Pritchard and Zywicki tentatively propose an alternative judicial ''finding'' model of tradition. In this model, the best source for identifying tradition returns the Justices to state constitutions, which are a bottom up source arising through a sufficiently complex set of processes so as to avoid the most obvious manifestations of interest group influence. The authors suggest, for example, that if three-quarters of the states came to recognize a new constitutional right (such as a right to privacy) or a new constitutional remedy (such as the exclusionary rule), the Supreme Court could claim that these rights have a root source in a legitimate American set of constitutional traditions.

Do you find this analysis persuasive? Does it set too high a standard for articulating constitutional rights? Why or why not? Does it set too low a standard? To what extent is it consistent with the framework set out by Buchanan and Tullock? Does this approach avoid the difficulties associated with formal amending under Article V? Why or why not?

VII. APPLICATIONS

In this section we present two cases, *INS v. Chadha*,[184] and *Romer v. Evans*.[185] Consider the extent to which the approaches that the separate Justices take in the various opinions and the outcomes in each of these two cases reflect insights from the materials in this chapter or the preceding chapters in this volume.

A. INS v. CHADHA

INS v. Chadha addressed the constitutionality of the ''one-House veto,'' a procedure through which Congress, after delegating decision-making authority to an agency, retains the power to reverse an agency policy by unilateral action of one House of Congress, notwithstanding the requirements of bicameralism and presentment in the Constitution. This summary procedure allows Congress to retain a modicum of control by reducing the burdens of checking agency decision-making. As you will see, the Court invalidated the one-House veto, and in later cases extended this holding to the context of two House vetoes. More notably, in the three main opinions that we discuss, the majority opinion written by Chief Justice Burger, a concurrence by Justice Powell, and a dissent by Justice White,[186] each Justice takes a different view of the and propriety of the one-House veto and its relationship more generally to the function of agency delegation and separation of powers.

Chadha was an East Indian born in Kenya who held a British passport. He came to the United States in 1966 on a nonimmigrant

184. 462 U.S. 919 (1983).

185. 517 U.S. 620 (1996).

186. Then–Associate Justice Rehnquist also produced a dissent, which we do not include in the discussion below. INS v. Chadha, 462 U.S. 919, 1013 (1983) (Rehnquist, J., dissenting).

student visa that expired in 1972. The following year, the District Director of the Immigration and Naturalization Service ordered that Chadha ''show cause'' why he should not be deported. Chadha applied for a suspension of deportation, which the immigration judge granted on the ground that Chadha had satisfied the statutory criteria, including most notably the ''extreme hardship''[187] requirement. The Attorney General then transmitted the immigration judge's order to Congress as a recommendation to suspend deportation, which Congress had the power to accept or to override via the so-called one-House veto of either the House or Senate. If one House executed the one-House veto, the Attorney General was then required to carry out the deportation order. Based upon a review of 340 suspension cases, Representative Eilberg, the Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, successfully introduced a resolution that ultimately won the approval of the House of Representatives. It reversed the suspension order for six aliens, including Chadha, who had overstayed their visas but who the immigration judge had determined met the eligibility requirements for suspending their deportation, '' 'particularly as it relates to hardship.' ''[188] Chief Justice Burger, writing for the Court, explained:

> The resolution was passed without debate or recorded vote. Since the House action was pursuant to § 244(c)(2), the resolution was not treated as an Art. I legislative act; it was not submitted to the Senate or presented to the President for his action.[189]

Chadha challenged the constitutionality of the proceedings under which he was ordered to be deported.

For the *Chadha* majority, the issue turned entirely on the constitutionality of the one-House veto, a procedure that the Court implicitly conceded had the benefit of allowing Congress to reduce the cost of monitoring agency action. Burger explained:

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies. . . .[190]

Burger then responded to an argument raised by Justice White in dissent, defending the one-House veto on grounds of administrative practicality:

187. The law required him to demonstrate that ''he had resided continuously in the United States for over seven years, was of good moral character, and would suffer 'extreme hardship' if deported.'' *Id.* at 924 (majority opinion).

