

SODOMY LAWS: DISGUST AND INTRUSION

6. Justice Scalia has repeatedly done this, not least in this area of law.

7. France is well known for its ban on large or conspicuous religious articles of dress in public schools; but individual cities in Belgium and the Netherlands have also been passing related laws—forbidding government employees to wear such articles, for example.

8. In order to express his attitude about this difference, Mill insisted on being buried in France.

9. Statutes against “buggery” remain in force in some former parts of the British empire; in Hong Kong, for example, both same-sex and opposite-sex “buggery” laws are still on the books, despite having been found unconstitutional in 2005.

10. However, cross-dressing and using a dildo were considered fraud: see Louis Crompton, “The Myth of Lesbian Impunity: Capital Laws from 1270 to 1791,” *Journal of Homosexuality* 6 (1980), 22–26.

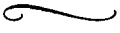
11. The initial proposal was a one-year maximum, but legislators demanded a harsher penalty.

12. Wilde, however, was in fact married and had two children.

13. The history of Paragraph 175 is complicated by the fact that some German states had had, and repealed, sodomy laws earlier (one reason for the national legislation); the more tolerant character of Germany is shown by the fact that the Social Democratic Party almost immediately sought repeal of Paragraph 175, and a wide range of both gay and straight artists and intellectuals (including Thomas Mann, Martin Buber, Rainer Maria Rilke, Herman Hesse, and many others) publicly joined the prorepeal movement. Wilde, by contrast, had virtually no nongay defenders (apart from a couple of prominent women), and no political party ever dreamed of defending him. Paragraph 175, though strengthened by the Nazis, was rewritten as a simple age of consent law in East Germany in 1957 and in West Germany in 1969. All legal distinctions between heterosexual and homosexual acts were abolished in the East in 1988 (including differences in age of consent), and, since Reunification in 1994, this uniformity extends to all Germany.

14. Gary David Comstock, *Violence against Lesbians and Gay Men* (New York: Columbia University Press, 1991).

CHAPTER FOUR



Discrimination and Antidiscrimination: *Romer and Animus*

Militant gays want government to give their lifestyle special class status—but we think it's important to know just what kind of lifestyle they want your tax dollars to endorse. You may already know that the sexual practices of gays differ drastically from those of most of Colorado's population. But how much these practices differ—and the dangerous perversions they involve—may shock you!

Gays have been unwilling (or unable) to curb their voracious, unsafe sex practices in the face of AIDS.... Overall, surveys show that 90% of gay men engage in anal intercourse—the most high-risk sexual behavior in society today.... About 80% of gay men surveyed have engaged in oral sex upon the anus of partners. Well over a third of gays in 1977 admitted to “fisting.”... Is this the kind of lifestyle we want to reward with special protection, and protected ethnic status? Gay activists want you to think they're “just like you”—but these statistics point out how false that is.

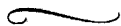
PAMPHLET CIRCULATED BY *COLORADO FOR FAMILY VALUES* DURING
THE CAMPAIGN FOR COLORADO'S AMENDMENT 2



DISCRIMINATION AND ANTIDISCRIMINATION

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

MAJORITY OPINION, *ROMER V. EVANS*, 1996



I. FAMILY VALUES AND ANTIDISCRIMINATION LAWS

Will Perkins is a Chrysler dealer in Colorado Springs, Colorado. Early in the 1990s, he was recruited to the board of Colorado for Family Values (CFV), a conservative organization founded by Tony Marco, a fundraiser for conservative religious groups, and Kevin Tebedo, son of a lobbyist for similar causes. (Tebedo was fired by CFV in 1995, during a scandal over his defense of a pastor who purported to cure homosexuality but who was then accused of child molestation.) The current (2009) CFV website describes it as "a non-profit advocacy group dedicated to preserving, protecting, and defending traditional family values."¹

CFV decided that its first large initiative would be a statewide referendum banning local gay-rights laws. Perkins was recruited to chair this campaign and to bankroll much of the early effort. Perkins then enlisted former U.S. Senator Bill Armstrong and popular University of Colorado football coach, Bill McCartney. The group hired Paul Cameron to advise them on strategy.

