Articles

Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America

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The law, after all, is meant to express our values and our aspirations for our society.

—Senator Joe Lieberman[1]

Foreword

Discrimination based on sexual orientation has been a fact of American social and political life for much of the country's history. As American values and aspirations change over time, so too do its laws evolve. Perhaps the greatest strength of American democracy is the document upon which it is built, the United States Constitution. The Constitution is living law that prescribes the goals of our democratic society and establishes the framework and the limits within which those goals may be pursued; it is flexible enough to accommodate the changing cultural face of America without losing its grounding in the fundamental ideals of equity and equality that underpin democracy.

In the latter half of the twentieth century attitudes toward the issue of discrimination against gays and lesbians have changed considerably.[2] While it is by no means universally accepted in the United States that discrimination based on sexual orientation should be prohibited by law in all cases, a consensus is developing with respect to the issue of sexual orientation discrimination in what for the purposes of this paper I will refer to as "public" contexts. More people in the United States are coming to the conclusion that discrimination based on sexual orientation in contexts such as the political process, the workplace, housing, and public assistance, for example, is unfair and should be

[1] *Election 2000: Vice-Presidential Debate* (NBC television broadcast, Oct. 5, 2000).
[2] *See generally* ALAN YANG, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 1973-1999 (1999).

prohibited by law. The primary areas in American life in which there is still a pronounced lack of consensus on gay rights issues are those that I will refer to as "private" contexts, such as religion, the family, marriage, and private accommodations.[3] Recognition of this dichotomy makes recent Supreme Court jurisprudence on gender issues easier to decipher and, in particular, informs the political and legal strategies of those who litigate toward the development of an American law that is more equitable to gays and lesbians.

Romer v. Evans is the Supreme Court case that arose as a result of the challenge to Amendment 2 of the Colorado state constitution. Colorado voters passed Amendment 2 in a statewide referendum in 1992. The provision, which became Article II § 30b of the Colorado Constitution, read 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

[3] I am acutely aware of the difficulty that inheres in using the terms "public" and "private" to describe these two different spheres of rights, but I have found no other terms better suited to articulating what I believe are two very distinct psychological and social realms within which gay rights issues appear to be perceived. There is strong evidence in recent opinion polls, surveys, and studies designed to gauge public opinion on gay rights issues that people make sharp distinctions in the ways in which they understand and evaluate gay rights claims. Judicial decision-making demonstrates the same. *See generally* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Anti-Gay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000). To summarize, there is a great deal of support among Americans for equality before the law for gays and lesbians in what I term "public contexts," that is, civil and political realms, employment, and other areas in which the rights at stake stem from arms-length and public relationships. It would seem, however, that there is much less consensus in what I have termed "private contexts," such as marriage, family, religious and private organizational contexts, and situations involving children and education. This dichotomy and the use of the terms "public" and "private" to describe it are not novel in the context of gay rights scholarship. *See id.* I have chosen to use the terms public and private throughout this paper to indicate these two conceptual realms of social relations; however, I do so fully aware of the difficulties this terminology might present to the reader who may perceive a conflation of these references with other uses of the public-private dichotomy. My use of these terms is not intended to be fully consistent with more traditional legal usages of the public-private dichotomy. I ask that the reader accept for the purposes of this argument that the term public, throughout this article, indicates a realm of civil and political interaction that generally includes employment, large scale housing, and political activity; the term private shall be used to describe a realm of social interaction that generally encompasses religious association, private social associations, marriage, family, child rearing, and education.

> or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[4]

Most commentators believed that the effect of this law would be to eliminate any non-federal cause of action for discrimination based on sexual orientation and to prevent organs of the state and municipal governments from passing new laws or enforcing existing laws that prohibit discrimination based on sexual orientation.[5] It was upon this interpretation of Amendment 2's language that the challenge to the law was made.

This paper explores the story of Colorado's Amendment 2 and seeks to provide a window into a key example of successful civil rights litigation as a culturally-informed[6] process through which social change is advanced within the cultural and political boundaries of majority values. To this end, I will argue that Amendment 2 was ultimately invalidated as a result of the plaintiff's exposure of the law as an instrument designed to greatly limit the access of gay rights advocates to commonly available remedies against public context discrimination based on sexual orientation,[7] an object generally inconsistent with mainstream American values.

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[4] Proposed Amendment 2 to the Colorado constitution, *quoted in* Brief for Respondents City of Aspen and City Council of Aspen at 1, Romer v. Evans, 517 U.S. 620 (1996).

[5] Karen Abbott, *Gay Rights Debate Took a Toll: Amendment 2 Led to Boycott of Colorado*, DENVER ROCKY MTN. NEWS, Nov. 30, 1999, *available at* 1999 WL 6668833. Some people still consider the attack on Amendment 2 as an overreaction, because it is not entirely clear how the Amendment would have been construed in its enforcement. This is a problem in any case in which a facial challenge is made to a law; however, the issue in this case was perhaps more pronounced due to state officials' explicit assurances that the law, if left unchallenged, would not be construed in the broad manner feared by its opponents. Tim Tymkovich, formerly of the Colorado Attorney General's Office and one of the key defenders of Amendment 2 on behalf of the state, argued that the legal effect of the Amendment would have been minimal. "We had a live-and-let-live state then, and we do now," he stated. *Id.*

[6] To engage in a discussion of cultural perspectives on sexual orientation, it is necessary to provide at least some indication of how I will define "culture" for the purposes of this paper. While for over a century British and American social and cultural anthropologists have made careers describing and explaining various aspects of literally hundreds, if not thousands, of cultures, there has, ironically, never been a true consensus among them as to the meaning of the term "culture." Virtually all of the great anthropologists of the twentieth century British and American schools had their own definitions for the term, none of which were sharply inconsistent with the others, but all of which manifested the distinct paradigmatic prejudices of the school of thought in which they originated. In general, my use of the term "culture" for the purposes this paper refers to the values and institutions that inform the beliefs, morality, behavior, and collective conscience (in the Durkheimian sense) of a people. I consider culture to be a framework that bounds the realm of acceptable and probable behavior and thinking in a given society and provides contexts for patterns of social relationships. *See* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 14, 28 (1973) ("Culture is not a power, something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context . . . .").

[7] H. Jefferson Powell, *The Lawfulness of* Romer v. Evans, 77 N.C. L. REV. 241, 252-53 (1998). Powell articulates this end with particular clarity. "Amendment 2 was a determination that no public entity in Colorado—short of the sovereign people itself—could respond to a claim for legal protection or redress for legal injury by the class of individuals identified in the Amendment by adopting laws or policies specifically protecting them against harm based on their membership in the class—no matter how arbitrary or egregious the mistreatment. Amendment 2 thus placed the

I. Historical Perspectives

A. The Rise of a Gay Minority and the Gay Liberation Movement in the United States

The concepts of gay identity and of gays and lesbians as a distinct minority in the United States are fairly recent constructions.[8] From the puritan, colonial beginnings of the United States, homosexual activity was discouraged and generally shunned as counter-utilitarian. "For the North American settlers who migrated from England in the seventeenth and eighteenth centuries, the imperative to procreate dominated the social attitude toward and organization of sexuality."[9] Because the colonial agricultural means of subsistence mandated a substantial labor force, "[t]he production of children by each conjugal pair was as much a necessity as the planting of crops in the spring."[10] Fertility rates were accordingly high, with the average female American settler giving birth to eight or more children.[11] "'Heterosexuality' remained undefined, since it was literally the only way of life,"[12] and instances of homosexual activity were just that—instances. During the colonial period, there was no such thing as "being gay," and sexual behavior that did not support reproduction was seen as deviant, self-indulgent, and generally inconsistent with utilitarian Protestant values of the period.[13] Same-sex eroticism remained the "sporadic and exceptional"[14] behavior of otherwise heterosexual individuals, and the concept of a homosexual identity remained elusive until economic and material developments opened the door for socio-cultural change.

As the economy of the United States was transformed over the next century through the industrial revolution, the agrarian culture of the colonial and early independence periods became less of a dominant force in the shaping of the American social landscape. The rise of the city as a dominant feature in American geography affected the ways in which

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members of the group it singled out in a uniquely disfavored legal position: they alone were required, in seeking protection of the laws, to forego remedies specifically protecting them as a group when addressing any agency or agent of the state other than the electorate as a whole." *Id.*

[8] JOHN D'EMELIO, SEXUAL POLITICS, AND SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970, 10 (1998). It was not until the mid-twentieth century that gays and lesbians were recognized as a distinct social group.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* "The prevailing ideology reflected the facts of social existence." *See also* MARVIN HARRIS, AMERICA NOW: THE ANTHROPOLOGY OF A CHANGING CULTURE 108-10 (1981).

[14] D'EMELIO, *supra* note 8, at 10 (citations omitted).

people organized for living and working purposes, and "provided the conditions for a homosexual and lesbian identity to emerge."[15]

> As a free-labor system, capitalism pulled men and women out of a household economy and into the marketplace, where they exchanged their individual labor power for wages . . . . The family, deprived of the functions that once held it together as an economic unit, became instead an affective entity . . . . Birth rates declined steadily, and procreation figured less prominently in sexual life. In place of the closely knit villages, the relatively small seaport towns, and the sprawling plantations of the pre-industrial era, huge impersonal cities arose to attract an ever larger proportion of Americans. The interlocking processes of urbanization and industrialization created a social context in which an autonomous personal life could develop. Affection, intimate relationships, and sexuality move increasingly into the realm of individual choice, seemingly disconnected from how one organized the production of goods . . . . In this setting, men and women who felt a strong erotic attraction to their own sex could begin to fashion from their feeling a personal identity and a way of life.[16]

Thus, the end of the nineteenth and beginning of the twentieth century saw the emergence of "a class of people who recognized their erotic interest in members of their own sex, and interpreted this interest as a significant characteristic that distinguished them from the majority . . . ."[17] Many among this class of people began to seek opportunities to meet and discuss the implications of this "significant characteristic" in their lives and their personal identities, and by the 1920s a gay culture was emerging in the United States.

> By World War I, gay men regularly cruised certain thoroughfares and parks . . . . Some public bathhouses and YMCAs became gathering spots for male homosexuals. In St. Louis and the nation's capital at the turn of the century, annual drag balls that brought together black gay men evinced well-developed networks . . . . Lesbians and gay men formed literary societies and planned private entertainment that sustained friendships and promised dependable social interaction. Newspapers revealed the existence of working class couples, sometimes legally

[15] *Id.* at 11.
[16] *Id.* (citations omitted).
[17] *Id.*

> married, in which both members were women, with one of them passing as a man to obtain work. Occasionally a circle of such cross-dressing women would come to light. Among the faculties of women's colleges . . . and in the professional associations and clubs that college-educated women formed, one could find lifelong intimate relationships supported by a web of friendships with other lesbians.
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> By 1915, one observer of male homosexual life was already referring to it as "a community distinctly organized." . . . Gradually a subculture of gay men and lesbians was evolving in American cities that would help to create a collective consciousness among its participants and strengthen their sense of identification with a group.[18]

This emergence of a gay subculture in the United States did not go unchallenged.

The Judeo-Christian influence on the evolution of social and political culture worked to counter the emergence of a gay identity in the United States.[19] Many sects of Judaism and Christianity considered homosexual activity and relationships as inherently sinful, and the laws of individual states reflected these religious views.[20] The secular cosmology of western medicine developed ways to account for homosexuality within the Judeo-Christian framework, and homosexuality came to be thought of as a psychological disorder that could be treated and potentially even cured through "modern" psychological therapies.[21] These religious, legal, and "scientific" approaches to the issue of homosexuality shaped hostility toward gays and lesbians in the United States and fostered a social environment in

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[18] *Id.* at 13 (citations omitted).

[19] *See id.*

[20] *Id.* at 15 (citations omitted). "The law stipulated harsh punishments for homosexual acts. Colonial legal codes, drawn either directly from the Bible or from the theologically influenced English buggery statute of 1533, prescribed death for sodomy, and in several instances courts directed the execution of men found guilty of this act. Magistrates invoked statutes prohibiting lewd behavior in order to prosecute other homosexual behavior by men and women. Although most states abolished the death penalty for sodomy in the half century after independence, all but two in 1950 still classified it as a felony. Only murder, kidnapping, and rape elicited heavier sentences. Statutes had also become more inclusive in the course of the nineteenth and twentieth centuries through penal code revisions and court rulings so that erotic activity between women and oral sex between men fell within the domain of the sodomy and 'crime against nature' statutes."

