that is retrospective in nature, such as money damages.<sup>16</sup>

The Ninth Circuit avoided the prohibition on retrospective remedies by characterizing the declarative and injunctive relief sought by the Tribe as prospective in nature.<sup>17</sup> The court based its ruling on its interpretation of the Supreme Court's plurality opinion in *Treasure Salvors*, stating that "federal courts may not hear actions to quiet title to property, in which the state claims an interest, without the state's consent,"<sup>18</sup> yet "declaratory and injunctive relief against state officials to foreclose future violations of federal law is available even if that relief works to put the plaintiff in possession of property also claimed by the state."<sup>19</sup> Accordingly, the Ninth Circuit held that *Treasure Salvors* allowed the Tribe to seek all "relief [against state officials] other than relief that would foreclose the State's claim [to ownership] in future judicial proceedings."<sup>20</sup> While the Eleventh Amendment prevented the Tribe from quieting title against state officials, the Tribe was allowed to proceed with its action for declaratory and injunctive relief.<sup>21</sup> Pursuant to the State's petition, however, the Supreme Court has granted certiorari to reconsider two issues.<sup>22</sup>

The Ninth Circuit's interpretation of Justice Stevens's plurality opinion in *Treasure Salvors* is more plausible than those of courts that have reached the opposite conclusion.<sup>23</sup> Stevens's opinion, however, suffers from three fatal

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in Eleventh Amendment immunity from suit."). Ironically, "unconstitutional conduct may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh." *Treasure Salvors*, 458 U.S. at 685.

15. See *Coeur d'Alene*, 42 F.3d at 1251.

16. See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (reasoning that if money damages are issued from state treasury, there is no way to avoid acknowledging that state, as opposed to state officials, is real party in interest) (citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945))

17. See *Coeur d'Alene*, 42 F.3d at 1252-55.

18. *Id.* at 1252 (citations omitted).

19. *Id.* (citations omitted).

20. *Id.* at 1254.

21. See *id.*

22. The first is whether a federal court may, consistent with the Eleventh Amendment, issue declaratory and injunctive relief "when such relief requires adjudication of [the] state's title and will deprive [the] state of all practical benefits of ownership of disputed waters and submerged lands." *Idaho v. Coeur d'Alene Tribe*, 65 U.S.L.W. 3061 (U.S. July 23, 1996) (No. 94-1474). The second concerns the merits of the Tribe's claim to the submerged lands, and will not be examined in this Case Note.

23. Some courts have reasoned that it is not possible to issue relief against state officials in many situations without, in effect, quieting title to property. See, e.g., *John G. & Marie Stella Kenedy Memorial Found. v. Mauro*, 21 F.3d 667 (5th Cir. 1994) (finding Eleventh Amendment barred plaintiff from seeking declaratory and injunctive relief against state official where such relief would place plaintiff in possession of disputed land); *Fitzgerald v. Unidentified Wrecked & Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989) (holding in rem admiralty action seeking injunctive relief preventing Puerto Rican government from interfering with plaintiffs' title and possession of valuable artifacts barred by Eleventh Amendment).

flaws. First, its reasoning is so confused and internally inconsistent that it provides inadequate guidance to lower courts seeking to resolve property disputes in which a state is a party. Second, its conclusions are aberrant within the context of Eleventh Amendment law.<sup>24</sup> And third, it shows insufficient respect for important principles of federalism. The Supreme Court, therefore, should use *Coeur d'Alene* as a vehicle for both overruling *Treasure Salvors* and adopting a clear rule preventing federal courts from directly or circuitously adjudicating a state's interest in real property without a state's consent.

*Treasure Salvors* arose out of a dispute between a salvage company and the State of Florida regarding the ownership of artifacts recovered from a seventeenth-century Spanish galleon discovered off the Florida coast. During the controversy, the company had asked a federal district court to issue a warrant of arrest to seize the contested artifacts held by the State of Florida.<sup>25</sup> In a five-to-four decision, with no majority opinion, the Supreme Court ruled that officials in possession of the artifacts did not enjoy Eleventh Amendment immunity from the district court's warrant of arrest. Writing for four Justices, Justice Stevens found that Florida did not have "a colorable claim"<sup>26</sup> to the artifacts. Because Florida's officials were holding the artifacts without lawful authority, according to *Ex parte Young*, their conduct could not be attributed to the State.<sup>27</sup> Thus, while a federal court could not formally adjudicate Florida's claim to the artifacts, it could issue a warrant of arrest to prevent state officials from maintaining unlawful possession of the property.<sup>28</sup>