188. *Id.* at 926.

189. *Id.* at 927–28 (footnote omitted).

190. *Id.* at 944.

> JUSTICE WHITE undertakes to make a case for the proposition that the one-House veto is a useful "political invention," and we need not challenge that assertion.... But policy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.[191]

The Court then turned to the questions of bicameralism and presentment raised by the one-House veto:

> *The Presentment Clauses*
>
> The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." As a consequence, Art. I, § 7, cl. 3, was added.
>
> The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President....
>
> ....
>
> The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. The President's veto role in the legislative process was described later during public debate on ratification:
>
> > "It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body.
> >
> > "... The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."
>
> The Court also has observed that the Presentment Clauses serve the important purpose of assuring that a "national" perspective is grafted on the legislative process:

191. *Id.* at 945 (citation omitted).

> > "The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide. . . ."[192]

Chief Justice Burger further considered the implications of the one-House veto for the constitutional requirement of bicameralism:

> By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials. . . .
>
> [After reviewing the views of several Framers on bicameralism, Burger stated:]
>
> These observations are consistent with what many of the Framers expressed, none more cogently than Madison in pointing up the need to divide and disperse power in order to protect liberty:
>
> > "In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."[193]

Burger then summarized the combined effect of bicameralism and presentment as follows:

> We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.[194]

192. *Id.* at 946–48 (citations and footnote omitted).

193. *Id.* at 948–50 (citations omitted).

194. *Id.* at 951 (citation omitted).

Burger then considered whether the one-House veto was "legislative" in nature and therefore subject to the requirements of bicameralism and presentment. Burger explained that while the spheres of legislative, executive, and judicial functions are not hermetically sealed, and while the Constitution itself identifies specific circumstances when a single House of Congress can act, the requirements of bicameralism and presentment apply to those actions that are " 'legislative in ... character and effect."[195] Burger explained:

> Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be canceled under § 244. The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha's status.
>
> The legislative character of the one-House veto in these cases is confirmed by the character of the congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation....
>
> The nature of the decision implemented by the one-House veto in these cases further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can imple-

195. *Id.* at 952.

ment in only one way; bicameral passage followed by presentment to the President....

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto [including initiating (by the House of Representatives) and trying (by the Senate) impeachments, the Senate's power of advice and consent for Presidential appointments, and the Senate's power to ratify treaties.]

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms....

....

The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the "sharing" with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency....

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.[196]

Burger concluded that "the congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional."[197]

In a concurrence in the judgment, Justice Powell took a very different view concerning the nature of the actions that the one-House veto represents:

196. *Id.* at 952–55, 958–59 (citation and footnotes omitted).

197. *Id.* at 959.

On its face, the House's action appears clearly adjudicatory. The House did not enact a general rule; rather, it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches.... Where, as here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative function of Congress," the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch.

The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid—the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."[198]

Responding to this argument, Chief Justice Burger observed:

JUSTICE POWELL'S position is that the one-House veto in this case is a *judicial* act and therefore unconstitutional as beyond the authority vested in Congress by the Constitution.... But the attempted analogy between judicial action and the one-House veto is less than perfect. Federal courts do not enjoy a roving mandate to correct alleged excesses of administrative agencies; we are limited by Art. III to hearing cases and controversies and no justiciable case or controversy was presented by the Attorney General's decision to allow Chadha to remain in this country.... Thus, JUSTICE POWELL'S statement that the one-House veto in this case is "clearly adjudicatory" simply is not supported by his accompanying assertion that the House has "assumed a function ordinarily [entrusted] to the federal courts." We are satisfied that the one-House veto is legislative in purpose and effect and subject to the procedures set out in Art. I.[199]

Writing in dissent, Justice White focused on what he regarded as the administrative benefits of the one-House veto. White began by noting the broad reach of the Court's ruling:

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a

198. *Id.* at 964–66 (Powell, J., concurring) (citations and footnotes omitted).