[21] *See* GILBERT HERDT, GAY CULTURE IN AMERICA: ESSAYS FROM THE FIELD 4 (1992). The term "homosexual" was coined by psychologists in 1869 and was defined as "the disease of effeminacy." "In the 1880s and 1890s, when the scientific literature first appeared, doctors engaged in a spirited debate over whether homosexuality was a vice indulged in by weak-willed, depraved individuals, an acquired form of insanity, or a congenital defect that indicated evolutionary degeneracy. In time, advocates of the first view dropped out of the discussion, content to leave the regulation of homosexual behavior to the church and the criminal justice system. Among proponents of a medical model, a near consensus had emerged by the early twentieth century that homosexuality was hereditary in its origins." D'EMELIO, *supra* note 8, at 15; *see also* D'EMELIO, *supra* note 8, at 15-20.

which gay and lesbian culture was compelled to remain largely underground.[22]

The onset of World War II "seriously upset patterns of daily life"[23] and continued the trend away from the pre-industrial tradition of large, nuclear families.[24]

> Following in the wake of a depression that saw both marriage and birth rates drop precipitously, the war further disrupted family stability and social relations between the sexes. It uprooted tens of millions of American men and women, many of them young, and deposited them in a variety of nonfamilial, often sex-segregated environments. Men left home as conscripts or volunteers to spend years in the armed forces, while millions of women entered the paid labor force for the first time. The relocation of civilians of both sexes to the burgeoning centers of defense industry typically involved a shift from rural and small-town residences to impersonal metropolitan areas. Young adults who in peacetime might have moved directly from their parents' home into one with their spouse experienced instead years of living away from kin and away from settings where easygoing intimacy with the opposite sex led to permanent ties. Families endured prolonged separations, divorce and desertion occurred more frequently, and the trend toward greater sexual permissiveness accelerated . . . .
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> World War II created a substantially new "erotic situation" conducive both to the articulation of a homosexual identity and to the more rapid evolution of a gay subculture . . . . For many gay Americans, World War II created something of a nationwide coming out experience.[25]

During the post World War II period, the women's liberation and African American civil rights movements began to gain greater mainstream acceptance; gay activists started to envision a more widespread understanding of sexuality as a benign, immutable quality that should not serve as the basis for state-legitimated discrimination.[26]

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[22] *See* D'EMELIO, *supra* note 8, at 13.
[23] *Id.* at 23.
[24] *Id.*
[25] *Id.* at 23-25 (citations omitted).
[26] *See id.* at 150-53. *See also* LISA KEEN & SUZANNE GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL (1998). "In American law, the argument for gay rights arises against a shared background of cumulative historical experiences of successful struggles for human rights in various domains—religious tolerance, racial equality, and, most recently, gender equality, all of which . . . appeal to constitutionally guaranteed principles . . . . Serious arguments for gay rights in the United States, which themselves only enjoyed some measure of freedom from censorship after World War II, naturally appealed to these earlier struggles. Indeed, they were clearly empowered by their

Assessments of homosexuality as a "medical disorder" were questioned from within the ranks of the medical profession by gay, lesbian, and straight professionals alike.[27] Sodomy laws were challenged in the courts,[28] and more gay and lesbian Americans felt ready to "come out" to friends, family, and colleagues.[29] The gay liberation movement slowly began to take shape.

The 1969 Stonewall riot in New York[30] galvanized support within the gay and lesbian communities of the United States for a more public gay liberation movement and incited many previously politically

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growing successes: the resistance at Stonewall, for example, drew its larger significance from comparable forms of resistances by African Americans and women." DAVID A. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES 1 (1999).

[27] *See* D'EMELIO, *supra* note 8, at 162-64.

[28] *See id.* at 149-55.

[29] "Coming out" has been defined as "recognizing one's homosexual desires, subsequently attempting to act upon them, and acknowledging one's sexual preferences to others of the same persuasion;" and as "identifying yourself as gay, lesbian or bisexual." *See* D'EMELIO, *supra* note 8, at 20; *see also* NATIONAL COMING OUT DAY PROJECT, RESOURCE GUIDE at 5 (2000). The coming out process has both personal and political implications. Individuals who have come out to their friends and family, or to the public at large in the cases of celebrities and political figures, have described the process as "freeing," and as one that provides the individual with a sense of affirmation and acceptance. *Id.* On a different level, the coming out process contributes to a general trend toward greater acceptance of gays and lesbians in American culture and, as such, is to some degree a political statement. *See* D'EMELIO, *supra* note 8, at 235-236. Millions of Americans have come out in the last thirty to forty years, undoubtedly helping to pave the way both for heterosexual acceptance of gays and lesbians, and for a greater willingness among gay and lesbian people to come out. NATIONAL COMING OUT DAY PROJECT, RESOURCE GUIDE at 3. It is currently estimated that 3-6 million Americans are gay. *Id.*

[30] The Stonewall riot is considered by many to have been a pivotal point in the gay rights movement, representing the beginning of a new era of resistance to gay persecution through public protest and a "shedding of [the] secrecy" of gay culture. HERDT, *supra* note 21, at 8. The incident began on Friday, June 27, 1969, just before midnight. D'EMELIO, *supra* note 8, at 231. New York detectives in Manhattan had planned a raid on the Stonewall Inn, a well known gay bar in the heart of Greenwich Village. *Id.* "New York was in the midst of a mayoral campaign . . . and John Lindsay, the incumbent who had recently lost his party's primary, had reason to agree to a police cleanup. Moreover, a few weeks earlier the Sixth Precinct had received a new commanding officer who marked his entry into the position by initiating a series of raids on gay bars." *Id.* What was planned to be just another routine raid turned into a riot when the Stonewall patrons "responded in anything but the usual fashion." *Id.* "As the police released them one by one from inside the bar, a crowd accumulated on the street. Jeers and catcalls arose from the onlookers when a paddy wagon departed with the bartender, the Stonewall's bouncer, and three drag queens. A few minutes later, an officer attempted to steer the last of the patrons, a lesbian, through the bystanders to a nearby patrol car . . . . '[T]he scene became explosive . . . . Beer cans and bottles were heaved at the windows and a rain of coins descended on the cops . . . . Almost by signal the crowd erupted into cobblestone and bottle heaving . . . . From nowhere came an uprooted parking meter – used as a battering ram on the Stonewall door.'" *Id.* at 231-32. Stonewall was set ablaze, and the rioting continued well into the night. *Id.* at 232. "By the following night, graffiti calling for 'Gay Power' had appeared along Christopher Street," and another long evening of rioting began. *Id.* The effects of Stonewall were felt far and wide. "Before the end of July, women and men in New York formed the Gay Liberation Front . . . . Word of the Stonewall riot and GLF spread rapidly among the networks of young radicals scattered across the country, and within a year gay liberation groups had sprung into existence on college campuses and in cities around the nation." *Id.* at 232-33. "Stonewall thus marked a critical divide in the politics and consciousness of homosexuals and lesbians. A small, thinly spread reform effort suddenly grew into a large, grassroots movement for liberation. The quality of gay life in America was permanently altered as a furtive subculture moved aggressively into the open." *Id.* at 239.

inactive gays and lesbians to action.[31] This widely publicized event represented a new beginning for the gay rights movement itself, as well as for the American public's understanding of homosexuality and gay identity. In 1973, the American Psychiatric Association took homosexuality off its list of mental disorders, and during the 1970s more than half of U.S. states decriminalized sodomy.[32] Anti-discrimination laws encompassing sexual orientation began to appear in municipal codes, and national level politicians began to address gay rights issues.[33] In 1980, the Democratic Party included a gay rights plank in its national platform for the first time.[34]

In the 1980s the gay rights movement experienced extraordinary politicization and publicity in the face of the AIDS crisis, with massive media attention suddenly being focused on the epidemic itself and on the gay men afflicted with AIDS. The gay community as a political and social entity was afforded greater national and international attention than it had ever experienced before. This attention, for better or worse, brought homosexuality to the forefront of the American consciousness and provoked personal and collective soul searching as Americans struggled to define this once-silent minority as a tangible sector of the population. Families began to grapple with the question of how to deal with gay and lesbian sons and daughters in a more compassionate and accepting way than had previously been common. More states decriminalized sodomy in the 1980s,[35] and some towns and cities began to institute anti-discrimination policies encompassing sexual orientation.[36] The political and legal situation for gays and lesbians in the United States in 1990 was a far cry from the pre-Stonewall years.

B. The Advent of Anti-discrimination Laws Covering Sexual Orientation and Other Non-Discrimination and Equality Policies

Anti-discrimination laws covering sexual orientation first began to appear in municipalities in the 1970s and became increasingly common throughout the 1980s and 1990s.[37] Over these three decades, states, private companies, universities, and other organizations began to pass laws and policies prohibiting discrimination, particularly in areas such as housing and employment.[38] States became more active in implementing anti-discrimination laws covering sexual orientation in the 1990s, and by August of 1999, eleven states and the District of Columbia

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[31] *See* KEEN & GOLDBERG, *supra* note 26, at 91-94.
[32] *See* D'EMELIO, *supra* note 8, at 238.
[33] *Id.*
[34] *Id.*
[35] *See* WAYNE VAN DER MEIDE, LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES 14, 25-82 (1999).
[36] *See infra* subpart I(B).
[37] *See* VAN DER MEIDE, *supra* note 35, at 9.
[38] *See generally* VAN DER MEIDE, *supra* note 35.

had legislation prohibiting employment discrimination based on sexual orientation,[39] and eighteen states and the District of Columbia prohibited discrimination based on sexual orientation in public employment specifically.[40] By 1999, over half of the Fortune 500 companies included sexual orientation in their workplace anti-discrimination policies,[41] and anti-discrimination policies in universities had become virtually standard.[42] The overwhelming majority of these anti-discrimination laws and policies address discrimination that is public, as defined for purposes of this argument.[43]

By contrast, the acknowledgement of rights and the provision of legal protections and workplace benefits have progressed much more slowly in more private contexts of social life, such as the family. For example, the provision of health and other family benefits for the domestic partners of employees has been, until very recently, one of the slowest areas of progress for gay rights activists.

> In 1982, the *Village Voice* became the first U.S. employer to offer health insurance benefits to the domestic partners of its gay and lesbian employees. For the remainder of the decade, only a couple of employers a year added this coverage. By 1990, fewer than two dozen U.S. employers offered domestic partnership benefits. In 1991, Lotus Corp . . . became the first publicly held corporation to offer health insurance coverage to the domestic partners of its employees.[44]

However, as more and more companies made the decision to include domestic partnership coverage in their benefits packages over the course of the late 1990s, a snowball effect of sorts ensued. In a bullish economy, accompanied by very low unemployment rates, American

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[39] *See* VAN DER MEIDE, *supra* note 35, at 4; KIM I. MILLS & DARYL HERRSCHAFT, STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED AMERICANS 6 (1999). These eleven states are California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. Only Minnesota's law provides protections for transgendered people. *Id.* Seven states have executive orders barring sexual orientation discrimination in public employment: Colorado, Maryland, New Mexico, New York, Ohio, Pennsylvania and Washington. *Id.* Illinois and Michigan have state civil service rules prohibiting sexual orientation discrimination. *Id.* Finally, while Oregon has no statute or executive order prohibiting discrimination based on sexual orientation, the Oregon Court of Appeals ruled that sexual orientation discrimination was prohibited under state law in *Tanner v. OHSU*, 971 P.2d 435 (1998).

[40] *See* VAN DER MEIDE, *supra* note 35, at 4.

[41] *See* MILLS & HERRSCHAFT, *supra* note 39, at 10.

[42] *See id.*

[43] *See generally* VAN DER MEIDE, *supra* note 35. States and municipalities that prohibit discrimination based on sexual orientation usually do so in public and/or private employment contexts, public accommodations, business practices, education, credit and lending, housing and real estate practices, and public contracting. *Id.* at 10-13. Much less common are domestic partnership registries and equal benefits programs and ordinances. *Id.* at 13-17.

[44] MILLS AND HERRSCHAFT, *supra* note 39, at 9.

companies found the provision of domestic partnership benefits almost essential to survival in a competitive private sector employment environment. As of 1999, "almost two employers a week . . . [were] adding domestic partner benefits to their compensation plans, recognizing that these benefits amount to equal pay for equal work."[45]

In spite of recent economic pressures supporting employment benefit-equality for gays and lesbians, conservative consumer organizations and members of the Religious Right have consistently sought to discourage companies from providing these benefits. They have done so because the provision of domestic partnership benefits requires the acknowledgement of same-sex relationships that are in many ways analogous to marriage. Beyond allowing for a workplace environment free of job-related discrimination, domestic partnership benefits plans acknowledge respect for same-sex relationships. For this reason, extreme conservatives have "systematically organized lawsuits" and mounted "well-orchestrated attacks against companies" that provide domestic partnership benefits.[46] These attacks have been substantially more effective than those on generalized workplace anti-discrimination policies because of the private, family-oriented nature of these policies.

II. The Birth of Amendment 2

The rise of the gay rights movement and the increase in mainstream American support for gay rights were not without a cultural counterbalance. This section moves from the cultural and political backdrop of the gay rights movement to the specific circumstances under which Amendment 2 was developed, marketed, and passed by a majority of Colorado voters in 1992. I will provide a look at the cultural and legal calculations the Amendment's proponents used to gauge (very successfully) how the Amendment might be marketed so as to garner mainstream acceptance among Colorado voters, and how this marketing was inconsistent with the purpose and the language of the law.