In *Coeur d'Alene*, the Ninth Circuit properly interpreted Justice Stevens's opinion to say that a federal court can issue relief against *state officials* affecting a state's possession of real property, so long as it does not formally adjudicate *the state's* claim to ownership.<sup>29</sup> Operating within the confines of *Treasure Salvors*, the Supreme Court has little choice but to uphold the Ninth Circuit's ruling on the question of Eleventh Amendment immunity.<sup>30</sup>

24. See *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 717 (White, J., concurring in part and dissenting in part) ("[T]he decision has earned a fitting sobriquet: aberration.").

25. See *Treasure Salvors*, 458 U.S. at 678.

26. *Id.* at 694.

27. See *id.* at 696-97.

28. See *id.* at 699-700. Justice Brennan cast the fifth vote against the State on other grounds. See *id.* at 700-01 (Brennan, J., concurring in judgment in part and dissenting in part).

29. While it is possible to view Justice Stevens's opinion as contingent on his judgment that Florida did not have even a colorable claim to the artifacts in question, see, e.g., *John G. & Marie Stella Kenedy Memorial Found. v. Mauro*, 21 F.3d 667, 673 (5th Cir. 1994), such a reading presupposes that Stevens made the elementary error of confusing the merits of the case with the issue of immunity. A better and more faithful reading of Stevens's opinion recognizes that the outcome of the Eleventh Amendment issue would have been the same even if Florida had possessed a colorable claim to the artifacts.

Furthermore, the Fifth Circuit, in *Mauro*, argued that granting relief that would have the practical effect of dispossessing the State of real property would be equivalent to recovering damages from the State. See *id.* While this position contains great intuitive appeal, it is clearly rejected by Stevens in *Treasure Salvors* when he points out that possession of specific property does not involve "attachment of state funds and would impose no burden on the state treasury." *Treasure Salvors*, 458 U.S. at 698.

30. As the Ninth Circuit pointed out, neither the declaratory relief nor the injunctive relief sought by the Tribe would prevent the State from attempting to quiet title in future state court litigation. See *Coeur*

Accordingly, *Coeur d'Alene* presents the Court with an opportunity to correct a past mistake and overrule *Treasure Salvors*.

In common parlance, the logic of *Treasure Salvors* does not pass the "duck test."<sup>31</sup> In *Coeur d'Alene*, if a federal court were to declare that the lands, formerly managed by the State, were now for the exclusive use, occupancy, and enjoyment of the Tribe; to hold all Idaho statutes and ordinances regulating or claiming ownership of the lands invalid; and to prevent state officials from taking any action to regulate or affect the Tribe's right to the lands, then that federal court obviously would have adjudicated the State's claim to the property. The Tribe would obtain possession of the lands in every meaningful sense. Although the State theoretically could still go to state court and seek to quiet title, such a ruling would have no practical effect unless the U.S. Supreme Court were to resolve the inherent tension between the state and federal court decisions. Therefore, the State, *as state*, under the *Treasure Salvors* fiction, is forced to go, hat in hand, to federal court to vindicate its title to the lands, a result supposedly forbidden in Justice Stevens's opinion.<sup>32</sup>

To replace *Treasure Salvors*, the Supreme Court should hold that the Eleventh Amendment denies federal courts the power to issue any relief against state officials that would have the practical effect of adjudicating a state's interest in real property. The Court has reasoned that if money damages are issued from the state treasury, there is no way to avoid acknowledging that the state, as opposed to state officials, is the real party in interest.<sup>33</sup> It is similarly absurd to maintain the fiction that the state is not the real party in interest when a federal court dispossesses the state of real property.