Like most states, Colorado houses a great deal of social and political diversity. Larger cities such as Denver and Boulder, and wealthy enclaves such as Aspen, tend to have a liberal character. All three of these cities (and the County of Denver, in a separate

ordinance) had passed broad antidiscrimination laws that included sexual orientation (along with race, sex, age, and many other categories) as a prohibited ground of discrimination, in "housing, employment, education, public accommodations, health and welfare services, and other transactions and activities."² Rural areas of the state are more conservative, and Colorado Springs is a headquarters for many Christian conservative groups, which it actively recruits through favorable policies.

Christian conservatives, in the early 1990s, had grounds for concern. The three city ordinances were problematic, but even more ominous were developments at the state level. The state legislature repealed Colorado's sodomy law in 1972, and antidiscrimination efforts had recently picked up steam. In 1990, popular Governor Roy Romer signed an executive order protecting state government workers from discrimination based on sexual orientation.³ In 1991, a state law targeting hate crimes against gays and lesbians was proposed, and even Colorado Springs saw the introduction of an antidiscrimination law. Although both measures failed, they gave an unsettling impression of social change.⁴

For Perkins and Marco, rolling back the forward march of what they repeatedly called "militant gay aggression" was an issue of the utmost urgency. According to Perkins, homosexuals have "a radically deviant obsession with sex" and are responsible for an overwhelming proportion of child molestation. Indeed, he charged in a CFV pamphlet that "sexual molestation of children is a large part of many homosexuals' lifestyle."⁵

On March 20, 1992, Perkins arrived at the Colorado State House in an armored car, from which he produced petitions containing eighty-five thousand signatures. He declared, "We consider these to be among the most important pieces of paper in the entire United States."⁶ The signatures Perkins had gathered were more than sufficient to put Amendment 2 on the ballot.

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Legitimate concerns can be raised about antidiscrimination laws in general and those involving sexual orientation in particular. People with strong religious beliefs are plausibly concerned that antidiscrimination laws will force religious organizations to hire people of whom some religions disapprove. This issue is not peculiar to sexual orientation. It may arise, for example, when such laws seem to force a religious organization to hire people who don't belong to that religion. In 1987, the Supreme Court ruled that the Church of Jesus Christ of Latter-Day Saints was not prevented by federal nondiscrimination laws from firing a janitor from his job in the Salt Lake City temple because he was not a Mormon.⁷ Even though being a janitor was not a religious function, the Court reasoned that attempting to make a distinction between religious and nonreligious functions would involve the Court in intrusive policing of religious institutions. The Court made clear that religious institutions enjoy considerable latitude to favor coreligionists, despite federal antidiscrimination legislation.

It remains debatable to what extent religious objections should exempt religious organizations from antidiscrimination laws when the issue is not religion but race or gender or sexual orientation or marital status. It is also controversial to what extent individuals (as opposed to religious organizations) may claim religiously based exemptions from antidiscrimination laws. (Cases involving landlords unwilling to rent to unmarried heterosexual couples on religious grounds have caused controversy in several states.) Both Denver and Aspen had shown their concern for this issue by crafting their ordinances to give exemptions for religious objections. If the purpose of Amendment 2 were to guarantee that religious opinions about sexual orientation were sufficiently respected, it could have been written so as to require all antidiscrimination laws and orders to have similar escape clauses.

Similarly, a worry might be raised about personal associational freedom. Suppose landlords in small owner-occupied rental buildings

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were required to rent to tenants of whose way of life they disapprove, whether on religious or on moral grounds. If one were worried about that issue, one could propose a law exempting small buildings (or even small family-operated businesses) from the scope of antidiscrimination laws.

More generally, an organization devoted to family values might legitimately worry about the future of families, understood along conservative Christian lines, in an era of rapid social change. It might seek to use the law to further the interests of such families. A likely strategy would be to seek state subsidy for drug and alcohol treatment and for marriage counseling, because we know that marriages often come apart because of substance abuse or lack of pertinent counseling. One might also propose legislation strengthening penalties for an ex-spouse's avoidance of child support payments, something that is badly needed to protect vulnerable children. One might consider measures to enhance family and medical leave time from work, thus easing burdens of child and elder care. In short, as District Judge Jeffrey Bayless memorably said, "Seemingly, if one wished to promote family values, action would be taken that is pro-family rather than anti some other group."

Amendment 2, the ballot measure proposed by CFV, chose none of these approaches. Instead, it proposed a highly general disqualification of gays and lesbians from the benefits of antidiscrimination protections:

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

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entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

What would Amendment 2 have accomplished if implemented?
As the Colorado Supreme Court analyzed the referendum:

The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. [a list of these is now given, including the ordinances in Denver, Boulder, and Aspen, and also including Romer's Executive Order and a similar provision of the Colorado Insurance Code]; and various provisions prohibiting discrimination based on sexual orientation at state colleges.