A. The Christian Right

In the 1980s and early 1990s, a growing movement of primarily Republican, politically conservative, fundamentalist Christians began to gain popular support in many parts of the United States and eventually drew a great deal of attention on the national political scene. Colorado Springs emerged as the headquarters of a substantial number of right-wing Christian organizations, and a culture of radical anti-gay activism

[45] *Id.*
[46] *Id.* at 27.

began to develop in what was becoming known as "ground zero" in the battle "between God and the Devil."[47] Ministers and activist leaders, citing biblical references in support of their claims that homosexual behavior was an "abomination," viewed the AIDS epidemic as God's punishment for the sexual iniquities of gay men.[48] They used the epidemic and all its implications as a rhetorical tool in the battle to raise public awareness of what they called the "gay agenda."[49] Capitalizing on the fear many Americans experienced regarding the AIDS epidemic, they portrayed gays and lesbians as unrepentant sinners, bent on "recruiting" the youth of America into an unhealthy "homosexual lifestyle" that would inevitably lead to sickness and early death.[50] Furthermore, these organizations sought to appeal to a wider, more secular audience by characterizing the gay rights movement as one aimed at getting "special rights" and "protected status" for gays and lesbians incorporated into civil rights law.[51] The organizations "planted a lot of fear in people... that there would be some kind of affirmative action, some kind of quota system" instituted to benefit gays and lesbians over straight people in the public contexts of employment, housing, and government contracts.[52] Through careful appropriation of the popular fear of AIDS and the anti-affirmative action sentiment of the late 1980s and early 1990s, these conservative organizations successfully established an environment that was distinctly suspicious of the gay movement as militant, radical, contagious, unhealthy, and essentially unfair.[53]

In the context of a burgeoning nationwide religious conservative movement in American politics, centered on opposition to "abortion, school busing, gay rights, and the content of school textbooks,"[54] Republicans sought to appropriate the moral high ground on the American political and cultural scene. By citing Judeo-Christian scriptures in support of a new moral agenda aimed at promoting "family values" and "character" in American social and political life, the Religious Right placed itself at the forefront of media coverage of the congressional stage. This approach backfired at the national level in the 1992 elections, however, when the Republican party was rocked by a series of sex scandals that demoralized the party's membership and

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[47] *See Bill Moyers' Journal: The New Holy War* (Public Broadcasting System television broadcast, Nov. 19, 1993).

[48] *See id.* This message may have been fairly powerful. In a 1993 poll, 11% of Coloradans agreed with the premise that "AIDS is God's way of punishing homosexuals." Defendants' Exhibit B, Romer v. Evans, 517 U.S. 620 (1996).

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] Steven Shaw, *No Longer a Sleeping Giant: The Re-Awakening of Religious Conservatives in American Politics*, *in* ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 7, 10 (Stephanie L. Witt and Suzanne McCorkle eds., 1997).

sliced into the credibility of its leadership.[55] Interested in avoiding more high profile challenges to the party's moral standing, the Republican party and the Religious Right "began seeking victories state by state"[56] as a means of minimizing the potential for negative national media attention. Small groups were set up to take the lead at the local level[57] by opposing any and all legislation designed to protect the civil rights of gay and lesbian Americans, and by initiating legislation to eliminate pre-existing legal protections.[58] It was in this local environment of ultra-conservative activism that Colorado for Family Values (CFV) was established in Colorado Springs.[59]

Colorado for Family Values was founded specifically for the purpose of "initiat[ing] and campaign[ing] for the passage of Colorado's Amendment 2."[60] CFV rallied conservative opposition to what it deemed "the homosexual agenda," a list of "special rights" the allegedly politically powerful gay minority systematically promoted through anti-discrimination legislation efforts.[61] The organization capitalized on the fear surrounding the AIDS epidemic and drew even more support from moderate Coloradans through its ingenious use of the anti-affirmative action sentiment of the 1990s. CFV's leadership served as the chief architects and promoters of Amendment 2, and their construction and marketing of the Amendment as a law consistent with mainstream public values was nothing short of exceptional.

B. The Construction of the Amendment

Amendment 2 was developed as a ballot initiative.[62] However, laws passed by voter initiative do not necessarily become law because

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[55] *See generally* KEEN & GOLDBERG, *supra* note 26, at 8-10.

[56] *Id.* at 8.

[57] "Part of the strategy of the Christian Coalition . . . has been a concentrated focus on grassroots politics and local organizing throughout the country . . . [with the goal being] 'to transform the religious conservative community from a political pressure group to a broad social reform movement based in local communities . . . . States and localities would become the laboratories for testing our policy ideas, and for building a farm system of future candidates.' . . . In discussing the future of the Christian Right, . . . it has 'its greatest potential in mobilizing diverse constituencies in support of local (and occasionally national) moral crusades.'" Shaw, *supra* note 54, at 15.

[58] KEEN & GOLDBERG, *supra* note 26, at 9.

[59] *See id.*

[60] Brief of Amicus Curiae Colorado for Family Values at 1, Romer v. Evans, 517 U.S. 620 (1996); *see also Bill Moyer's Journal*, *supra* note 47.

[61] *See Bill Moyer's Journal*, *supra* note 47.

[62] Colorado, like many states in the American West, includes among its law-making institutions a direct democracy mechanism, specifically one that allows the passage of direct state constitutional amendments, as well as legislation, through a direct democratic process. The rise of institutions of direct democracy in American states has been an unexpected twist on the republican governmental theme envisioned by the authors of the Constitution:

> Direct democracy devices such as the initiative, referendum, and recall were adopted by many states during the Progressive Era, a period of radical redesign and reform for many American political institutions.

"[s]tatutes passed by the initiative process are subject to judicial review under the state and federal constitutions, and state constitutional amendments passed by initiative are reviewed under the United States Constitution."[63] Therefore, although a group of voters may succeed in passing a law through the referendum process, the law will not stand if it is challenged in the court system and found to violate either state or federal law. Laws passed by voter initiative are generally subject to fairly close judicial scrutiny[64] because voter initiatives, in some sense, operate outside the realm of the traditional checks and balances that characterize the legislative process.[65]

> The unique institutions emerging from this era were expected to give citizens a greater voice in state-level policy making and weaken the hold of wealthy interests over state legislatures . . . . Direct democracy clearly was not part of America's original constitutional design. In practice, it was virtually unknown when the Constitution of 1787 was drafted, and it was abhorred by the Federalists. For the authors of the Constitution, the ideal form of democracy was representative (or republican) government, in which the control of legislation, in practice and theory, was insulated from popular majorities by representative institutions. . . . [F]orceful agitation for greater direct citizen involvement in legislation began later in the nineteenth century with disaffected groups and racial movements such as grange organizations, single-taxers, socialists, labor groups, prohibitionists, and evangelists – groups that often had their greatest political influence in the western United States.

Todd Donovan and Shaun Bowler, *An Overview of Direct Democracy in the American States*, *in* CITIZENS AND LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 1, 1-2 (1998) (citations omitted). The first state to adopt an initiative process was South Dakota in 1898, and since that time, over 1700 voter initiatives have been placed on ballots in states across the country. *Id.* at 3. From 1898 to 1992, roughly 38% of all initiatives that made it to ballots across the country were passed by the voters. *Id.* When Amendment 2 went to the ballot in 1992, Colorado had already had roughly 150 previous ballot initiatives. *Id.*

[63] Caroline J. Tolbert, Daniel H. Lowenstein, and Todd Donovan, *Election Law and Rules for Using Initiatives*, *in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 27, 50 (Shaun Bowler et al. eds., 1998).

[64] *See* Tolbert et al., *supra* note 63, at 52.

[65] There is some academic and theoretical support for the premise that the voter initiative process itself may violate the United States Constitution's Guaranty Clause, and this concern was reflected in the plaintiffs' original complaint in *Evans v. Romer*. Amended Complaint at 13-14, Evans v. Romer, (Dist. Ct., City and County of Denver) (No. 92 CV 7223). The Guaranty Clause is embodied in U.S. CONST. art. 4, § 4, and requires that the United States ensure that every state in the union provides to its citizens a republican form of government. Many scholars interpret this as meaning that only representative democracy, as opposed to direct democracy, meets the constitutional requirement for state government format. *See* Tolbert et al., *supra* note 63, at 51-52. The objection is that "the submission to the voters of certain types of measures, particularly those that stigmatize particular groups, violates the requirement of a republican form of government." *Id.* Aside from the generalized "tyranny of the majority"-oriented objection, some scholars also find that direct democracy institutions are even more subject to appropriation by special interest or single interest groups. Single interest groups have no incentive to advocate for the good of the community as a whole, rather than one particular aspect of what they consider to be the common good. As such, they are often not aware of or interested in the ancillary effects the legislation they propose may have, as would be a legislator who is accountable to other interests and constituencies. Furthermore, "[s]ingle issue groups often have the strength of commitment to persist in signature-gathering phase. The initiative process does not require compromise in the drafting phase, and some sponsoring groups are often desirous of getting a 'pure' vote on their statute or constitutional Amendment. These groups . . . are not as concerned about implications for the governmental process as they are

As a result of these constraints, the language of Amendment 2 had to be constructed very carefully if the measure were to withstand judicial scrutiny upon its passage. The authors of the measure made numerous miscalculations in their assessment of how they could word the Amendment so as to avoid judicial invalidation. The measure was sweeping rather than "narrowly tailored" to fit a legitimate state interest, and eliminated such a wide variety of traditional political and legal avenues for redress of discrimination that it was bound to fail in judicial review. Rather than constructing the language of the Amendment so as to withstand judicial scrutiny and approaching the marketing of the Amendment as a separate issue, the authors of Amendment 2 conflated these considerations early in the drafting process.[66] This haphazard planning process put the proponents of Amendment 2 in a legally untenable position from the start, and worsened the difficulty the public would later have in distinguishing the actual intended (and probable) legal effect of Amendment 2 from the marketing and propaganda that surrounded it.

C. *The Marketing of the Amendment—Accentuating Privacy and "Fairness"*

The marketing of Amendment 2 was carefully planned to invoke images and feelings that were consistent with the vast majority of Colorado voters' views on how civil rights law should be, while not going so far that the majority of citizens would find the proposed Amendment repugnant or vicious. While the Religious Right had a committed following of individuals and communities who would be ready and willing to vote and mobilize support for a bill denying gays and lesbians equal civil rights, it would take more than this to pass the bill in a statewide election. An appeal to the center was the key to successful passage of Amendment 2, and supporters of the initiative had to keep this in mind throughout the campaign process.[67] Clearly, Colorado for Family Values and other supporters of the Amendment realized that this moderate center position might be amenable to a law

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about getting their way on the issue. . . . But politics is many issues, and government is more than the sum of single-interest concerns." DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 189 (1984).

[66] *See* Plaintiffs' Exhibit 18, Romer v. Evans, 517 U.S. 620 (1996).

[67] In the 1990s, the Christian Right began to determine that in order to attract the larger and more consistent following necessary to become an effective political force at the national level, it would be necessary to cast "a wider net" in terms of issues and stances. Shaw, *supra* note 54, at 15. "[A]s the movement has tried to become more mainstream and less extreme, at least in the case of the Christian Coalition, vitriol against gays and lesbians has lessened in some quarters . . . . [I]n the coalition's Contract with the American Family, discussion of homosexuality as a threat to the family is prominent by its absence . . . . Nonetheless, homosexuality is definitely not a part of . . . the Christian Coalition's "family-friendly agenda." *Id.* (citations omitted). Undoubtedly, the realization that extreme anti-gay rhetoric would not be attractive to the majority of mainstream voters played a role in the campaign strategy for Amendment 2.

that prohibited special rights and permitted private context discrimination, but that an outright attack on gay public and political rights would likely lead to failure.[68] As such, the Amendment 2 campaign strategy emphasized the issue of special rights and the protection of private, versus public, types of discrimination.

1. The Invocation of Affirmative Action and "Special Rights" Rhetoric

The anti-affirmative action sentiment of the 1980s and 1990s stemmed from a general frustration among American workers with what had come to be seen as an increase in government sanctioned special rights and quota preferences for certain minority groups. People began to reject the idea that government should be able to influence who a private employer should hire on the basis of race or gender, and while Americans continued to believe in equal rights before the law, a "sentiment common among moderate voters" was the disapproval of what was becoming known in anti-affirmative action parlance as "special rights."[69] Many white Americans began to take issue with what they saw as a "stacking of the decks" against them in the job market, education, and government bidding through affirmative action programs. By playing on this growing disinclination toward affirmative action and other "special rights" programs, Colorado for Family Values was able to successfully construct Amendment 2 as a fair and reasonable law and increase the Amendment's likelihood of passage.

The campaign propaganda used in support of the Amendment 2 effort clearly reflects this strategy. Take, for example, the following excerpt from an Amendment 2 campaign flier sponsored by Colorado for Family Values.

> Rabbi Steven Foster (Co-Chairman of EPOC, the "gay rights" campaign against Amendment 2) says he thinks homosexuals deserve special minority status. Amendment 2 doesn't change "gays" [sic] present status -- it just prevents special rights for "gays." According to Colorado's most prominent Civil Rights leaders, "gays" already have the same basic rights as anyone else. That means they are equal

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[68] In the aftermath of Amendment 2's passage, the Amendment's authors downplayed the appropriateness of an inflammatory Focus on the Family video, *The Gay Agenda*, used by that organization's members to help persuade voters to support Amendment 2. Linda Castrone, *Focus on Family Pushes Anti-Gay Rights Video*, ROCKY MOUNTAIN NEWS, Apr. 8, 1993, at 5A. The video, which portrays gays as pedophiles and participants in "unhealthy lifestyles," was referred to by Amendment author Tony Marco as likely to "escalate violence between supporters and opponents of Amendment 2." *Id.* Nonetheless, the video mysteriously appeared at a series of public gatherings immediately preceding the election. *Id.*

[69] Suzanne Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1059 (1994).