While *stare decisis* is always a valid concern, the reasons given by the Court for overruling *Pennsylvania v. Union Gas Co.*<sup>34</sup> in *Seminole Tribe* last Term argue equally well for overruling *Treasure Salvors*. First, as in *Union Gas*, there was no majority reasoning in *Treasure Salvors*.<sup>35</sup> And, second, *Treasure Salvors* is a fairly recent opinion on which no substantial body of law rests. In fact, *Treasure Salvors* was such a confusing opinion that a substantial number of courts appear to have misapplied the Court's key holding.<sup>36</sup>

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*d'Alene Tribe v. Idaho*, 42 F.3d 1244, 1254 (9th Cir.), cert. granted, 116 S. Ct. 1415 (1994)

31. If it walks like a duck, quacks like a duck, and looks like a duck, then it must be a duck.

32. Stevens held that a federal court could not adjudicate a state's title in real property without the state's consent. See *Treasure Salvors*, 458 U.S. at 699-700. Under the *Treasure Salvors* fiction, however, a state can be forced to go to federal court to derive any benefit from holding title to real property. While it could be argued that this is not problematic because a state technically would be giving its consent to such an action by initiating it, the obvious reality is that a state is being forced into the federal judicial system against its will by previous federal court action. This is meaningful consent only in an Orwellian sense of the word.

33. See *supra* note 16.

34. 491 U.S. 1 (1989).

35. In *Treasure Salvors*, Justice Brennan never addressed the issue that evenly split the rest of the Court. In *Union Gas*, Justice White similarly joined the holding of a four-Justice plurality but disagreed with the plurality's reasoning. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1127 (1996)

36. See *supra* note 23. In *Seminole Tribe*, the Court similarly noted that *Union Gas* "has created

Overruling *Treasure Salvors* would restore Eleventh Amendment jurisprudence to its pre-1982 status and affect only a narrow area of law. In those cases that do not involve the direct transfer of resources from a state to other parties, the *Ex parte Young* fiction would continue to apply undisturbed.

The doctrine of state sovereign immunity is crucial to the continued vitality of federalism.<sup>37</sup> Under our constitutional system, states must have sufficient freedom to run their own affairs free from federal interference. Federalism promotes innovative policy experimentation by states,<sup>38</sup> encourages citizen participation in representative government,<sup>39</sup> and, most importantly, safeguards our liberty as a people.<sup>40</sup> These vital functions of federalism, however, are undermined as it becomes easier for citizens to subject state governments to the supervision of the federal judicial system.<sup>41</sup>

A state's ability to maintain possession of its own property is as indispensable an element of sovereignty as its ability to control its own treasury. If a federal court is empowered to reverse over one hundred years of practice and, in one fell swoop, deprive the State of its ability to preserve Lake Coeur d'Alene for the benefit of all Idahoans,<sup>42</sup> then what can be said of the future of Our Federalism?<sup>43</sup> Will we continue to have a system of dual sovereignty, or will the fifty sovereign states become little more than servants of their federal master? While the answers to these weighty questions will not be discovered in any one case, the Court can take a step in the right direction by jettisoning *Treasure Salvors* and finding for the State in *Coeur d'Alene*.

—Matthew Berry

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confusion among the lower courts that have sought to understand and apply the deeply fractured decision." 116 S. Ct. at 1127.

37. See *Nevada v. Hall*, 440 U.S. 410, 430 (1979) (Blackmun, J., dissenting) (describing state sovereign immunity as "essential component of federalism").

38. See *United States v. Lopez*, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring).

39. Noting that "federalism enhances the opportunity of all citizens to participate in representative government," *FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part), Justice O'Connor pointed out, "If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer their local problems." *Id.* at 790.

40. See *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring) ("[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

41. The need for federal intervention is particularly questionable in cases such as this where the State has waived its sovereign immunity in state court. Both state and federal courts "have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976). The Supreme Court has been reluctant to presume that state courts are inadequate fora for vindicating federal rights. See, e.g., *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (expressing confidence in ability of state courts to uphold federal law).

42. See IDAHO CODE § 67-4304 (1989).

43. The phrase "Our Federalism," which was popularized by Justice Hugo Black in *Younger v. Harris*, 401 U.S. 37 (1971), recognizes that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44.

# Principled Silence

*Romer v. Evans*, 116 S. Ct. 1620 (1996).