[examples again given]

The "ultimate effect" of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.

Nor are these changes limited to what is traditionally called the "public sphere": nondiscrimination laws are binding on private as well as public employment and in places that qualify as places of "public accommodation." (The Boulder ordinance, for example, defined such places as "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind.") Landlords are also affected, if they offer enough units to count as a public accommodation, a definition

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that varies from place to place. In addition, specific legal protections for gays and lesbians in all transactions in housing, real estate, health and welfare services, and private employment would be abolished.

So, the amendment would reach widely, denying many ordinary privileges of life in a democratic society to gays and lesbians, and preventing gays and lesbians from bringing legal action against any form of discrimination, however invidious. That, indeed, was just the point. The changes envisaged in Amendment 2 are sweeping. Gays and lesbians are singled out from all others and put in a special class of their own: only they may not seek or enjoy specific legal protection from discrimination.

But surely Amendment 2 denies them "special rights," not equal rights. Such was always the rhetoric of its proponents. But let's think a minute. Why do communities pass laws protecting a group from discrimination? They don't do so just to be nice, but because there is a perceived problem: enough of the general public feels that discrimination against members of the group warrants changes in the law.

Let's just imagine, now, a 1960 Mississippi version of Amendment 2, let's call it Amendment M, a referendum that would debar African-Americans (and only them) from protected status under state and local nondiscrimination laws. Let's suppose that its proponents keep saying, "Equal rights, not special rights": we don't hate African-Americans, we just want to deny them *special* rights.

We see right away that this referendum would not be a neutral measure designed to restore all citizens to a plane of equality. It would be a racist measure, designed to prevent African-Americans from availing themselves of legal protections that they had won because citizens saw a problem of discrimination and decided to remedy it. By mentioning African-Americans as a group not entitled to seek antidiscrimination protection, the law singles them out from all others. It doesn't simply have an impact that affects them more than others (as would an amendment prohibiting laws against

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discrimination on the basis of race). It names them as the one group that cannot turn to the law for protection against discrimination. All other groups—Italian-Americans, Roman Catholics, cyclists, animal-lovers, smokers, people over sixty, and any other groups you like to imagine—all those could mobilize to seek protection from discrimination. Only African-Americans could not do so. Wouldn't we think that African-Americans were being stigmatized in a unique manner and denied the status, under the law, that other citizens enjoy?

Amendment 2 is the equivalent of Amendment M. CFV was not proposing a narrow measure targeted at protecting religious citizens, or traditional families; it was proposing a wide and open-ended set of disabilities for gays and lesbians, named as a targeted group (even those who never have sex at all, since the amendment carefully included both status and conduct).

Amendment 2 expresses a Devlinesque conception of society: what the average person views with strong disapproval, he is entitled to discourage by law. Amendment 2 asks voters to express strong emotion about sexual orientation, and then makes that indignation the basis for widespread legal disadvantages. As for the Millian idea that the fully equal rights of individuals should not be abridged just because lots of people don't like what they imagine these people are doing, that idea is left on the outside looking in. It would be the business of the *Romer v. Evans* litigation to reinstate it.

The contest began. Perkins, Marco, and their allies had raised quite a lot of money (with Perkins a primary contributor), and leaf-letting began all across the state. The campaign was clever. On the whole, it did not foreground the appeal to naked disgust or dislike. The leading theme was always that of "equal rights, not special rights." That gave ordinary citizens a reason to support the referendum without thinking that in so doing they were expressing dislike of gays and lesbians. Many citizens surely supported the referendum for these other reasons—prominently including members

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of other protected minorities who feared that antidiscrimination laws mentioning sexual orientation would sap the protections their groups already enjoyed (for example, by encouraging state expenditure on other nondiscrimination efforts that might take money and support from their own).

Many citizens of good will also voted for the referendum because they were simply confused by the length and complexity of the measure: exit polls showed that a significant number didn't understand on which side they were voting.