> right now. Amendment 2 means they'll stay equal, not special.[70]

In this excerpt, representing only about a quarter of the flier's full text, Amendment 2 supporters have appropriated equality and fairness in support of their position, claimed civil rights community support for the law, and cast doubt on the validity of gay and lesbian status through the use of quotations around the word "gays." While failing to name the civil rights leaders who have allegedly come out in support of Amendment 2, the authors of the fliers take great pains to include not only the name but also the title—Rabbi—of an anti-Amendment 2 leader. It seems clear that, in doing so, this right-wing Christian organization intended to make a less than complimentary connection between the Jewish and gay communities as a means of generating support for the Amendment.

The remainder of this flier is dedicated to the presentation of highly questionable and thinly annotated statistics on the relative income, education level, managerial experience, and "travel experience" of gay versus "average" Americans.[71] By indicating that gay and lesbian Americans enjoyed substantially better salaries and higher education levels, and that they tended to be managers and professionals who travel around the world on ample supplies of disposable income, CFV was seeking to destroy the image of gays and lesbians as somehow disadvantaged before the law. The flier's clear message was that gays and lesbians occupy a privileged position in American society, and that they therefore were likely to have opportunities for political access beyond those open to "average" Americans. Further, the implication was that if the gay community had their way, they would obtain even more "special rights" through the use of affirmative action and anti-discrimination legislation. This served as a very effective rebuttal to arguments that Amendment 2 disadvantaged gays and lesbians by obstructing their access to the political process.

"Feel sorry for us ... then give us special rights," is how CFV characterized the gay rights movement's message in this flier.[72] After providing these highly generalized and suspect statistics on income and other quality of life indicators, the flier went on to attack the analogy between gays and other groups such as "Black people, women and the handicapped,"[73] whom the flier alleged had also been awarded "special rights" under United States laws.[74] In a fascinating lay rendition of equal protection jurisprudence's use of suspect classifications, CFV argued that

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[70] COLORADO FOR FAMILY VALUES, *"Gay Rights" Opposition to Amendment 2 Boils Down to Three Phony Arguments* (1992) (unpublished campaign flier).
[71] *See* COLORADO FOR FAMILY VALUES, *supra* note 70.
[72] *Id.*
[73] *Id.*
[74] *Id.*

these other groups "qualified" for special rights as a result of their being "disadvantaged," "not defined by behavior," and "politically powerless."[75] By contrasting an image of an economically, and therefore politically, powerful gay minority with a set of "qualifications for special rights," CFV's flier invoked a conceptualization of Amendment 2 as a fair and reasonable way to prevent another minority group from obtaining special protections and quota preferences over the white male majority. This concept was an exceptionally powerful and persuasive force in framing the issues, and it played a substantial role in the Amendment's passage.

Polls conducted in the months following the 1992 election reflected the pivotal role of CFV's construction of Amendment 2 as a law that would prevent special rights, rather than deny gays equal rights. When asked, "Do you think the majority of those who voted in favor of Amendment 2 voted that way because they dislike homosexuals or because they are against laws that would give homosexuals a type of special or protected status," 74% answered that they believed voters disapproved of special rights laws, not of gays and lesbians.[76] Furthermore, roughly a year following Amendment 2's passage, 59% of voters agreed with the statement, "when homosexuals talk about gay rights, what they are really saying is that they want special treatment."[77]

While CFV and its allies successfully rallied anti-affirmative action sentiment in support of Amendment 2's passage, the appropriation of this rhetoric was problematic at best. At the time Amendment 2 was passed, "there [were] not and had never been any affirmative action programs in employment or education for gays and lesbians."[78] Despite this, supporters of Amendment 2 clung to the special rights rhetoric even after the Amendment was invalidated by the United States Supreme Court.[79] Furthermore, CFV leadership was well aware of and freely admitted that the language of Amendment 2 said nothing about prohibiting special rights, and that, in fact, the "'No Special Rights' theme used to promote the Amendment [had]... no legal meaning."[80]

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[75] *Id.*

[76] Fred Brown, *Voters Unchanged on Amendment 2*, DEN. POST, Feb. 23, 1993, at A1.

[77] Defendants' Exhibit B, at 130, Romer v. Evans, 517 U.S. 620 (1996).

[78] Interview with Jean Dubofsky, Lead Attorney for the *Romer v. Evans* Plaintiffs, in Boulder, Colo. (Oct. 16, 2000). Dubofsky opined that the CFV argument that Amendment 2 was merely designed to preclude affirmative action programs for gays and lesbians was simply an attractive way "to sell the Amendment." *Id.*

[79] "The head of Concerned Women for America, which filed a Supreme Court brief supporting the Colorado constitutional Amendment, spoke defiantly: 'We'll stop at nothing. We'll redouble our efforts at the grass roots,' James Woodall, the group's chief executive officer, said . . . . We're willing to tolerate [homosexual] behavior. Who they want to sleep with is their business. But that does not give them special protected status under the law." *Civil Rights or Special Rights? Emotional Reaction to Supreme Court Decision on Gay Rights*, CNN.com, May 21, 1996, *at* http://www.cnn.com/US/9605/21/gay.reax/.

[80] Goldberg, *supra* note 69, at 1071 (discussing the extent to which CFV leadership testified to their knowledge of the inappropriateness of the special rights theme and their choice to use it anyway because of its value as a powerful marketing tool to attract moderate voters).

2. *Private Discrimination*

In addition to the special rights rhetoric, for Amendment 2 to pass in a statewide election it was essential that voters perceive the law as merely protecting private citizens from being forced to acquiesce to the premise that homosexuality was a valid form of existence. The law had to be seen not as taking public context civil and political rights from gays and lesbians, but as protecting private citizens from being forced into relationships and situations that were morally or religiously objectionable to them. "Protecting the rights of little old ladies to not be forced to rent out their spare room" to gays, lesbians, or others "living in sin" was at the heart of the marketing strategy in support of Amendment 2.[81] This legal protection from what many were convinced was a campaign to force on Coloradans a gay-tolerant moral code was very attractive to many moderate voters.

Opinion poll results from the time period following the passage of Amendment 2 also makes it clear that Coloradans were swayed by the construction of the Amendment as pertinent primarily to private context discrimination. When asked to respond to the statement, "gay rights are more about making homosexual behavior acceptable than about equal housing and employment opportunities," 64% of Coloradans polled agreed—38% "strongly."[82] The great disparity between responses to questions regarding public context versus private context rights throughout the survey indicates that Amendment 2's sponsors gained a considerable advantage through their ability to market the law as protecting private context rights for those who disapprove of homosexuality, rather than limiting public rights for gays and lesbians.[83]

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[81] *See Bill Moyers' Journal, supra* note 47.

[82] Defendants' Exhibit B at 132, Romer v. Evans, 517 U.S. 620 (1996) (No. 92 CV 7223).

[83] Some examples of the remaining responses to the survey are useful here. In September 1993, only 15% percent of those polled agreed that "public schools should teach students that homosexual relationships are morally equal to heterosexual relationships," and only 11% agreed that public schools should provide gay and lesbian role models. Defendants' Exhibit B at 129, Romer v. Evans, 517 U.S. 620 (1996). Further, 57% responded that gays and lesbians should not be allowed to adopt children. *Id.* at 132. In contrast to these views on the private context issues of child rearing and education, 22% of respondents agreed that gays and lesbians should be allowed to seek employment as teachers in public schools. *Id.* at 125. The characterization of the right at stake as private or public context—that is, relevant to child rearing and education, or relevant to equal employment opportunity—seems to matter significantly in determining the likely responses to these survey questions. Interestingly, an example of the public-private rights dichotomy might also be seen in the different ways Coloradans approached the issues of hiring and leasing, versus firing and evicting. Coloradans seemed to have accorded greater import to protecting rights relevant to personal choice in the former than in the latter. While 26% of people polled in 1993 agreed with the premise that an employer should have the right to refuse to hire someone on the basis of sexual orientation, only 13% agreed that an employer should be able to fire someone on the basis of sexual orientation. *Id.* at 131. Similarly, while 24% of those polled agreed with the premise that a landlord should not be legally required to rent to gays and lesbians, only 13% agreed that a landlord should be able to evict someone on the basis of his or her status as gay or lesbian. *Id.* While the legal distinction between

3. *The Reality of Amendment 2's Language*

Notwithstanding the campaign emphasis on special rights and private realm discrimination, the reality of Amendment 2's language was indisputably destructive to the rights of gays and lesbians, as well as pro-gay rights activists, to participate fully in the political process. Furthermore, the law protected virtually all forms of discrimination against gays and lesbians, from the most private to the most public. Most importantly, the most egregious forms of discrimination permitted by the law—discrimination in the workplace and in the political process—involved the diminution of legal protections for gays and lesbians in the public realm. This reality was fully inconsistent with the themes emphasized in the marketing of Amendment 2. It is clear from the public opinion polling conducted around the time Amendment 2 was passed that had it ever taken effect, the Amendment would have created a legal environment inconsistent with what most Coloradans valued. The marvel of Amendment 2's electoral success was not the extraordinary conservatism of the voters who passed it, but the genius of the Amendment supporters who managed to construe such an extremely conservative law as a fair and reasonable proposition.[84]

D. *The Passage of Amendment 2*

Notwithstanding both the strong disapproval of the idea of special rights and popular support for the protection of private context discrimination in certain cases, 70% of the population of Colorado supported equal rights for gays and lesbians at the time Amendment 2 was introduced.[85] Despite this, Amendment 2 passed with roughly 53%

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hiring and firing and leasing and eviction is arguably *de minimis*, and while most anti-discrimination laws would treat the activities equally, there is clearly some distinction in respondents' mindsregarding these activities, a disparity that merits attention. I would argue that the respondents considered the personal choice involved in the decision of whether to rent or hire someone as more private—more worthy of the kind of legal protection for moral conviction described in the text preceding this footnote—than the decision to fire or evict someone may be. That is, it would appear that once a person is hired or has leased a property, he or she has crossed a line between the personal, informal relationship associated with the pre-employment or pre-lease period, into a relationship that is more public in the sense intended in this paper, and, therefore, more worthy of legal protection in the minds of the respondents.

[84] Many Coloradans were outraged at what they saw as a deceptive campaign strategy in support of Amendment 2 and argued that had Colorado voters been appraised of the actual legal effects the Amendment would have had, the Amendment would not have passed. A lesbian mother protesting with her children in the wake of Amendment 2's passage said, "We're not here to be militant homosexuals. We just want to confront the people who hoisted lies on the voters and ended up passing a law that discriminates against us." Beth Krodel, *Colorado for Family Values Meeting Draws Crowd*, DAILY CAMERA, Feb. 27, 1993, at 1A.

[85] Sean Patrick O'Rourke & Laura K. Lee Dellinger, Romer v. Evans: *The Centerpiece of the American Gay-Rights Debate, in* ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 133-40, 134 (Stephanie L. Witt & Suzanne McCorkle eds., 1997).

of the vote.[86] This seems to be due in large part to the success of the measure's advocates in characterizing the proposal as a prohibition on special rights and a protection for private rights to express anti-gay sentiment; their efforts overcame those of the gay community and its allies to frame the proposal as an inhibitor to equal rights in the most public aspects of American life. The Religious Right and other supporters of the Amendment convinced voters that a vote for the Amendment meant a vote to eliminate the possibility of a powerful

[86] *Id.* This appears to be a key example of why many commentators argue that direct democracy may be more susceptible to popular movements aimed at disadvantaging certain minorities in a way that violates those minorities' civil rights. The idea of "civil and human rights . . . [being] put to a popular vote" is one that has been subject to some criticism. KEEN & GOLDBERG, *supra* note 26, at 104. As Joe Hicks, Executive Director of the Southern Christian Leadership Conference's Los Angeles Chapter phrased the issue, "I think [that] had . . . [the issue of civil rights] been put to the population [for a vote] . . . in the fifties and sixties, black folks would have lost." *Id.* This type of concern is not rooted in the premise that the majority of the populace hold beliefs and values contrary to the interests of the minority. Rather, popular votes are often swayed through the use of inflammatory rhetoric, misconstruction or, at the very least, questionable construction of the issues, and dogmatism. *See generally* James Wenzel, Todd Donovan, & Shaun Bower, *Direct Democracy and Minorities: Changing Attitudes about Minorities Targeted by Initiatives, in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES, 228-48 (1998). As we see in the case of Amendment 2, the legal and cultural implications of voter initiatives on the ballot are not always clear to the voters. Discriminatory rhetoric and understatement of the potential effects of civil rights related referenda often color voter understanding of the issues up for vote, and this problem is complicated by the fact that ballot initiatives are normally neither party-affiliated nor easy to understand through a single reading of the text. It is a perhaps unfortunate consequence of the two-party system in the United States that many voters tend to vote by party affiliation, rather than taking the time to learn about the individual candidates on the ballot in order to form an educated opinion regarding their votes. Be that as it may, it is certainly the case that voters can determine with which party's platform they generally agree, and vote by party lines for candidates accordingly. Due to the fact that voter initiatives virtually never carry party endorsements, the potential for voting by party lines disappears in the case of ballot initiatives. This is particularly problematic because voter initiatives tend to contain very complicated language which in many cases the voter sees for the first time when he opens the ballot to vote. *See* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 101 (1984). A fascinating body of literature has developed in an effort to address the question of how representative of public values the passage of an initiative tends to be. The general conclusion of this literature is that very few people vote in the first place, fewer still vote on the ballot initiatives, and very few of those who do not "drop off," that is, cease voting before reaching the initiative section of the ballot, actually know what the initiatives stand for and vote accordingly. Generally speaking, it is estimated that 15-18% of those eligible to vote who actually turn out do not vote on the proposition/initiative sections of the ballot. *Id.* at 100. These drop-off voters tend overwhelmingly to be low-income groups and racial minorities. *Id.* at 103-04. In sum, "voters who participate on local propositions [have been found] to be unrepresentative." *Id.* at 103. In addition to the problem of unrepresentative voter participation in the initiative process, there is also a substantial problem created by the fact that initiative language provided on the ballot tends to be very difficult to equate into practical terms for the non-lawyer voter on a first reading, which often leads to random block checking or uninformed voting among voters who do not drop off. *Id.* at 183. The way in which the proposition is phrased is also often highly relevant to voter response. "Because of the way in which propositions are worded, voters often must choose the least inaccurate expression of their opinion," and as such find it very difficult "to translate variations of opinion into a single affirmative or negative vote." *Id.* In conclusion, it would appear that rather than "the people" serving as the law makers in the voter initiative process, it is often the case that "[t]hose who set the legislative agenda and those who actually vote on that agenda" determine the outcome of the vote. *Id.*

minority lobbying its way unfairly into favored status under the law.[87] All of this led to the construction of an Amendment that was attractive to a majority of voters, despite the Amendment's actual language, which made it clear that its purpose was to inhibit gay civil rights in public and private contexts.