For the first time in its history, the Supreme Court has drawn a line that the state may not cross in its treatment of gay people. In *Romer v. Evans*,<sup>1</sup> the Court was asked to rule on the constitutionality of Amendment 2 to the Colorado State Constitution, which categorically prohibited gay people from obtaining legal protection from discrimination based on their sexual orientation.<sup>2</sup> The Colorado Supreme Court had held that the right to participate in the political process, with which the amendment clearly interfered, was a fundamental right requiring strict judicial scrutiny, and that the amendment failed that test.<sup>3</sup> The U.S. Supreme Court affirmed on different grounds. Writing for a six-member majority, and giving short shrift to a vigorous dissent by Justice Scalia, Justice Kennedy held that Amendment 2 was repugnant to the spirit of the Equal Protection Clause. The Court deployed its most deferential standard and found that “Amendment 2 fails, even defies, this conventional inquiry . . . ; it lacks a rational relationship to legitimate state interests.”<sup>4</sup> The majority thereby answered a question that the Court had left open in its decision in *Bowers v. Hardwick*:<sup>5</sup> Can the Equal Protection Clause ever be used to strike down anti-gay legislation? In the ten years between *Bowers* and *Romer*, only one court of appeals had found room for gay people inside the Equal Protection Clause. Its insistence, now vindicated, that the

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1. 116 S. Ct. 1620 (1996).

2. The parties and the Court adopted the name “Amendment 2”—the title under which the amendment was submitted to Colorado voters—for ease of reference. *See id.* at 1623. Amendment 2 reads, in full:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. 2, § 30b.

3. *See Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (en banc).

4. *Romer*, 116 S. Ct. at 1627.

5. 478 U.S. 186 (1986). *Bowers* held that a Georgia statute prohibiting oral or anal sex between consenting adults did not violate the Due Process Clause when applied to homosexuals. *See id.* at 189. The Court’s previous decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), suggested that, if applied to heterosexuals, the statute would not have passed constitutional muster—a point Georgia conceded. *See Bowers*, 478 U.S. at 218 n.10 (Stevens, J., dissenting). The Court did not address that question, *see id.* at 188 n.2, nor any claim of equal protection, *see id.* at 196 n.8.

equal protection and due process claims of gay litigants are analytically distinct remained for years as a lone voice amidst an unsympathetic, hostile throng.<sup>6</sup>

*Romer* is the seminal decision in the jurisprudence of equal protection for gay people. As such, it is the beginning of a story, not the end. This Case Note argues that Justice Kennedy's carefully crafted opinion foreshadows chapters in that story that have yet to be written, shedding light on an issue that *Romer* ultimately leaves unresolved: Do gay people constitute a suspect class that merits heightened judicial protection? The *Romer* Court had two distinct analytical models upon which to draw, following its two landmark rational review cases: an open-ended analysis grounded in principle, as exemplified by *Reed v. Reed*,<sup>7</sup> or an exhaustive analysis grounded in fact, as exemplified by *City of Cleburne v. Cleburne Living Center, Inc.*<sup>8</sup> It chose the former, speaking not at all to the factual record on which the lower court had rested its decision. That silence carries a message—one that betokens a shift in the attitude of the Court toward the claims of gay litigants and casts the more strident portions of Justice Scalia's dissent as a harsh counterpoint to its subtle theme. To hear this message properly requires attention to context—its absence in the majority opinion, and its use in the dissent.

The *Romer* majority introduces its analysis with the proposition that evaluating the merits of an equal protection claim always depends upon "knowing the relation between the classification adopted and the object to be attained."<sup>9</sup> Those laws that the Court has upheld against rational basis challenges, it reminds us, have been "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain that there existed some relation between the classification and the purpose it served."<sup>10</sup> But the majority opinion is remarkably devoid of any discussion of the particular traits that serve to define gay people as a class.<sup>11</sup> Rather, the majority concludes

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6. The opinion was written by Judge William A. Norris of the Ninth Circuit Court of Appeals. Compare *Watkins v. United States Army*, 847 F.2d 1329, 1340 (9th Cir. 1988), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc) ("[N]othing in *Hardwick* suggests that the state may penalize gays for their sexual orientation. . . . We cannot read *Hardwick* as standing for the proposition that government may outlaw sodomy only when committed by a disfavored class of persons."), *with id.* at 1355 (Reinhardt, J., dissenting) ("The anti-homosexual thrust of *Hardwick*, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear."), and, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-66 (7th Cir. 1989) (rejecting Judge Norris's analysis).

7. 404 U.S. 71 (1971).

8. 473 U.S. 432 (1985).

9. *Romer*, 116 S. Ct. at 1627.