199. *Id.* at 957 n.22 (majority opinion) (citations omitted).

"legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well advised to decide the cases, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.

> The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. . . . The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.[200]

Justice White linked the increased use of the one-House veto to the growth of the administrative state:

> The legislative veto developed initially in response to the problems of reorganizing the sprawling Government structure created in response to the Depression. The Reorganization Acts established the chief model for the legislative veto. When President Hoover requested authority to reorganize the government in 1929, he coupled his request that the "Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive" with a proposal for legislative review. He proposed that the Executive "should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration." Congress followed President Hoover's suggestion and authorized reorganization subject to legislative review. Although the reorganization authority reenacted in 1933 did not contain a legislative veto provision, the provision returned during the Roosevelt administration and has since been renewed numerous times. Over the years, the provision was used extensively. Presidents submitted 115 Reorganization Plans to Congress of which 23 were disapproved by Congress pursuant to legislative veto provisions.
>
> . . . .

200. *Id.* at 967–68 (White, J., dissenting) (footnote omitted).

> Over the quarter century following World War II, Presidents continued to accept legislative vetoes by one or both Houses as constitutional, while regularly denouncing provisions by which congressional Committees reviewed Executive activity . . . . .
>
> . . . .
>
> Even this brief review suffices to demonstrate that the legislative veto is more than ''efficient, convenient, and useful.'' It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking. Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives . . . are not entirely satisfactory.[201]

Turning to the constitutional issue, White explained:

> The Constitution does not directly authorize or prohibit the legislative veto. Thus, our task should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of separation of powers which are reflected in that Article and throughout the Constitution. We should not find the lack of a specific constitutional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the Government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government's responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure its role as the Nation's lawmakers. But the wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles. . . .
>
> . . . In my view, neither Art. I of the Constitution nor the doctrine of separation of powers is violated by this mechanism by which our elected Representatives preserve their voice in the governance of the Nation.[202]

Justice White further explained how, as a practical matter, the interests of the President and both Houses are preserved in the one-House veto regime:

> The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval

201. *Id.* at 968–69, 972–73 (citations omitted).

202. *Id.* at 977–79 (footnote omitted).

of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal status quo—the deportability of the alien—is consummated only with the approval of each of the three relevant actors. The disagreement of any one of the three maintains the alien's pre-existing status: the Executive may choose not to recommend suspension; the House and Senate may each veto the recommendation. The effect on the rights and obligations of the affected individuals and upon the legislative system is precisely the same as if a private bill were introduced but failed to receive the necessary approval. "The President and the two Houses enjoy exactly the same say in what the law is to be as would have been true for each without the presence of the one-House veto, and nothing in the law is changed absent the concurrence of the President and a majority in each House."

. . . .

Thus understood, § 244(c)(2) fully effectuates the purposes of the bicameralism and presentation requirements. . . .[203]

Turning to the question of separation of powers, White explained:

[T]he history of the separation-of-powers doctrine is also a history of accommodation and practicality. Apprehensions of an overly powerful branch have not led to undue prophylactic measures that handicap the effective working of the National Government as a whole. The Constitution does not contemplate total separation of the three branches of Government. "[A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."

Our decisions reflect this judgment. . . .[204]

Justice White concluded:

I regret the destructive scope of the Court's holding. . . . Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history. I fear it will now be more difficult "to insur[e] that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people." I must dissent.[205]

DISCUSSION QUESTIONS

1. In the case of Mr. Chadha, what is the actual harm that arises from the deviation from formal bicameralism and presentment? Applying the insights of public choice theory, is it possible that as a constitutional matter we might want to categorically permit or disallow the one-House veto even if the benefits and costs are not readily apparent in a given case?

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203. *Id.* at 994–96.

204. *Id.* at 999 (citations and footnote omitted).

205. *Id.* at 1002–03 (citation omitted).