E. Post-Election Backlash

According to the *Denver Rocky Mountain News'* account of the Amendment 2 story, the unexpected passage of the Amendment resulted in an almost immediate backlash, both from within the state and across the country.[88] "Movies stars shunned our ski slopes. Big cities coast-to-coast ordered their officials not to travel [to Colorado.] Conventions were cancelled. A lucrative Stephen King movie wound up being filmed in Utah.... In Aspen, there was talk of seceding from the state."[89] In addition to the boycott and the widespread negative treatment of the Amendment's proponents by the media, scores of organizations took public stances against the passage of the law.[90]

Analysts and reporters sought to understand how such an allegedly hateful law could have passed in a statewide election. In this immediate aftermath of Amendment 2's passage, such questioning pointed toward a discrepancy between what voters thought Amendment 2 stood for, and what the language actually meant.

> If you look at the entire text of the amendment, one of the things that was voted on by the people as part of the amendment is the title, and that title is "No protected status based on homosexual, lesbian, or bisexual orientation." And it is that that sets the trend of what the amendment means. It is to just not provide any additional status. It is not intended to take away any otherwise existing rights.[91]

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[87] Fifty-one percent of those surveyed in September 1993 in Colorado agreed with the statement, "Gay rights groups are some of the most politically influential groups in the country." Defendants' Exhibit B, Romer v. Evans, 517 U.S. 620 (1996).

[88] "The backlash came almost immediately," and consisted of widespread opposition to enforcement of the law and outrage at the fact that the law passed in what was coming to be known as "the Hate State." *See* Abbott, *supra* note 5.

[89] *See* Abbott, *supra* note 5, at 30A.

[90] The U.S. Conference of Mayors, Lotus Software, the Women's Sports Federation, the Latin American Studies Association, the National Organization for Women, the National Education Association, and the National Association of Social Workers all cancelled meetings or conventions in Colorado in the wake of Amendment 2's passage. *Id.*

[91] Gale Norton, in Evans v. Romer *Oral Arguments Before the Colorado Supreme Court* (Channel 4 News broadcast, May 24, 1993). The justices went on to question Attorney General Norton regarding the disconnect between this title and the actual language of the Amendment.

This clear lack of consistency between the actual language of Amendment 2 and popular conceptions of the its purpose was the subject of a great deal of debate in the months and years following the election.

III. The Challenge to Amendment 2: An Appeal to the Middle of the Road

On Thursday, November 12, 1992 the Colorado Springs newspaper reported on Colorado gay rights advocates' plans to challenge the recently passed Amendment 2: "The Colorado Legal Initiatives Project plans to file a lawsuit today that would allege the amendment violates the U.S. Constitution's Fourteenth Amendment right to free expression and association, usurps the power of home-rule cities and requires the state to recognize and promote a particular religious belief."[92] Although the technical details in this particular framing of the issues were somewhat inaccurate, the sentiment is essentially correct. The complaint to which this report referred challenged Amendment 2 on First and Fourteenth Amendment grounds, emphasizing the Amendment's interference with rights to freedom of expression and association, equal participation in the political process, and equal protection under the law. The complaint was filed with the District Court, City and County of Denver,[93] and marked the official beginning of the legal battle to invalidate Colorado's Amendment 2.

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[92] *Group Ready to Challenge Amendment 2*, COLO. SPRINGS GAZETTE TEL., Nov. 12, 1992, at B1.

[93] Conventional wisdom indicates that, in general, the best hope a plaintiff has for success in a civil liberties suit based on a federal constitutional question can be found in the federal courts. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); *see also* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999). For reasons ranging from the political makeup of the federal judiciary to the procedural differences between state and federal courts, the preference among most civil rights litigators for suits in federal rather than state court is longstanding and fairly consistent. *See id.* However, a marked departure from this generalization is seen in the case of gay rights litigation, in which litigators have found that state courts tend to be more hospitable to gay civil rights claims than federal courts. *See id.* Remarkably, this is true even among some of the country's more conservative states, such as Kentucky, Louisiana, Texas, Georgia, and Montana. *See id.* Given the history of greater success in state courts for gay rights plaintiffs and the Tenth Circuit's reputation as a politically conservative bench, it is not surprising that Jean Dubofsky and her team would abandon what some consider to be a presumption in favor of federal courts for civil rights cases. Bill Rubenstein, who at the time of *Romer v. Evans* was working with the ACLU Gay and Lesbian Rights Project, would argue that because this case is about group rights, rather than individual liberties, it is particularly well suited to the state court system. *Id.* Rubenstein makes a distinction between civil liberties cases, which he argues generally involve iconoclastic persons seeking to exercise largely and often purposefully provocative interpretations of their rights, and civil rights cases, which tend to be more relevant to the practical concerns of everyday people. *Id.* Because *Romer* falls into the latter category, suit in state court is consistent with Rubenstein's prescription. Furthermore, the plaintiffs' attorneys reasoned that because the amendment in question was made to the Colorado Constitution, the case should be heard by Colorado judges. Interview with Jean Dubofsky, Lead Attorney for the Plaintiffs, in Boulder, Colo. (Oct. 16, 2000). This factor, combined with the Tenth Circuit judges' conservative reputations and the attorneys' preference for and substantial experience in the Colorado state court system, led the

The litigation team amassed a set of organizational and individual plaintiffs that would emphasize the breadth and the depth of the effect that Amendment 2 would have on Coloradans, as well as the sweeping nature of the law's potential impact on the public and civic landscape of the state. There was very little effort to demonstrate Amendment 2's effect on private context rights and relationships; the vast majority of the plaintiffs' and their witnesses' testimony at trial was geared at demonstrating the law's potential for legitimating anti-gay discrimination in public contexts. A variety of individual and organizational plaintiffs agreed to serve as the named plaintiffs for the case. The diverse backgrounds from which these plaintiffs came was essential to establishing the breadth of the social spectrum affected by the law and to presenting the Amendment as a sweeping, over broad answer to the proponents' concerns.[94]

A. The Litigation Strategy

The plaintiffs in *Romer v. Evans* eventually succeeded in making a case that would strike a sympathetic chord with the District Court, the Colorado Supreme Court, and the United States Supreme Court. There was certainly debate as to how to build the record so as not to inflame any anti-gay sentiment the judges and justices may have harbored, while nonetheless clearly expressing the challenge to Amendment 2 as an unfair law that would have broad and serious implications for gay, lesbian, and heterosexual people alike.[95] The plaintiffs' contributions of exhibits to the joint appendix for the case reelect two ways in which this balance was struck. First, the plaintiffs included the texts of all the

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plaintiffs to choose the state forum over the federal. *Id.* Once it was established that the case would be filed in state court, there was the question of who would hear the case. The plaintiffs' attorneys did not know which judge would hear the case once they filed in state court. There was some concern that they would draw a gay judge, and the general consensus of the litigation team was that this would not be the most desirable situation for the plaintiffs. *Id.*; *see also* Interview with Jeanne Winer, Trial Attorney for the Plaintiffs, in Boulder, Colo. (Oct. 17, 2000). A favorable verdict from a gay jurist might not have provided as strong a case going into the inevitable appeal as one from a moderate to conservative straight judge. Further, an unfavorable decision from a gay judge could be lethal to the case. When Judge Jeffrey Bayless emerged as the jurist who would hear the case, Jean Dubofsky and her team were very satisfied. *Id.* A former district attorney known to be something of a moderate on the bench, Judge Bayless fit the plaintiffs' bill as a fair-minded and credible jurist whose decisions would be viewed favorably on appeal. *Id.*

[94] Interview with Jeanne Winer, Trial Attorney for the Plaintiffs, in Boulder Colo. (Oct. 17, 2000); Interview with Jean Dubofsky, Lead Attorney for the Plaintiffs, in Boulder, Colo. (Oct. 16, 2000). The original cast of plaintiffs included parties from backgrounds as diverse of that of a Denver police officer and tennis superstar Martina Navratilova. (The latter eventually disengaged from her position as a named plaintiff due to schedule conflicts.) *Id.* The organizational plaintiffs were important in a secondary capacity, in that they represented not only the numerous municipal organs that would be unable to pass non-discrimination policies under Amendment 2, but also large voting constituencies. Sending a message to Colorado elected officials expressing disapproval of Amendment 2 by large numbers of voters was certainly a secondary, but nonetheless important, goal in the coordination of the organizational plaintiffs. *Id.*

[95] Interview with Jean Dubofsky, Lead Attorney for the Plaintiffs, in Boulder, Colo. (Oct. 16, 2000).

statutes that would be invalidated under the Amendment; this served to emphasize the reasonable and democratic nature of the legal structures challenged by the Amendment and the public nature of the discrimination that would be protected under it. Second, the plaintiffs included the texts of several communications between organizational supporters of Amendment 2 as a means of highlighting the discriminatory and hateful flavor of the anti-gay agenda that the Amendment's sponsors promoted. These two strategies served to marginalize CFV and its allies as entities hostile to even the most basic public context rights for gays and lesbians.

The joint appendix to the United States Supreme Court proceedings provides the texts of numerous ordinances and policies that would have been invalidated by Amendment 2. They include portions of the Colorado Code of Judicial Conduct, the Colorado Rules of Professional Conduct for Lawyers, state laws prohibiting discrimination based on sexual orientation in insurance and regulating unfair competition, and several city and school district ordinances and non-discrimination policies. The wide range of statutes and the repeated inclusion of sexual orientation in lists of well-established classifications upon which discrimination is prohibited, such as race, national origin, disability, gender, and religion, served to cast Amendment 2 as an unreasonable and undemocratic provision. That is, evidence of legislative and executive decisions to prohibit discrimination based on sexual orientation throughout the served to make the classification of sexual orientation appear very reasonable. Any state constitutional initiative designed to overturn so many democratic expressions of the value of non-discrimination based on sexual orientation would appear suspect in this light.

To support their attempt to arouse judicial suspicion of an invalid purpose behind the law, the plaintiffs followed up with some particularly incriminating correspondence between proponents of Amendment 2. For example, the advisory letter written by Robert K. Skolrood at the National Legal Foundation to Tony Marco at Colorado for Family Values is a smoking gun with respect to the purpose of the Amendment. Clearly stating his opposition to any form of civil rights recognition for gays and lesbians, Skolrood provides detailed language and legal advice concerning how best to write Amendment 2 so as to prevent any cause of action for gays, lesbians or bisexuals in "employment, education, housing, or status."[96] Similarly, a letter from CFV Director Kevin D. Tebedo referring to coverage of opposition to Amendment 2 as "pro-homosexual rhetoric"[97] implies that Amendment 2 is in fact motivated by anti-homosexual sentiment. These examples may have been instrumental in creating an impression among the judges and justices

[96] Plaintiffs' Exhibit 18, Romer v. Evans, 517 U.S. 620 (1996).
[97] Plaintiffs' Exhibit 15, Romer v. Evans, 517 U.S. 620 (1996).

hearing the case that the Amendment was motivated primarily by philosophical opposition to homosexuality, rather than any legitimate government interest.