It cannot be doubted, however, that the appeal to disgust was a major part of what carried the day. CFV literature foregrounded "equal rights not special rights." It even repeated slogans such as "Hate is not a family value."⁸ But material about the degenerate lives and horrible sex practices of gays and lesbians was always present, as with the passage I quoted from one typical leaflet, where it was conveniently positioned right next to the column titled "Hate is not a family value." I personally heard the testimony of Will Perkins in the bench trial of Amendment 2 on October 15, 1993. I heard him admit (somewhat reluctantly) to circulating yet other pamphlets that mentioned the classic Cameron claim that gays eat feces and drink raw blood. The proponents hired Cameron to help direct their strategy, well aware of his views.

Was the appeal to disgust just an extra add-on, or was it a central part of the strategy? Perkins and Marco frequently used disgust language, and related terms such as "depraved" and "deviant." They also gave Cameron a central place in their campaign—as the state's attorney general later gave him a central place in its defense of the amendment. Their speeches talked about disease, about child molestation, about "militant gay aggression." Above all, they sought to extinguish any sense of empathy or commonality with gays and lesbians by continually insisting that their practices "differ drastically" from those of average Coloradans. Promoting disgust and

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undermining a "politics of humanity" went hand in hand. So if the material about sex practices was not always front and center, it was important. The strategy was to give voters lots of reasons to feel disgust—but then to give them, as well, more socially acceptable reasons for voting "yes," which they could use to justify their vote to both self and others.

On November 3, 1992, Amendment 2 passed by a vote of 813,966 to 710,151 (53.4 percent to 46.6 percent). Immediately, a group of plaintiffs—including individuals (Martina Navratilova was one), and numerous governmental entities (the Boulder Valley School District, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen) began contesting the law, hoping to prevent its implementation.

2. ACT I: COLORADO—FUNDAMENTAL RIGHTS AND THE POLITICAL PROCESS

The litigation surrounding Amendment 2 was complicated, involving three distinct legal theories. Following these will give us further insight into what support for the amendment was really about and why its rejection by the Supreme Court was right.

Act 1 of the drama was the plaintiffs' motion, before District Court Judge H. Jeffrey Bayless, for a preliminary injunction against the implementation of the law. Throughout the initial phases, the plaintiffs were trying to find a way of ensuring that the state would have to show not simply a rational basis for the law, but a compelling state interest. Most laws are upheld on rational basis review, so, despite the fact that the plaintiffs consistently argued that the law lacked even a rational basis, a key part of their strategy was to devise some theory that would move Amendment 2 into the category of laws for which heightened scrutiny was required.

There are two ways in which such an argument may be made under the Equal Protection Clause of the Fourteenth Amendment. First, one can argue that classification of people on the basis of their sexual orientation is a suspect classification, an idea explored in chapter 2. That strategy seemed unlikely to succeed, because it had not succeeded in other cases. Second, one can argue, as we saw in chapter 3, that the challenged law infringes one of the unenumerated "fundamental rights" that have been recognized as inherent in the Equal Protection Clause, such as the right to vote and the right to travel.

During act 1, the plaintiffs elaborated a clever version of the latter strategy, which was endorsed by the Colorado Supreme Court.⁹ They argued that Amendment 2 deprives gays and lesbians of the right to "participate equally in the political process," by "fencing" them "out" from the opportunity, which all other citizens enjoy, to pass local and state laws protecting their interests. They rested this argument on a group of cases involving reapportionment, minority party rights, and various other attempts to "limit the ability of certain groups to have desired legislation implemented through the normal political processes." The Colorado Supreme Court argued that, although the precedents all involved race, the core of the argument did not rest on the notion of racially suspect classification, but rather, on the principle that the Equal Protection Clause "guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny."

This was an interesting legal theory, but it had its problems. First of all, the ballot-access and right to vote cases were being stretched, in order to find a general right to participate as equals in the political process.¹⁰ More puzzling was the theory's use of the notion of "an independently identifiable group." Obviously this

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could not mean only those groups who already enjoyed suspect classification status, or gays and lesbians would be excluded. On the other hand, one would have to find some way of demarcating the notion of "independently identifiable," or the theory would sweep too broadly. (Many laws discriminate against felons, for example, and the Colorado Supreme Court certainly did not intend to call those laws into question.) The court tried to demarcate the notion, suggesting that it includes only groups who traditionally have been protected under antidiscrimination laws or would benefit from such protections. It's not clear, however, that this makes "independently identifiable" into a workable notion.