2. In his dissent, Justice White writes, ''But the history of the separation of powers doctrine is also a history of accommodation and practicality.'' White is referring to a long line of cases that includes most notably the *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952), in which Justices Black and Frankfurter debated in separate opinions the role of longstanding political accommodations between the President and Congress in informing constitutional separation of powers. So viewed, to what extent does this sort of accommodation inform our understanding of the external costs and decision costs in the Buchanan and Tullock framework? For example, does the prevalence of the one House veto suggest that the decision costs of passing full blown legislation to check against agency activity are too high? If so, is this a relevant factor in assessing the constitutionality of the one-House veto? Why or why not?

3. Chief Justice Burger's opinion, in marked contrast with that of Justice White, reflects a rigid separation of powers formalism that refuses to permit action by a single House other than in the circumstances precisely identified in the Constitution itself. Do the materials in this chapter suggest support for constitutional formalism in this context? Consider the argument that the one-House veto is not constitutionally problematic because contrary to Chief Justice Burger's argument, the underlying law that created it went through the ''finely wrought and exhaustively considered, procedure'' set out in Article I, § 7. In this analysis, because the statute creating the one-House veto was enacted by constitutional means, the vehicle it created to check against agency action lies outside the scope of Article I, § 7. Conversely, one might argue, given the high costs of securing constitutionally established lawmaking procedures, it is important to insist upon rigid adherence to formalism. Which of these arguments is more persuasive? Which finds stronger support in public choice? Why?

4. Justice Powell views Congress's action as akin to judicial decision-making. Chief Justice Burger replies by claiming that unlike Congress, a court does not have a ''roving mandate to correct alleged excesses of administrative agencies; we are limited by Art. III to hearing cases and controversies.'' Does this argument undermine or strengthen Powell's position that the one-House veto is unconstitutional? Why? Does the analysis help to inform the understanding developed in this chapter and elsewhere in this book concerning the differences between adjudicatory and legislative lawmaking? Why or why not?

5. In chapter 6, we examined the question of delegation by Congress to agencies from the perspective of public choice theory. Based upon your review of *Chadha*, how does that analysis relate to the question of the propriety of the one-House veto?

B. ROMER v. EVANS

In *Romer v. Evans*,[206] the Supreme Court addressed the constitutionality of Colorado Amendment 2, a 1992 statewide referendum affecting access by gays, lesbians, and other sexual minorities to various protections under state and municipal law. Prior to adopting the amendment, several

206. 517 U.S. 620 (1996).

Colorado municipalities had "banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services"[207] on a variety of bases including sexual orientation. Amendment 2 effectively repealed these ordinances by proclaiming that no state or municipal law shall give protected status on the basis of sexual orientation.

The amendment, which Justice Kennedy writing for the *Romer* majority reproduced in its entirety, provides as follows:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[208]

Justice Kennedy began his opinion by explaining how the amendment does more than simply repeal specific protections on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Kennedy explained:

> Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. . . .[209]

While Justice Kennedy agreed with the Colorado Supreme Court that the amendment violated the Constitution, he disagreed that the relevant test was strict scrutiny. Justice Kennedy began his analysis by considering the argument the state advanced in support of the amendment:

> The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court. The state court, deeming it unnecessary to determine the full extent of the amendment's reach, found it invalid even on a modest reading of its implications. The critical discussion of the amendment, set out in *Evans I*, is as follows:

207. *Id.* at 624.

208. *Id.* (quoting Colorado Amendment 2).

209. *Id.*

> "The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. . . .
>
> Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.
>
> The change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern antidiscrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." The duty was a general one and did not specify protection for particular groups. The common-law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations. In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes.[210]

After explaining that "Colorado's state and municipal laws"[211] specify a broader class of covered businesses than was customary under the common law, Kennedy described the class of persons "within [the] ambit of [the laws'] protection," as follows:[212]

> Enumeration [of groups of persons] is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In following this approach, Colorado's state and local governments have not limited antidiscrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. Rather, they set forth an extensive catalog of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation.