B. The Role of Amici

The role the plaintiffs' *amici* played in constructing Amendment 2 as a law deeply inconsistent with American ideals of fairness cannot be understated.[98] Coordination of the numerous *amici* for the plaintiffs was conducted by Lambda Legal Defense and Education Fund attorney Suzanne Goldberg,[99] who encouraged organizations to file joint briefs as a means of economizing the *amici* efforts and maximizing their potential effect.[100]

The work of the *amici* undoubtedly contributed to the strength of the plaintiffs' case by making clear the sweeping and public nature of the discrimination which would be permitted under Amendment 2. It did so by emphasizing the denial of access to the political process the Amendment would visit on a discreet portion of the population,[101] and by hinting at the arguably hateful, irrational and psychologically damaging purposes behind the law.[102] The massive show of support the *amici* effort represented was in itself important in representing to the Court the broad implications of Amendment 2. It is likely that at least some of

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[98] The increasingly important role of *amicus* briefs in United States Supreme Court cases has been noted by several legal scholars, and has served as the starting point for discussion of the role of special interest groups in the judicial process. *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000). Whether and how special interest groups influence judicial decision making is an important question for the litigating attorney seeking to maximize her likelihood of success before the court and minimize unwanted distractions from key arguments. Today, virtually any interested party can file an *amicus* brief with the United States Supreme Court. "[The] . . . rules today provide that governmental representatives–such as the Solicitor General or a state attorney general–may file an *amicus* brief in any case. Non-governmental entities may file an *amicus curiae* brief in any case if they obtain the consent of all parties. If a party refuses to consent to an *amicus* filing, then a would-be *amicus curiae* may file a motion with the Court seeking leave to file a brief. The full Court will then either grant the motion, permitting the would-be *amicus* to file over the party's objection, or deny the motion. The biggest change in the last fifty years has occurred not in the Court's formal rules, but in the manner in which they are implemented. The Court's current practice in argued cases is to grant nearly all motions for leave to file as *amicus curiae* when consent is denied by a party." *Id.* at 761-62 (footnotes omitted). The level of influence these briefs exert on the Court varies widely and depends upon the type of case and the questions presented, the identity of the *amicus*, the quality of the brief, and many other factors. *Id.* at 787-819.

[99] Interview with Jean Dubofsky, Lead Attorney for the Plaintiffs in Boulder, Colo. (Oct. 16, 2000).

[100] *Id.* For example, the Human Rights Campaign-authored *amicus curiae* brief broached the subject of suspect classification for equal protection purposes, while the American Association on Mental Retardation coalition brief focused on issues relevant to the development of equal protection law as it relates to classes of people who have not been afforded the benefit of suspect classification status. This approach allowed the plaintiffs to ensure that the Court was not overloaded with repetitive briefs, and that all the major elements of the plaintiffs' arguments were addressed by at least one *amicus* brief. *Id.*

[101] *See, e.g.*, Brief of Amicus Curiae American Civil Liberties Union et al. In Support of Respondents, Romer v. Evans, 517 U.S. 620 (1996).

[102] *See, e.g.*, Brief of Amicus Curiae American Psychological Association et al. In Support of Respondents, Romer v. Evans, 517 U.S. 620 (1996).

what the justices saw in the briefs worked its way into the judicial decision-making process in the case.[103] The wide variety of *amici*, combined with the breadth of legal theory underlying the briefs, also had the advantage of making it unnecessary for the litigation team to address all of the arguments in its own brief and in oral argument before the Court.[104]

C. *Judicial Invalidation of Amendment 2: Lower Court Proceedings*

After several days of testimony from both sides of the Amendment 2 controversy, the trial court granted the plaintiffs a preliminary injunction against Amendment 2, and the state of Colorado filed an immediate appeal to the Colorado Supreme Court. In its decision to affirm the preliminary injunction, the Colorado Supreme Court emphasized the public nature of the issues presented by the case, noting that the plaintiffs' arguments were framed by two general propositions. First, the plaintiffs argued that Amendment 2 represented an infringement on the First Amendment rights of all gays, lesbians, and bisexuals because it "eliminate[d] all potential means of redress for private retaliation or discrimination" against these groups.[105] Therefore, a compelling justification for the measure would be required of the government for the provision to stand.[106] Second, the plaintiffs advanced a series of equal protection arguments, encompassing rights that almost invariably fell into the public rights context.[107] The Colorado Supreme Court found that the trial court had not addressed the First Amendment arguments in its decision, and that it had instead relied on its own reading of the equal protection case law to come to the conclusion that the injunction was warranted.[108] That reading turned out to be a key determinant in the evolution of the case, in terms of both the informal and the legal framing of the issues.

The trial court had addressed the equal protection claims presented by the plaintiffs in the context of its deliberations regarding whether a preliminary injunction was necessary to protect the plaintiffs' constitutional rights. The court found that a preliminary injunction was indeed warranted because an "identifiable group of persons" would have a burden placed on their "right not to have the State endorse and give

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[103] Interview with Jean Dubofsky, Lead Attorney for the Plaintiffs, in Boulder, Colo. (Oct. 16, 2000); *see also* The Federalist Society, *ABA Files Amicus Brief in* Romer v. Evans (visited Sept. 2, 2000), *available at* http://www.fed-soc.org/abaw8966.htm, attributing several elements of the Court's reasoning in the majority opinion to the American Bar Association's brief in support of the plaintiffs.

[104] Interview with Jean Dubofsky, Lead Attorney for the Plaintiffs, in Boulder, Colo. (Oct. 16, 2000). The inclusion of too many arguments in the litigants' briefs is thought to distract the Court from the most important arguments and weaken the overall strength of a brief.

[105] Evans v. Romer, 854 P.2d 1270, 1273 (Colo. 1993).

[106] *Id.*

[107] *Id.* at 1274.

[108] *Id.*

effect to private biases."[109] The questionable constitutional origin of such a right was the key issue on appeal.[110] The trial court's reliance on a theory not presented by either party made for an interesting twist in the framing of the issues presented by the case. The plaintiffs were placed in the unusual position of having a decision in their favor justified by an extraneous line of reasoning upon which they did not necessarily wish to rely for the duration of the litigation.

> Plaintiffs have presented to this court the same equal protection arguments that were made to, but not relied on by, the trial court. They do not urge that we base our decision on the precise right identified and relied on by the trial court in rendering its decision. To the contrary, they have argued to this court that the right identified by the trial court, "when read in light of the arguments actually presented to [it] . . . is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation . . . ." In short, plaintiffs urge us to rely only on the equal protection arguments which they have relied on, and that the trial court's ruling should be construed to have done the same.[111]

This unexpected development in the judicial framing of the issues posed some obstacles in terms of litigation strategy; it did not, however, change the essential theme—the challenge to the public context discrimination sanctioned by Amendment 2. The Colorado Supreme Court nonetheless reoriented this framework in its affirmation of the preliminary injunction.

In its *de novo* review of the facts, the Colorado Supreme Court determined that although gays and lesbians were not a suspect class, the question of whether to uphold the preliminary injunction would nonetheless be reviewed using strict scrutiny due to the fundamental nature of the rights at stake. The court found that Amendment 2 presented the primary issue of interference with individual rights to participate in the political process.[112] Citing to voting rights case law, the court found that the equal protection clause mandated the use of strict scrutiny in the review of Amendment 2. Acknowledging that the precondition, reapportionment, and candidate eligibility case law did not address precisely the same issues as those presented by the Amendment 2 case, the court nonetheless found the equal protection reasoning which unified those cases applicable.

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[109] *Id.*
[110] *Id.* at 1270.
[111] Evans v. Romer, 854 P.2d 1270, 1274 (Colo. 1993).
[112] *Id.* at 1276-79.

> [W]hile all three categories of cases are distinguishable from the present controversy, the common thread which unites them with one another, and with the case before us, is the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest.[113]

This language emphasizes the centrality of the issue of political participation, a public rights concept, to the reasoning of the Colorado Supreme Court decision. The court spent several pages of its opinion justifying the application of strict scrutiny to this law as a function of the law's overt purpose, which was to make the political process less accessible to a particular group of people. This approach to the issues was much more consistent with the plaintiffs' framing of the case than the trial court's reasoning had been, although the sentiments behind the decisions were clearly compatible. By citing to a large body of United States Supreme Court precedent, the Colorado Supreme Court decision also provided a clearer legal and theoretical basis upon which to insulate the injunction from further challenge..

The Colorado Supreme Court's application of the strict scrutiny standard to the question of interference with a fundamental right resulted in an affirmation of the preliminary injunction. The case was then remanded to the trial court to determine "whether Amendment 2 was supported by a compelling state interest and narrowly tailored to serve that interest."[114]

The remand provided the defendants with a new opportunity to influence the way in which the court would view the issues by requiring that they proffer a compelling state interest in support of Amendment 2.In response, the defendants offered six compelling state interests to support the Amendment:

> (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing the government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado children.[115]

The defendants' formulation of the compelling state interests justifying Amendment 2 clearly illustrates their struggle to frame the law as having

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[113] *Id.* at 1279.

[114] Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994).

[115] *Id.* Note that the sixth compelling interest was not asserted on appeal.

the purpose of protecting private context rights, without adversely affecting the public context rights of gays and lesbians. In a sense, the weak justifications offered by the defendants highlighted the speciousness of the special rights rhetoric of the Amendment 2 campaign. Two of six justifications appear to emphasize private context rights such as family life, "the physical and psychological well-being" of children, and personal and religious freedom of conscience.

Meanwhile, the remaining compelling interests were poor camouflage for the public context discrimination that the law was designed to legalize and encourage. The interest of "deterring factionalism" was a thin veil for Colorado for Family Values' interest in silencing the gay and lesbian minority of Colorado. Likewise, "preserving the integrity of the state's political functions" scarcely masked what was truly the interest of right-wing Christian organizations—to promote an anti-gay agenda via the voter initiative process and to prevent "the government from subsidizing the political objectives of a special interest group." For these right-wing Christian organizations, "factionalism" was no more than an attempt to invalidate anti-discrimination laws that protected gays and lesbians so as to privilege one minority—the Religious Right—over another.[116]

The trial court issued its permanent injunction based on its rejection of the majority of the interests as non-compelling and its finding that those issues that may have been compelling were not served by a narrowly tailored law. Further, scholars have noted that Judge Bayless clearly discerned a distinction in the compelling interests offered by the defendants, consistent with the public versus private contexts rights dichotomy.

> Judge Bayless acknowledged that, in contrast to other alleged compelling state interests, the justification of Colorado Amendment Two . . . of protecting rights of *personal, familial, and religious privacy at least articulated compelling state interests*; but he denied that the

[116] The alleged compelling state interest in "preserving the ability of the state to remedy discrimination against suspect classes" was offered in support of the premise that were the state required to uphold laws prohibiting discrimination based on sexual orientation, fewer state resources would be available to enforce "real" civil rights laws for African Americans, women, and other "legitimate" minorities. While the interest does not fit clearly into the public or private rights contexts offered in this paper, it nonetheless merits mention for its sheer boldness and creativity as a means of attempting to divide minority coalitions' support for gay rights. By framing the gay and lesbian minority as a group of free-riders seeking to capitalize on the "special minority rights" won in race and gender civil rights battles, the defendants sought to obscure the parallels between race and gender civil rights movements and the gay rights movement. The defendants apparently thought they could win some points with the court by advocating fiscal conservatism for the benefit of other, more "legitimate" civil rights laws and claims. However, "Judge Bayless rejected the justification . . . both because it lacked factual support and on the normative grounds that fiscal concerns were inadequate to justify abridgement of basic rights . . . ." RICHARDS, *supra* note 26, at 121 (footnotes omitted).

> Amendment in question was, in light of its abridgement of rights of homosexuals to nondiscrimination, sufficiently narrowly drawn to achieve these compelling state interests.[117]

The defendants' struggle to offer any compelling state interest sufficient to warrant upholding Amendment 2 and the court's outright rejection of all but the most private rights-oriented of the justifications, clearly illustrate that public context discrimination was less compatible than private context discrimination with the legal and moral values that the court upheld. Amendment 2 was a law that promoted public context discrimination, and because what little private context justification might have existed for the law was negated by its sweeping and disproportionate nature, Amendment 2 was destined to fail when challenged in court.

The Colorado Supreme Court affirmed the grant of the permanent injunction and issued a lengthy opinion addressing the interests offered as justifications for the Amendment.[118] In its affirmance of the preliminary injunction, the Colorado Supreme Court evaluated all five of the compelling interests offered on appeal. While obliquely casting doubt on the "compelling" nature of some of the state interests offered by the defendants, the court found that even assuming that all of the interests offered were indeed compelling, Amendment 2 was not narrowly tailored to serve them. The court provided numerous examples of how, if the law were truly intended to serve certain compelling state interests, it might have done so through much less drastic means.[119] The court cited a great number of examples of the sweeping nature of Amendment 2, and sharply contrasted them with the arguably minor measures that would have sufficed to serve the same alleged interests.[120] The religious freedom interest, for example, while undoubtedly compelling, was not served by a narrowly tailored law when the law in question would actually invalidate even anti-discrimination laws with exceptions for religious objectors to homosexuality, such as those enacted in Denver.[121] The language of the Amendment was shown to be equally disproportionate to the associational privacy interests it was allegedly intended to protect because it purported to outlaw all attempts at banning discrimination, "no mater how impersonal."[122] In addressing and refuting one by one the defendants' best attempts at legitimating the law, indicating at every turn that the state interests offered were inconsistent with the breadth of Amendment 2, the Colorado Supreme

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[117] RICHARDS, *supra* note 26, at 122 (emphasis added) (footnotes omitted).
[118] Evans v. Romer, 882 P.2d at 1335.
[119] *Id.* at 1342-50.
[120] *Id.*
[121] *Id.* at 1342-43.
[122] *Id.* at 1344.