10. *Id.*

11. Richard Evans levied a facial challenge against Amendment 2. *See id.* at 1632 (Scalia, J., dissenting). A court necessarily conducts its analysis of such a challenge on a more generalized level, as "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). But the difference concerns the type of facts that are relevant, not the relevance of facts at all. A facial challenge to a restriction requires an inquiry into the relationship between the restriction and the class rather than the restriction and the individual litigant. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 64-79 (1972) (striking down portions of Oregon landlord/tenant statute based on facial challenge and resting decision on characteristics of landlord and tenant classes).

that no factual context could ever support a classification of such "sheer breadth" as Amendment 2.<sup>12</sup> But this bold statement of principle, when considered in isolation from the nature of gay people's class status and the discrimination levied against them, seems discontinuous with the Court's previous equal protection jurisprudence. Classifications of rights and privileges based on age, for example, exhibit extraordinary breadth in this country: Young people are categorically excluded from participating in the political process, voting, and serving on juries, and older Americans are excluded from the private and public sectors alike through mandatory retirement ages. Yet the Supreme Court has upheld such broad classifications on a rational basis theory<sup>13</sup> by adverting to those "distinguishing characteristics [of different age groups] relevant to interests the State has the authority to implement,"<sup>14</sup> and to our common interest, as people who age, in protecting both the young and the old.<sup>15</sup> Similarly, in *Romer*, it seems to be the combination of the breadth of Amendment 2, the nature of the classification, and the identity of its target that so offends the Constitution. On this combination of factors, however, the majority is silent.

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12. *Romer*, 116 S. Ct. at 1627. The majority offers an alternative explanation for its result: Observing that Amendment 2 "impos[es] a broad and undifferentiated disability on a single named group," it opines that "[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 1627-28. A brief filed by Professors Laurence Tribe, John Hart Ely, Gerald Gunther, Philip Kurland, and Kathleen Sullivan, which describes Amendment 2 as a "per se violation of the Equal Protection Clause," may have influenced this language. Brief of Laurence H. Tribe, et al., as Amici Curiae in Support of Respondents at 3, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039). However, the Tribe brief rests its argument on a reading of Amendment 2 that precludes homosexuality from "being made the basis for any protection pursuant to the state's laws from any instance of discrimination, however invidious and unwarranted," *id.*—that is, one that exempts gay people even from rational basis review. The Court acknowledges that such a reading is possible but finds it unnecessary to its disposition of the case. See *Romer*, 116 S. Ct. at 1626 ("It is a fair, if not necessary, inference that [the amendment] deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination. The state court did not decide whether the amendment has this effect, however, and neither need we.")

Moreover, the majority itself suggests a more appropriate context within which to read its alternative explanation—the Court's rejection of segregation and second-class citizenship in *Brown v. Board of Education*, 347 U.S. 483 (1954). The majority's judgment that Amendment 2 is a "denial of equal protection . . . in the most literal sense," *Romer*, 116 S. Ct. at 1628, and hence not amenable to the type of balancing normally required by the Equal Protection Clause, echoes its holding in *Brown* that "[s]eparate educational facilities are inherently unequal." *Brown*, 347 U.S. at 495. Likewise, the *Romer* majority's admonition that "[i]t is not within our constitutional tradition to enact laws of this sort," *Romer*, 116 S. Ct. at 1628, is powerfully evocative of the Court's judgment in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the companion case to *Brown*, that "[c]lassifications based solely upon race . . . are contrary to our traditions and hence constitutionally suspect." *Id.* at 499. The *Romer* majority clearly invites the comparison with *Brown* and *Bolling*: It opens its opinion with Justice Harlan's ringing dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the case that *Brown* rejected, and conspicuously cites to *Sweatt v. Painter*, 339 U.S. 629 (1950), one of *Brown*'s progenitors, for a proposition of law that originated, not in *Sweatt*, but in *Shelley v. Kramer*, 334 U.S. 1 (1948). See *Romer*, 116 S. Ct. at 1623, 1628 ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.") (quoting *Sweatt*, 339 U.S. at 635 (quoting *Shelley*, 334 U.S. at 22)).

13. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (applying rational basis analysis to age discrimination).

14. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (discussing *Murgia*).