More problematic was the relationship of this legal theory to *Bowers v. Hardwick*. According to *Bowers*, gays and lesbians can rightly be stigmatized as criminals. But of course many provisions, thought to be constitutional, disadvantage criminals in the political process. Take, for example, the laws on the books in many states that remove the vote from convicted felons. If gays are or can legally be made criminals, can't they be treated unequally in the political process? We could try to distinguish between act and orientation, saying that it's wrong to treat people of homosexual orientation unequally, even though there is a very strong likelihood that they routinely commit criminal acts (or acts that may be criminalized). This has always been a murky distinction, however.

Evans 1 was a ringing victory for the plaintiffs, but one whose legal credentials seemed flimsy.

3. ACT 2: THE BENCH TRIAL—ANIMUS ON PARADE

By upholding the preliminary injunction against the law, the Colorado Supreme Court had simply returned it to the District Court for a trial on the merits. Act 2 of the drama, then, returns us to the

Denver courtroom of District Judge H. Jeffrey Bayless. It was now clear (under the traditional standards for heightened scrutiny) that the state would have to demonstrate that Amendment 2 served a "compelling state interest," and that it was the narrowest and least burdensome way of protecting that interest.

The plaintiffs, however, also wanted Judge Bayless to rule that sexual orientation is a suspect classification. On that issue, the plaintiffs failed. They called a range of expert witnesses to demonstrate that gays and lesbians, as a class, have the three characteristics that have traditionally served as criteria of a suspect classification: a history of discrimination, political powerlessness, and the immutability of the class's defining characteristic. Judge Bayless found the plaintiffs' argument persuasive on the first issue, and both strong and interesting on the third, although he made no final determination. The argument that gays and lesbians are politically powerless, however, failed to convince him: the very laws that Amendment 2 nullified were proof, he said, of gays' and lesbians' substantial political power. In the end, Judge Bayless refused to conclude that sexual orientation was a suspect classification.

Most of the action in the trial therefore focused on the state's attempt to demonstrate that Amendment 2 served a compelling state interest. The strategy of Colorado Attorney General Gale Norton was blunt and aggressive: line up as many compelling interests as possible, then bring in academic experts to testify in support of each.

Six compelling interests were originally alleged: (1) deterring factionalism (by which the state meant that political debate over this "deeply divisive" issue would be removed from local governments); (2) preserving the integrity of the state's political functions—allegedly at risk from "militant gay aggression"; (3) preserving the state's ability to remedy discrimination against traditional suspect classes; (4) preventing the government from interfering with personal,

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familial, and religious privacy; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of children. The state argued that each of these, taken singly, was compelling, and that, even if none was compelling taken singly, they might be found compelling in the aggregate. In addition, at a relatively late point in the trial, a seventh allegedly compelling interest, in "public morality," was added. The state claimed that it pervaded all the other six.

Judge Bayless ultimately found that interest 1 was not compelling: indeed, he wrote that "[t]he *opposite* of defendants' first claimed compelling interest is most probably compelling," in the sense that vigorous political debate at the local level, not the removal of that debate, is a compelling interest.¹¹ He also found that interest 2 was not compelling: "The evidence presented does not satisfy this court that there is militant gay aggression in this state which endangers the state's political functions." The third alleged compelling interest amounted to the claim that the state doesn't have enough resources to protect an extra group from discrimination, without taking money away from efforts to aid already protected groups. Judge Bayless found that the testimony of Denver's mayor and of the officer in charge of enforcing Denver's antidiscrimination ordinance established that "[t]he inclusion of sexual orientation in the Denver ordinance has not necessitated an increase of enforcement staff nor has it resulted in an increase in costs."

The fourth compelling interest was a different story. Clearly, the protection of religious freedom is a compelling state interest. Amendment 2, however, Judge Bayless held, is not narrowly tailored so as to achieve that interest in the "least restrictive manner possible": what the state could do was to require antidiscrimination provisions to contain a religious exemption, as Denver's and Aspen's already did.

The fifth alleged interest concerned the way in which, according to the state, people would be forced to accept the "gay ideology" by complying with nondiscrimination laws. "For example," wrote the state in its trial brief, "if a landlord is forced to rent an apartment to a homosexual couple, the landlord is being forced to accept, at least implicitly, a particular ideology." Bayless concluded that this alleged compelling interest "was not supported by any credible evidence or any cogent argument."

The sixth alleged compelling interest was the promotion of the physical and psychological well-being of children. Testimony had been offered by expert witnesses for the state suggesting that homosexuals are often child molesters. To this, Bayless responded that the extensive testimony of a reputable psychologist called by the plaintiffs showed convincingly that pedophiles are predominantly heterosexual; thus the defendants had not established this claimed compelling interest. Finally, Bayless did not address the public morality issue directly; he simply concluded at this point that the state had not met the requirements that strict scrutiny imposes.