Court set the stage for the United States Supreme Court's decision in *Romer v. Evans*.[123]

D. Romer v. Evans: *The Case Before the United States Supreme Court*

Given the overwhelming failure of the defendants' proffered compelling state interests at the state supreme court level, the defense strategy changed somewhat going into the United States Supreme Court's hearing of the case. While virtually the same compelling interests remained central to the defendants' arguments, other rhetorical themes became more prominent at this stage in the litigation. Perhaps because of the defendants' failure at the trial court level to convince the court that the interests proffered were compelling, and certainly due in part to the Colorado Supreme Court's finding that even the private context justifications were not met by narrow tailoring to serve those interests, the pleadings and the *amicus* briefs focused less on the religious, associational, and familial privacy claims than it did on the tried and true "special rights" rhetoric. This rhetoric had worked well at the voter initiative level and was probably the key element in the initiative's success. Given the growing anti-affirmative action political environment and several conservative justices who had shown a willingness to vote against affirmative action programs, the defendants apparently thought that their best chance for success at the United States Supreme Court level lay in a reintroduction of the special rights theme to the case.

The plaintiffs, on the other hand, followed their success at the state court level by staying fairly true to the litigation strategy that they had pursued from the start. Political participation and other public context rights arguments remained central to their argument, as did the irrationality and disproportional nature of the law when compared to the interests offered in support of it. The issues were framed one final time at the United States Supreme Court level, and the underlying tone was that of special rights versus equal rights.

The Supreme Court found the equal rights arguments more compelling and stated, in the majority opinion, that the special rights reading of the Amendment was simply "implausible."[124] Writing for the majority, Justice Kennedy emphasized the equal protection issues above

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[123] Given the court's negative treatment of the defendants' arguments in the preliminary injunction appeal process, it is surprising in retrospect that the defendants were willing to risk an even more negative treatment of their case in the second appeal. It would seem that the authors of Amendment 2 had not calculated a series of strong government interests with which to attempt to justify the law on an eventual challenge when they wrote the provision. If they had, they might have opted for a less sweeping version of the proposal that, while not meeting all of their ideological goals, would nonetheless have had a better chance of passing constitutional muster.

[124] Romer v. Evans, 517 U.S. 620, 620 (1996).

all others, citing the Equal Protection clause as the primary basis for invalidation of Amendment 2.[125] Although the Court did not find sexual orientation to be a suspect classification, it invalidated Amendment 2 using a rational basis standard. The Court found the statute's "sheer breadth ... so discontinuous with the reasons offered for it that the Amendment seems inexplicable by anything but animus toward the class it affects."[126] This statement reflected the Court's view that the Amendment's effect of invalidating numerous, relatively reasonable statutes could only have been motivated by a desire to disadvantage gays and lesbians in the eyes of the law. A landmark affirmation of gay rights, at least in the public context, *Romer v. Evans* marked an immensely important day for the gay rights movement and a major setback for anti-gay rights activists of all persuasions.

IV. The Legacy of *Romer v. Evans*

A. The Place of the United States Supreme Court Decision in American Civil Rights Jurisprudence

The United States Supreme Court decision in *Romer v. Evans* has been the subject of abundant academic commentary and is one of the most significant decisions ever issued by the United States Supreme Court on the issue of gay and lesbian rights. The majority opinion in *Romer* has inspired widely varying interpretations and qualitative evaluations. The quality of the majority opinion has been evaluated repeatedly and in the context of some fairly heated debates with respect to the legal reasoning employed by the Court and the manner in which the opinion does or does not comport with prior Supreme Court jurisprudence on gay rights issues. *Romer* has been cited in scores of subsequent cases, and has provided the primary subject matter for at least two dozen law review articles, notes, and comments. Conclusions on the jurisprudential value of *Romer* range from extreme disapproval[127] to ambivalence[128] to high acclaim.[129]

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[125] *Id.*

[126] *Id.* at 632.

[127] "*Romer* has attracted an enormous amount of attention, both positive and negative: the decision has been hailed as a 'radical [and] unexpected revival of Warren Court activism,' and has been condemned as 'a replay of *Griswold v. Connecticut*' and '[t]he operation of judicial policymaking in the name of the Constitution.' .... [T]here is considerable sentiment for the proposition that *Romer* [is] difficult to justify on conventional terms or that it must rest on some basis not easily reconciled with the opinion of the Court itself." H. Jefferson Powell, *The Lawfulness of* Romer v. Evans, 77 N.C. L. REV. 241, 242 (1998) (footnotes omitted). For a particularly acerbic critique of the majority opinion in *Romer*, see Lino A. Graglia, Romer v. Evans*: The People Foiled Again By the Constitution*, 68 U. COLO. L. REV. 409 (1997).

[128] Lynn Baker's comments are particularly useful as a summary of the mixed moral and legal review afforded *Romer* by many legal scholars. "My initial reaction last May to the Supreme Court's

The one thing upon which virtually all commentators seem to agree is that the Supreme Court's decision in *Romer* makes it much harder for laws that single out certain minority groups for special treatment to survive constitutional review:

> Using a rational basis analysis that focused on the legislation-based questions advocated in Stevens' *Cleburne* concurrence, the *Romer* Court identified two aspects of Amendment 2 that triggered a more careful consideration: the amendment's unusual nature and its singling out of a particular group for disfavored treatment. These triggers can also be found in other anti-gay legislation ... [and] 'raise the inevitable inference' that the statute is 'born of animosity.'[130]

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decision in *Romer v. Evans* was deeply ambivalent. I wholeheartedly support the efforts of gay men, lesbians, and bisexuals to eradicate all forms of discrimination on the basis of sexual orientation. And, had I been a Colorado resident in 1992, I surely would have voted against Amendment 2. I therefore found it easy to applaud the outcome in *Romer*. At the same time, however, I was troubled by the Court's opinion. I have devoted a significant portion of my academic career to defending the institution of direct democracy through which Amendment 2 was adopted, and to explaining the importance of preserving opportunities for interstate diversity in areas of significant moral disagreement.... I was not sure I could reconcile my carefully considered scholarly positions with the *Romer* Court's analysis. Moreover, the majority's opinion was, by the current Court's standards, so brief as to lend disturbing credence to the dissent's claim that the majority was simply 'imposing upon all Americans' its elite view that 'animosity toward homosexuality . . . is evil.'" Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 387 (1997)(footnotes omitted).

[129] Robert D. Dodson summarizes some of the positive reaction to the *Romer* decision, stating that the opinion "marked the first time the Court struck down a law which discriminated against homosexuals. Commentators heralded the opinion as a victory for gay rights and suggested that *Romer* went a long way [toward] . . . overturning the Court's opinion in *Bowers v. Hardwick*." Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271, 272 (1999)(footnotes omitted).

[130] Courtney G. Joslin, *Recent Development: Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick, 32 HARV. C.R.-C.L. L. REV. 225, 243-44 (1997) (footnotes omitted). One of the key criticisms of the movement to invalidate Amendment 2, and of the Supreme Court's decision in *Romer v. Evans*, is that opposition to the Amendment was based on the presumption of hatred of gays and lesbians as the motivation behind the Amendment. The alleged anti-gay hatred behind the Amendment was a key element in several of the briefs submitted by the Amendment's challengers throughout the litigation process, and was central to Justice Kennedy's opinion for the majority in *Romer*. Former Colorado Attorney General Gale Norton specifically addressed the issue of anti-gay hatred in her oral arguments. "The vast majority of Coloradans who supported Amendment 2 did not do so out of hatred or malice. They did not want government to intervene and impose values on an unwilling segment of the public in this most controversial area of public debate." Evans v. Romer *Oral Arguments Before the Colorado Supreme Court* (Channel 4 News broadcast, May 24, 1993). In retrospect, Colorado for Family Values' Will Perkins still attributes the success of the anti-Amendment 2 movement—in the public discourse and in the courts—to the movement's appropriation of the hatred theme. Abbott, *supra* note 5 at 3. "I had no idea the magnitude of what I was getting involved in," Mr. Perkins said in 1999. *Id.* "A difference of opinion has never been equated with a demonstration of hate. But if you don't agree with the homosexual community, they accuse you of hatred," Perkins explained in an earlier interview. Howard Pankratz, *Activists to Ask for Stay of Law*, THE DENVER POST, Jan. 10, 1993. He claimed to be "still . . . amazed that gays and lesbians took Amendment 2 so personally," given that the Amendment was merely "a rule against unfair special protections for one group's behavior that others traditionally have viewed as wrong, often on religious grounds . . . . If you don't happen to agree with or affirm what they're doing, they equate that to hating them or disliking them . . . . That makes it very difficult to deal with." *See* Abbott, *supra* note 5, at 3.

Stated differently, *Romer* provides that "[i]f a law targets a narrowly defined group and then imposes on it disabilities that are so broad and undifferentiated as to bear no discernable relationship to any legitimate governmental interest, then the court will ... invalidate the law."[131] This establishment of something akin to a presumption of invalidity for certain types of anti-gay rights statutes has been helpful to plaintiffs seeking to challenge laws like Amendment 2, but is not by any means impenetrable.[132] Nonetheless, both proponents and detractors of the Court's majority opinion argue that *Romer* represents a fundamental change in the Court's treatment of gay rights issues, although the precise nature and course of this change are not yet clear.[133]

Many commentators have also concluded that the constitutional grounds of the 1986 *Bowers v. Hardwick*[134] decision are less sure in light of the *Romer* decision.[135] An eventual reversal of *Bowers v. Hardwick* would undoubtedly undermine many anti-gay rights legal arguments. One important underlying, and in many cases, overt argument presented in the defense of anti-gay legislation is that people whose sexual conduct may be constitutionally criminalized should not be afforded civil rights protections from discrimination against them based on that sexual conduct.[136] In this sense, *Bowers v. Hardwick* has posed an enormous

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[131] Richard F. Duncan, *The Narrow and Shallow Bite of* Romer, *and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL OF RTS. J. 147, 148 (1997) (footnotes omitted).

[132] For a discussion of one of the most well known instances of a successful rebuttal of this presumption, see Jill Dinneen, Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati: *The Sixth Circuit Narrowly Construes* Romer v. Evans, 73 ST. JOHN'S L. REV. 951 (1999).

[133] *See* Barbara J. Flagg, *"Animus" and Moral Disapproval: A Comment on* Romer v. Evans, 82 MINN. L. REV. 833 (1998); Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick, 32 HARV. C.R.-C.L. L. REV. 225 (1997).

[134] 478 U.S. 186 (1986).

[135] For a starting point on the topic of the implications of *Romer* for *Bowers, see generally* Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick, 32 HARV. C.R.-C.L. L. REV. 225 (1997) (arguing that *Romer* delivered a significant blow to *Bowers*). Says one commentator on the role of *Romer* in the *Bowers* debate, "Court observers are left to speculate on whether *Hardwick* has been overruled *sub silentio*, or at least weakened by *Romer*." Steven A. Delchin, *Scalia 18:22: Thou Shalt Not Lie With the Academic and Law School Elite; It is an Abomination* – Romer v. Evans *and America's Culture War*, 47 CASE W. RES. L. REV. 207, 241-42 (1996) (footnotes omitted).

[136] Baker, *supra* note 128, at 389. "For many, the most surprising aspect of the majority opinion in *Romer* was surely the absence of any discussion of—or indeed, citation to—the Court's 1986 decision in *Bowers* .... In *Bowers*, the Court held that the U.S. Constitution does not include 'a fundamental right to engage in [consensual] homosexual sodomy' and, therefore, that the states are free to outlaw such conduct. It thus seemed inevitable that the *Romer* Court would need to discuss *Bowers*—perhaps even explicitly overrule it—if a majority of the Justices were to find Colorado's Amendment 2 unconstitutional. In the words of Justice Scalia, dissenting ... '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.'" *Id.* (footnotes omitted). However, this argument, while well taken on a national level, would not have been useful to Colorado in its defense of Amendment 2. "[P]rivate, consensual homosexual sodomy is not illegal in Colorado, and, as Justice Scalia himself noted, the state defendants argued that Colorado's general laws prohibiting arbitrary discrimination by public and private actors would continue to protect gays and lesbians." Powell, *supra* note 7, at 255 (footnotes omitted).

conceptual and psychological bar to gay civil rights legislation efforts and litigation, even in states where sodomy laws have been eliminated through legislative or judicial action.

Some commentators have questioned whether *Romer* could accurately be called a victory for gay rights given that the Court declined to review the discrimination at issue using any form of heightened scrutiny.[137] However, the majority of scholars and practitioners who have analyzed the case have found that the fact that the case was won using a rational basis test adds to the strength of the decision for gay rights.

> [T]he fact that the Court invalidated Amendment Two without resorting to heightened scrutiny was itself a victory, especially in light of the Court's increasingly deferential approach to rational basis scrutiny. . . . *Romer* represents a milestone for gay civil rights and in no way limits the ability of gay litigants to seek heightened scrutiny in future cases.[138]

Only time will tell if *Romer* will remain a turning point in gay rights jurisprudence. However, the decision is consistent with a growing consensus among Americans that discrimination against gays and lesbians should not be legal, particularly in public contexts.