15. See *Murgia*, 427 U.S. at 313-14.

Such reticence calls to mind the Court's opinion in *Reed v. Reed*.<sup>16</sup> There, parties to a probate action challenged an Idaho statute giving men an automatic preference over women for appointment as estate administrators.<sup>17</sup> The Court struck down the statute—the first time it had invalidated a law on the basis of sex discrimination—holding insufficient the State's interests in administrative efficiency and the reduction of intrafamily controversy.<sup>18</sup> As in *Romer*, the Court employed a rational basis test,<sup>19</sup> and, as in *Romer*, the Court did not engage in a particularized analysis of the classification, despite a clearly hostile precedent<sup>20</sup> and despite the Idaho legislature's finding that "in general men are better qualified to act as an administrator than are women."<sup>21</sup> Rather, *Reed*'s holding was briefly stated and broadly worded: "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ."<sup>22</sup> Thus, the decision in *Reed* was extremely open-ended. While the Court took no position on heightened scrutiny for sex discrimination,<sup>23</sup> it also provided no fact-based analysis that could have lent support to a future determination that a gender classification was, in fact, rationally related to a legitimate end.

*Reed* is now recognized as the case that ushered in the era of heightened scrutiny for gender discrimination.<sup>24</sup> As Justice Ginsburg wrote in the VMI case, "[s]ince *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature."<sup>25</sup> *Reed*'s open-ended, principled structure signaled the

16. 404 U.S. 71 (1971).

17. *See id.* at 71–72.

18. *See id.* at 76–77.

19. *See id.* at 76 ("The question presented . . . is whether a difference in the sex of competing applicants . . . bears a rational relationship to a state objective . . . .").

20. *See* *Goesaert v. Cleary*, 335 U.S. 464, 465–66 (1948) (upholding Michigan's right to draw "a sharp line between the sexes" and to forbid women to work as bartenders). The *Reed* Court declined even to cite *Goesaert*, just as the *Romer* majority refused to discuss *Bowers*. As in *Reed*, the *Romer* majority's refusal to acknowledge hostile precedent may call into question that precedent's continuing vitality. *Compare* *Nabozny v. Podlesny*, No. 95-3634, 1996 U.S. App. LEXIS 18866, at \*33 n.12 (7th Cir. July 31, 1996) ("Of course, *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*."), (citation omitted), with *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("Although the [*Bowers*] Court analyzed the constitutionality of the statute [before it] on a due process rather than equal protection basis, *Hardwick* nevertheless impacts on the scrutiny aspects under an equal protection analysis."), and *Romer v. Evans*, 116 S. Ct. 1620, 1629, 1631–33 (1996) (Scalia, J., dissenting) (arguing that *Romer* holding "contradicts" *Bowers* holding and that decisions cannot be reconciled).

21. *Reed v. Reed*, 465 P.2d 635, 638 (Idaho 1970).

22. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

23. The Idaho Supreme Court had made no ruling on the issue. *See Reed*, 465 P.2d at 635. Similarly, in *Romer*, the state trial court rejected the claim that gay people constitute a suspect class, and the plaintiffs elected not to appeal the ruling. *See Evans v. Romer*, 882 P.2d 1335, 1341 n.3 (Colo. 1994) (en banc).

24. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (identifying *Reed* as progenitor of cases applying heightened scrutiny to gender discrimination).

25. *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996).

Court's awareness of women's need for constitutional protection and set the stage for a later, explicit adoption of a heightened standard of review.

The language and analytical structure of *Reed* and *Romer*, and the subsequent history of *Reed*, stand in sharp contrast to the Court's other landmark rational basis opinion, *City of Cleburne v. Cleburne Living Center Inc.*<sup>26</sup> In *Cleburne*, the plaintiffs challenged a zoning ordinance that gave disfavored treatment to the mentally retarded. On review, the Fifth Circuit Court of Appeals granted them relief, holding that the mentally retarded constitute a quasi-suspect class calling for a heightened standard of judicial review, a standard the ordinance failed to satisfy.<sup>27</sup> The Supreme Court, per Justice White, affirmed the Fifth Circuit's result on different grounds: It rejected any heightened standard of protection for the mentally retarded but found that the ordinance could not survive even rational basis scrutiny.<sup>28</sup>

The majority grounds each stage of its analysis in *Cleburne* in a highly particularized discussion of the class of mentally retarded people and the Texas ordinance that operated to their detriment. First, in rejecting the application of heightened scrutiny, the Court investigates the definition of mental retardation and the problems that attend its treatment, the avenues for legal relief already available to the mentally retarded, and the sympathetic representation that the group receives in the political process.<sup>29</sup> Then, in finding that the zoning ordinance nonetheless fails rational basis scrutiny, it analyzes with particularity the stated purposes of the legislature, explaining why they fail to save the ordinance.<sup>30</sup> Unlike its opinions in *Reed* and *Romer*, the *Cleburne* Court's exhaustive factual analysis leaves no room for subsequent litigants to shift the analytical paradigm with evidence of their disfavored class status.