Those were the interests and the outcome. In between was expert testimony, designed to support the claims of compelling state interest. It was here that the bench trial of Amendment 2 became circuslike. The state, advised by Paul Cameron (to whom, it later emerged, Norton paid more than \$10,000 of state money for his help in the case) rounded up a remarkable group of witnesses to support its claims.¹² On the issues of child molestation and family values, the extreme views of Cameron shaped the witness list, and several state experts shared with Cameron the characteristic of having been expelled from, or denounced by, a respected professional organization for views that flew in the face of the evidence, or (as with Cameron) for manufacturing evidence.¹³ Cameron himself was on the witness list. (He was never put on the stand, but his expert witness statement became part of the trial record.) The state

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seemed eager to call as a witness any reasonably well-known scholar who would say something bad about gays and lesbians.

Expert testimony is not truth seeking. Each side will properly call experts who support its views. Nonetheless, there was still something ugly about the experts called by the state, many of whom were known to be discredited. The same antigay sentiment that had gained passage of Amendment 2 shaped the state's defense of the law.

Oddest and perhaps most revealing was the testimony about "public morality," most of which had no relevance to the case. The state, presumably aware that its expert social scientists were not distinguished, learned that a few genuinely eminent intellectuals wanted to testify about moral philosophy and its history, hoping to establish that gays had been found depraved and unacceptable by all the world's great thinkers.

The primary witnesses who testified in this arm of the trial were: philosopher John Finnis of Oxford University (now also at the University of Notre Dame); political theorist Robert George of Princeton University; philosopher David Novak of the University of Toronto (then at the University of Virginia); and political theorist Harvey Mansfield of Harvard University. Novak offered a scholarly and closely reasoned account of the tradition of Jewish thought that, while controversial, was in the scholarly mainstream.¹⁴ Nor did Novak ever claim that his historical material had any bearing on what modern democracies should do. The other three witnesses, however, were zealous in their defense of Amendment 2 and in their contention that the history of thought supported the law. They offered an odd concoction of claims. Robert George, an advocate of a conservative variety of Catholic natural law teaching, revealed in his testimony that he believed same-sex acts to be bad for just the reasons and in the way that contraception and masturbation are bad; he urged that landlords be permitted to refuse to rent to tenants

who would practice either—a position so extreme that it surely had no relevance to establishing “public morality” in Colorado. Harvard’s Mansfield testified that homosexuality is a pathological and miserable lifestyle that always leads to deep unhappiness.¹⁵ (It’s not terribly clear how this supported an amendment that was likely to make gays in Colorado more unhappy than they were before.) He supported all sorts of comparative claims about the happiness of gays and lesbians (vis-à-vis African-Americans and women) by citing the great books of the Western tradition of political philosophy—naming Rousseau, Tocqueville, Plato, and Aristotle, despite the fact that such comparisons were never discussed by those thinkers.

4. ACT 3: THE SUPREME COURT—ANIMUS AND RATIONAL BASIS

The state appealed to the Colorado Supreme Court, which found Amendment 2 unconstitutional on the same ground it had mapped out in its first opinion.¹⁶ Colorado appealed to the U.S. Supreme Court, which agreed to hear the case.

At this point, the issue of strategy became all-important for the plaintiffs. The fundamental rights strategy was risky, because of *Bowers*. To avoid a head-on challenge to *Bowers*, the plaintiffs argued that Amendment 2 had no rational basis, invoking *Gleburne* and *Department of Agriculture v. Moreno*,¹⁷ in which the Court had found laws to lack a rational basis if they were motivated by dislike or fear of an unpopular group. In *Moreno*, which concerned a requirement of the federal food stamp program that aid could go only to households that contained no member who was “unrelated” to other members, the Court wrote, “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”¹⁸

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On May 20, 1996, the Supreme Court held Amendment 2 unconstitutional by a vote of six to three. Justice Kennedy, writing for the majority, sees the case as going directly to the heart of the Equal Protection Clause and the rule of law: that our Constitution "neither knows nor tolerates classes among citizens." He opened his opinion with this quote from Justice Harlan's dissenting opinion in *Plessy v. Ferguson* (1896), the notorious case in which the Supreme Court upheld the constitutionality of segregation in public accommodations—thus connecting *Romer* with our nation's long struggle against hierarchical arrangements that systematically subordinate groups.