210. *Id.* at 626–28 (citations omitted).

211. *Id.* at 628.

212. *Id.*

> Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.
>
> Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. . . .
>
> . . . .
>
> . . . [E]ven if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[213]

After describing the reach of Amendment 2, Justice Kennedy explained why it violates the Constitution even under rational basis scrutiny:

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.
>
> Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that

213. *Id.* at 628–29, 631 (citations omitted).

the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

. . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive. . . .

It is not within our constitutional tradition to enact laws of this sort. . . . 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. . . .

. . . .

A . . . related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." . . . Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

. . . .

. . . Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.[214]

Justice Scalia, with whom the Chief Justice and Justice Thomas joined, dissented:

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a " 'bare . . . desire to harm' " homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional

214. *Id.* at 631–36 (citations omitted).

sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is *precisely* the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that ''animosity'' toward homosexuality, is evil. I vigorously dissent.[215]

Justice Scalia began his equal protection analysis by claiming that ''[t]he amendment prohibits *special treatment* of homosexuals, and nothing more.''[216] Scalia explained:

> [The Amendment] would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would [for example] prevent the State or any municipality from making death-benefit payments to the ''life partner'' of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee. . . .
>
> . . . .
>
> . . . The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain *preferential* treatment without amending the State Constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged ''equal protection'' violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.[217]

215. *Id.* at 636 (Scalia, J., dissenting) (citations omitted).

216. *Id.* at 638.

217. *Id.* at 638–39.

Justice Scalia then set out an analysis that turns on the nature of lawmaking in a multilevel democracy:

> The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (*i.e.*, by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection.... [T]he Court's theory is unheard of.
>
> ... The Court's entire novel theory rests upon the proposition that there is something *special*—something that cannot be justified by normal ''rational basis'' analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.[218]

Justice Scalia then described what he viewed as a rational justification for the enacted law:

> I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In *Bowers* v. *Hardwick*, we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime.... If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.... And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct....
>
> ... If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct....[219]

218. *Id.* at 639–40.

219. *Id.* at 640–42 (citation and footnote omitted).

Justice Scalia then described why he regarded the amendment as a reasonable exercise of regulatory power:

> First, as to its eminent reasonableness. The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*. The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are *homosexuals*; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status *because of their homosexual conduct*—that is, it prohibits favored status for *homosexuality*.
>
> But though Coloradans are, as I say, *entitled* to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceivable. . . . Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens.
>
> There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. The Court cannot be unaware of that problem; it is evident in many cities of the country, and occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable "alternative life style." The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.
>
> By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not

> limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed "sexual orientation" as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. The phenomenon had even appeared statewide: The Governor of Colorado had signed an executive order pronouncing that "in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form," and directing state agency-heads to "ensure non-discrimination" in hiring and promotion based on, among other things, "sexual orientation." I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.
>
> That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it *must* be unconstitutional, because it has never happened before.[220]

Justice Scalia then responded to Justice Kennedy's argument that included in the " '[c]onstitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.' "[221]

> [This proposition] is proved false every time a state law prohibiting or disfavoring certain conduct is passed, because such a law prevents the adversely affected group . . . from changing the policy thus established in "each of [the] parts" of the State . . . .
>
> . . . The Constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah *to this day* contain provisions stating that polygamy is "forever prohibited." Polygamists, and those who have a polygamous "orientation," have been "singled out" by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps

220. *Id.* at 644–47 (citations omitted).

221. *Id.* at 647.

even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

. . . .

Has the Court concluded that the perceived social harm of polygamy is a "legitimate concern of government," and the perceived social harm of homosexuality is not?