Indeed, the *Cleburne* majority reaches out to foreclose any avenue short of outright reversal for according heightened scrutiny to the mentally retarded. As Justice Marshall points out in his dissent, "because the Court invalidates Cleburne's zoning ordinance on rational basis grounds, the Court's wide-ranging discussion of heightened scrutiny is wholly superfluous to the decision of this case."<sup>31</sup> Apparently recognizing that future courts might take his invalidation of the Cleburne ordinance as a step toward heightened scrutiny, Justice White abandons judicial restraint and engages the issue.

Such restrictive overreaching is entirely absent from both *Reed* and *Romer*. In *Reed*, the Court declines to address the State's contention that men are more qualified than women to administer estates.<sup>32</sup> In *Romer*, the Court barely

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26. 473 U.S. 432 (1985).

27. See *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191 (5th Cir. 1984).

28. See *Cleburne*, 473 U.S. at 435, 442, 447-48.

29. See *id.* at 442-46 & 442 n.9.

30. See *id.* at 447-50.

31. *Id.* at 456 (Marshall, J., dissenting).

32. See *Reed v. Reed*, 404 U.S. 71, 75-77 (1971).

mentions Colorado's asserted interests in prioritizing discrimination claims, protecting intimate association, and discouraging political factionalism.<sup>33</sup> The *Romer* Court also leaves unexamined the question of whether political participation constitutes a fundamental right,<sup>34</sup> an inquiry that would require a discussion as to whether the denial of that right only to gay people is, or is not, constitutional. *Romer* tracks *Reed*, rather than *Cleburne*, employing a rational basis review that would be entirely consistent with a future determination that gay people require heightened judicial protection.

Justice Scalia's extraordinary dissent in *Romer* takes on a more definite shape in light of the foregoing analysis. The Justice refers to gay litigants' civil rights struggle as a "Kulturkampf," an assault upon the "traditional sexual mores" of "tolerant" commonfolk.<sup>35</sup> Homosexuals, he writes, are a "geographically concentrated and politically powerful minority" with "high disposable income" who have successfully aligned themselves with an elite "lawyer class," the "knights rather than the villeins," "Templars" who have betrayed the more "plebeian attitudes" of true citizens.<sup>36</sup>

When a Supreme Court Justice authors a dissent that uses such language to describe the parties requesting relief,<sup>37</sup> we must strive to understand the impetus behind his words. In *Romer*, Justice Scalia's impetus was the need to respond to the majority's carefully schooled, suggestive silence. The traditional test for a discrete and insular minority meriting heightened judicial scrutiny requires, inter alia, a showing that the group is unable to find protection in the political process.<sup>38</sup> There are strong arguments supporting the conclusion that gay people satisfy this requirement.<sup>39</sup> Justice Kennedy does not engage these arguments at all, however, causing Justice Scalia's diatribe in seeming response to them to appear, at first blush, like gratuitous shadow-boxing. But it is *Romer's* very silence on the question of heightened scrutiny, and on the factual inquiries that might eventually support its application, that inspires Justice Scalia to such rhetorical depths. As *Reed v. Reed* demonstrates, silence, when properly deployed, can testify to a fundamental shift in the Court's attitude toward discrimination against a disfavored group. Justice Kennedy's opinion suggests that another such shift may have occurred.

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33. See *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996).

34. But see *Romer*, 116 S. Ct. at 1628 (opining that "government and each of its parts [should] remain open on impartial terms to all who seek its assistance.").

35. *Id.* at 1629 (Scalia, J., dissenting).

36. *Id.* at 1634–37.

37. Cf. Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 94 MICH. L. REV. (forthcoming Oct. 1996) (manuscript at 30 & n.138, on file with the *Yale Law Journal*) (discussing overtones of dissent with reference to persecution of gays and Jews during World War II).

38. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685–86 & nn.14 & 17 (1973).

39. See, e.g., Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. (forthcoming Nov. 1996) (manuscript at 57–92, on file with the *Yale Law Journal*) (discussing disadvantages gays face in finding sympathetic representation in political process).