B. The Place of the United States Supreme Court Decision in the American Cultural Debate on Gay Rights

Lead attorney Jean Dubofsky has argued that, at a minimum, the case "helped a lot of people think harder about what sorts of discrimination" were common in Colorado.[139] The questioning and defining of cultural values that accompanies a very public controversy like Amendment 2 is one of the key elements in developing law that is consistent with mainstream values. Likewise, the Amendment 2 controversy illustrates well the cultural discourse inherent in the parallel processes of changing values and changing laws. Although the case has not, in legal terms, opened the door to success in gay rights litigation challenging discrimination in private domains such as marriage, it has certainly created a greater sense of awareness of gay rights issues generally.

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[137] *See, e.g.*, Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory of Gay Rights?*, 35 CAL. W. L. REV. 271 (1999); Thomas E. Baker, *Our Crowd Says*, LEGAL TIMES, July 10, 2000, at 59.

[138] Anthony E. Varona and Sharon Debbage Alexander, *Scout Ruling A Victory for No One*, LEGAL TIMES, July 17, 2000, at 61.

[139] Abbott, *supra* note 5.

C. *Why* Romer *Represents Good Law*

In the years since *Romer*, there has been a substantial increase in support for legal equality for gays and lesbians in the United States. This is consistent with the result reached in *Romer*. Therefore, it would seem that in terms of being a decision that generally reflects the political and civil values of the majority of Americans, Romer is "good law."[140] Although the tide is turning in favor of legal equality for gay and lesbian Americans, there is by no means a universal understanding of how far the gay rights movement should be able to proceed, and whether there are some parts of private life that should not be subject to laws banning discrimination based on sexual orientation. Despite this, it is clear that in all contexts—public and private—there is a strong and consistent trend toward recognizing the full and equal citizenship of gays and lesbians in American society. *Romer* prevented a small minority of voters with a questionable understanding of the issues at stake in Amendment 2 from dictating a political and legal reality inconsistent with what most Coloradans—indeed, most Americans—believe with respect to equality for gays and lesbians; to this extent, it is undoubtedly "good law."[141]

Illustrative of the fact that public context equality for gays and lesbians is consistent with current mainstream American values are the Republican and Democratic vice-presidential nominees' strikingly similar answers to a question on gay rights posed in the first vice-presidential debate of the 2000 election year.[142] The candidates' answers

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[140] Ronald Dworkin outlines a conceptualist definition of "popular morality" as "the set of opinions about justice and other political and personal virtues that are held as matters of personal conviction by most of the members of [a] . . . community, or perhaps of some moral elite within it." RONALD DWORKIN, LAW'S EMPIRE 97 (1986). The connection, then, between a community's popular morality and its laws should be one of possession or reinforcement. *Id.* To the extent that this consistency between popular morality and law is established or maintained by a judicial decision, it serves as "good law" in the sense contemplated here.

[141] It is telling that in 1998 in Colorado Springs an attempt to overturn a city resolution that Colorado for Family Values claimed protected gays and lesbians from discrimination failed when CFV was unable to gather the minimum number of signatures required to get their measure on the municipal ballot. *Family Values Initiative Falls Short*, GLENWOOD POST ONLINE, Dec. 16, 1998, *at* http://searchcolorado.com/glenwood/stories/121698/fea_1216980041.html. Said Pikes Peak Gay and Lesbian Community Center vice president Carolyn Cathey, "[t]he city of Colorado Springs has really come together to say no more hate, no more intolerance in our city." *Id.* It would seem that Ms. Dubofsky's assessment of the impact of the Amendment 2 controversy on gay-straight relations may well have been borne out. *See supra* text accompanying note 140.

[142] Although mainstream values on gay rights have certainly evolved in favor of the movement for equality such that political parties must consider the gay rights constituency in the formation of their national platforms, the current Republican and Democratic national party platforms nonetheless exhibit marked differences in their approaches to specific gay rights issues. While the Democratic platform pledges support "to lead the fight to end discrimination on the basis of race, gender, religion, age, ethnicity, disability, and sexual orientation," the Republican platform omits any reference to support for gay rights. 2000 Democratic Platform, *available at* http://www.democrats.org/hq/resources/platform/platform.html; 2000 Republican Platform, *available at* http://www.rnc.org/2000/2000platform. The Democratic platform further enunciates support for the Employment Non-Discrimination Act, and for "equitable alignment of benefits" for gays and lesbians. 2000 Democratic Platform. Virtually the only reference to gay rights in the Republican platform of 2000 is found in the party's affirmation of its opposition to gays in the

to the questions reflected a less decisive commitment to the gay rights issue in private realms such as marriage, but otherwise clearly indicated at least rhetorical support for equality. Commentator Bernard Shaw asked the candidates whether gays and lesbians should, "have all—*all* the constitutional rights enjoyed by every American citizen."[143] The candidates' answers were strikingly similar in their normative bent, and both candidates seemed to interpret Shaw's emphasis on "all" rights as indicating that the question was meant to elicit the candidates' views on same-sex marriage proposals in particular. Both candidates expressed conflicted emotions regarding the tension between the private context, cultural values associated with the preservation of marriage as a heterosexual institution and the public cultural values of freedom and equality for all American citizens embodied in the American constitution. Senator Joseph Lieberman was the first to answer the question, stating "I'm thinking about this, because I have friends who are in gay and lesbian partnerships who have said to me, isn't it [sic] fair. We don't have legal rights to inheritance, visitation when one partner is ill, to health care benefits. . . . I'm thinking about it."[144] Senator Lieberman indicated that his mind was open to "taking some action that will address those elements of unfairness while respecting the traditional religious and civil institution of marriage."[145] His statement clearly reflected the struggle to balance mainstream acceptance of gays and lesbians as equally worthy of fairness and equality in public contexts with special interest social, religious and political pressures to preserve the right to express disapproval of homosexuality in private contexts such as marriage.

Former Secretary of Defense and Republican vice-presidential nominee Dick Cheney echoed Lieberman's conflict, which was certainly deepened by his own struggle to reconcile his commitment to the Republican party's traditional values with the fact that one of his own daughters is gay.[146] On the overarching question of whether gays and lesbians should be accorded equal rights, Cheney answered, "... we live in a free society, and freedom means freedom for everybody."[147] He continued, "... people should be free to enter into any kind of relationship they want to enter into," and stressed his opinion that

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military, stating "homosexuality is incompatible with military service." 2000 Republican Platform; *See also* Human Rights Campaign, *GOP Platform Continues to Showcase Anti-Gay Policy Positions* (Aug. 1, 2000), http://www.hrc.org/hrcnews/2000/000801.asp (discussing the incompatibility of the Republican platform with the "moderate image . . . the Bush/Cheney campaign seeks to put forward").

[143] *Election 2000: Vice-Presidential Debate*, *supra* note 1.

[144] *Id.*

[145] *Id.*

[146] For a discussion of the impact of Mary Cheney's involvement with her father's campaign despite the Republican party's poor record on gay rights issues, *see generally* Lois Romano, *Activist Presses Cheney on Gay Rights*, WASH. POST, Oct. 17, 2000, at A39.

[147] *Election 2000: Vice-Presidential Debate*, *supra* note 1.

government has "no business ... regulating behavior in that regard."[148] While by no means a clear or even particularly accurate articulation of the Republican party's platform on gay rights issues, Cheney's answer reflected a consciousness that opposition to gay and lesbian equality under the law in all realms of public and private life would be inconsistent with what most Americans want from their government. Such a position, therefore, would be politically untenable in the context of a close presidential race. This very middle-of-the-road answer, from a statesman with a reputation as an ardent conservative, represents a change in the political and cultural reality with respect to the issue of gay rights.[149]

Afterword: Dale

In the July 2000 *Boy Scouts of America v. Dale*[150] decision, the United States Supreme Court recognized almost explicitly the distinction between public and private context rights; it was a decision Justice John Paul Stevens referred to in his lengthy dissent as "an astounding view of the law."[151] In *Dale*, the Court overturned a unanimous New Jersey Supreme Court ruling in favor of scoutmaster James Dale, a young gay man who sought reinstatement to his post as a scoutmaster following his expulsion based on the Boy Scouts' discovery of his sexual orientation.[152] The Supreme Court ruled 5-4 that the New Jersey anti-discrimination law infringed upon the Boy Scouts of America's First Amendment expressive association rights, and that, as such, it was invalid as applied to the organization.[153] A marked departure from *Romer*, as well as from prior expressive association jurisprudence, *Dale* is a tragic and classic example of what Professor Eskridge has called the "privatized argument"[154] prevailing in a gay rights case. That is, the

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[148] *Id.*

[149] Despite Cheney's professed aversion to government regulation of sexual behavior and rhetorical nod of approval to gay equality under the law, the former Secretary of Defense argued that it was indeed appropriate for state governments, although not the federal government, to regulate the issue of gay marriage. *See id.* In doing so, he deferred to the long-standing tradition of supporting individual states' rights to prescribe their own laws regulating marriage without federal interference and averted the need to make a formal statement of the party's position at the national level. Such a statement would almost certainly alienate the much needed Religious right if it were not conservative enough and would frustrate the mainstream if it were too conservative. Cheney failed to mention, however, how the federal Defense of Marriage Act, which provides for congressionally-sanctioned state refusals to recognize gay marriages, fits into this equation. After making his concessions to the party line on gay marriage, Cheney professed that, like Senator Lieberman, he was "wrestling with the extent to which there ought to be legal sanction of those relationships." *Id.* Such a moderate statement on the topic of gay marriage, coming from the Republican vice-presidential nominee and former Bush administration Secretary of Defense, undoubtedly represents an evolution in the place of gay rights in mainstream American values.

[150] 530 U.S. 640 (2000).

[151] *Id.* at 686.

[152] *Dale*, 530 U.S. 640 (2000).

[153] *Id.* at 656.

[154] Eskridge, *supra* note 3 at 1330.

Court in *Dale* ruled in favor of the Boy Scouts because the majority were convinced that the New Jersey anti-discrimination law, as applied to the Scouts, would force this (arguably) private organization to "endorse or promote ideas or conduct with which they fundamentally disagree."[155] The Court ignored the particulars of whether the Scouts could legitimately be defined as anything other than a public accommodation,[156] whether James Dale's presence could truly be thought to establish an endorsement or promotion of homosexual equality,[157] or whether the Boy Scouts honestly had a uniform policy of opposition to homosexuality prior to Dale's case.[158] Despite the fact that there were very strong arguments in favor of Dale as a case of public context discrimination, the Court was more convinced by the Boy Scouts' construction of this case as one of private context discrimination. The status of the Boy Scouts as among the most traditional of American associations was certainly in part responsible for this result; the result in *Dale*, however, seems virtually incomprehensible jurisprudentially and culturally except through the lens of the public-private context dichotomy in gay rights discourse.

Perhaps James Dale was ahead of his time from both a cultural and jurisprudential standpoint. Perhaps a different Court would have ruled against the Boy Scouts and continued a line of cases beginning with *Romer* that would have lead the country along a more progressive path with respect to the important issue of gay rights. *Boy Scouts of America v. Dale* will go down in history as a deviation from an otherwise marked trend toward equality for gays under the law, and perhaps it will not be long before *Dale* is overruled either via the Supreme Court's re-visitation of the issue, or through the Boy Scouts' own revision of its policies with respect to gay members as a result of public pressure.

It remains to be seen where the next opportunity to build a landmark gay civil rights case will emerge, or precisely what questions

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[155] *Id.*; *see also Dale*, 530 U.S. at 651-60.

[156] The Court in *Dale* found that the Boy Scouts of America was an "expressive association, and that the forced inclusion of Dale would significantly affect its expression." 530 U.S. at 656. The Court concluded that the public accommodations law as applied to this expressive association violated the Boy Scouts' First Amendment based freedom of expression. *Id.* The majority did not address whether or not the Boy Scouts are a public accommodation and how the Boy Scouts' numerous ties to government at the local, state, and federal levels affected Dale's claim or the validity of the New Jersey Supreme Court's ruling.

[157] The Court asserted with little explanation that the presence of gay men "who have 'become leaders in their community and are open and honest about their sexual orientation' ... would at the very least, force the organization to send a message, both to the youth members and to the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." 530 U.S. at 653. According to the dissent, the Boy Scouts did nothing to prove to the Court "why the presence of homosexuals would affect its expressive activities." *Id.* at 678.

[158] The Court found that "it is not the role of the courts to reject a group's expressed values because they . . . find them internally inconsistent . . . . The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight,' . . . and that it does "not want to promote homosexual conduct as a legitimate form of behavior . . . . We accept the Boy Scouts' assertion." *Dale*, 530 U.S. at 651; *but see id.* at 671-84 for the dissent's treatment of the ambiguous and questionable nature of the Boy Scouts' anti-gay policies.

will be posed the next time gay rights go before the Supreme Court. Whatever they may be, the combined lesson of *Romer* and *Dale* seems to be that understanding sexual orientation discrimination as public, rather than purely private discrimination, will be key to piercing the armor of anti-gay rights legal activists and moving the country closer to equality for all.