I strongly suspect that the answer to the last question is yes, which leads me to the last point I wish to make: . . . The Court's stern disapproval of "animosity" towards homosexuality might be compared with what an earlier Court (including the revered Justices Harlan and Bradley) said in *Murphy* v. *Ramsey*, rejecting a constitutional challenge to a United States statute that denied the franchise in federal territories to those who engaged in polygamous cohabitation:

> "[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing more than " 'a bare . . . desire to harm a politically unpopular group,' " is nothing short of insulting. (It is also nothing short of preposterous to call "politically unpopular" a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.)

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school

or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: ''assurance of the employer's willingness'' to hire homosexuals. This law-school view of what ''prejudices'' must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws.

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.[222]

DISCUSSION QUESTIONS

1. Compare the ruling and logic in *Romer v. Evans* with the Court's holding in *Powers v. Harris*, discussed in chapter 5. Both cases purport to apply the same level of scrutiny to the law in question, rational basis, and yet they achieve seemingly contrary results in terms of actual deference afforded to the state lawmakers. Can you identify reasons for this seeming divergence in the application of this judicial standard? To what extent is public choice helpful in answering that question?

2. Writing for the *Romer* majority, Justice Kennedy suggests that there is a preferred level at which the relevant political decisions concerning antidiscrimination policies in various settings should be made, and in this case it is local rather than state. Writing in dissent, Justice Scalia observes that, traditionally, higher levels of governmental authority retain the power to trump lower levels of governmental authority when their regulatory authority is concurrent. Does public choice provide any guidance as to the preferred level at which such policies should be made? Does Madison's ''size'' principle say anything about this question? Does Tiebout's exit model? Does Levmore's analysis explaining why local governments tend toward unicameralism, while state and federal governments tend toward bicameralism? Does it matter that the challenged law was not secured through ordinary legislation, but rather through a statewide referendum? Why or why not?

3. *Romer* also raises an important issue concerning how to identify operative constitutional baselines. The majority frames Amendment 2 as

222. *Id.* at 647–48, 651–53 (citations omitted).

manifesting hostility toward gays and lesbians by denying them the benefit of statutory protections afforded others. In contrast, the dissent frames the amendment as denying the same group special treatment. Can either framing be said to be "correct"? Can this question be answered without first answering whether gays and lesbians are a suspect or quasi suspect class? Can you identify reasons why Justice Kennedy did not resolve this preliminary issue? Is it possible to know whether this is an example of majority vindication or minority suppression? To what extent, if any, does public choice help in answering these questions?

4. The majority opinion in *Romer* suggests that gays and lesbians might be uniquely subject to political animus or bias because of traditional societal hostility. Justice Scalia's dissent, in contrast, claims that this group holds disproportionate political influence due to such factors as geographic concentration, and group cohesion. In other words, the majority suggests that the political process may be prone to a political market failure at the state level that disproportionately disadvantages gays and lesbians, thus requiring federal judicial correction, while the dissent suggests a political market failure at the local level disproportionately benefiting gays and lesbians, thus justifying statewide correction in the form of a referendum. Is it possible to know which of the two claimed (and opposite) forms of political market failure better characterizes the underlying facts? Why or why not?

5. Justice Scalia states: "[Amendment 2] sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection?" Consider this argument in light of the discussion of referenda. Does Amendment 2 relate to subject matter that is well suited to the referendum process? Is this an area in which it is normatively preferable to locate the preference of the median electoral voter or instead to allow those most affected by the proposed law to register their intensities of preference? Are the public choice tools developed in this chapter and more broadly in this book helpful in answering this question? Why or why not?

6. Justice Scalia notes that Colorado was one of twenty-five states (at that time) that had repealed prior laws criminalizing homosexual behavior. Does that observation shed any light on the question of whether the *Romer* majority properly relied upon an animus analysis in striking the Colorado initiative down under rational basis scrutiny? Why or why not?

7. After *Romer*, in 2003, the Supreme Court struck down *Bowers v. Hardwick*, in the case of *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Scalia relies upon *Bowers* in his dissenting opinion in *Romer* as reflecting social norms consistent with Amendment 2. Does the rejection by the Supreme Court of *Bowers* affect the analysis? If so, how?

*