The balance of the unusually brief opinion is devoted to an analysis of the disqualifications imposed by Amendment 2, in order to establish that they do create such a hierarchy. Kennedy rejects as implausible the state's argument that the amendment did no more than deny homosexual "special rights" (a reading accepted by Justice Scalia in his dissenting opinion). "Sweeping and comprehensive is the change in legal status effected by this law.... Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres." Kennedy then documents in detail the areas in which systematic inequality would result from Amendment 2.

Justice Kennedy then recognizes that most laws classify, with the result that some people are disadvantaged. For this reason, except when a law concerns a fundamental right or a suspect class, the classification is typically upheld "so long as it bears a rational relation to some legitimate end." Amendment 2, however, fails that test: it imposes broad and sweeping disqualifications on a group in every area of life, and these disqualifications are utterly discontinuous with the reasons offered for the law. Therefore "the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." The amendment is both too narrow and too broad: "It

identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.... It is not within our constitutional tradition to enact laws of this sort."

Justice Scalia's dissenting opinion, noting that sodomy laws were held constitutional in *Bowers*, invokes a notorious case called *Davis v. Beason* (1890) to suggest that it is permissible to impose general disqualifications on a group if practices characteristic of the group can be made criminal. In *Davis*, the Court upheld an Idaho law denying polygamists, advocates of polygamy, and members of any organization that teaches or advocates polygamy (hence all Mormons) the right to vote and hold office. Justice Scalia reasoned that if Mormons can be denied the right to vote because of their likely or characteristic practices, then the disqualifications Amendment 2 imposes on gays and lesbians must also be constitutional.

It's rather shocking to see Justice Scalia relying on *Davis*, surely one of the most criticized, indeed abhorred, decisions in the history of the Supreme Court. As Justice Kennedy points out, *Davis* is no longer good law insofar as it denies the right to vote based upon belief. All that remains of *Davis* is the idea that a convicted felon may be denied the right to vote: but that was not what was at issue in considering Amendment 2. (For one thing, as we already noted, sodomy was no longer illegal in Colorado.)

As for the possibility that religious concerns could justify Amendment 2, Justice Kennedy concluded that a far narrower remedy (religious exemptions) could handle that concern. In its sweeping breadth, Amendment 2 is plainly not directed at any legitimate purpose. The only inference one can make is that the real purpose of Amendment 2 is to make homosexuals unequal to everyone else. Kennedy insisted: "This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."

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Because Justice Kennedy's opinion is so brief, it has given rise to a lot of questions. Is the main issue that of illegitimate intent? Or is the sweeping nature of the hierarchy imposed by Amendment 2 itself an equal protection violation, no matter what the animating purpose? I side with those scholars who hold that illegitimate intent or purpose is at the heart of the analysis.¹⁹ The sweeping nature of the disqualifications is important, but it is important heuristically, in revealing that the purpose of the amendment is not what the state claims, namely the protection of religious freedom or the restoration of equal rights (as opposed to special rights). Notice, then, that this analysis relies on cases such as *Moreno* and *Cleburne*, and is not analytically the same as *Brown* and *Loving*, which hold that hierarchy is by itself objectionable, no matter what the state's purpose. The illegitimate purpose animating the classification is, it seems, a key to showing that, despite appearances, the law in *Romer* does not bear a rational relationship to a legitimate governmental interest.

CFV greeted the opinion with strident denunciation. Will Perkins described the forces that had prevailed as "forces bent on forcing a deviant life style down the throats of the American people."²⁰ He called the ruling "truly a chilling day for people of conscience across America." He opined that Americans would soon rise up to impeach the six justices who had joined the majority opinion.²¹

In *Romer* Justice Kennedy was on secure ground. From the first to the last, illegitimate intent was written all over the law and its defense. For this very reason, however, *Romer* is a narrow holding, which offers little guidance for future antidiscrimination cases involving sexual orientation. When illegitimate intent can be plainly found, a law imposing disadvantages on gays and lesbians will be found to lack a rational basis. Rational basis review might certainly be extended in a tough-minded way to invalidate other forms of discrimination against gays and lesbians. But what about more

subtle disadvantages, or more narrowly drawn disqualifications? Such laws might well survive rational basis review. The question of heightened scrutiny, therefore, remains central. The secure protection of gays and lesbians from a wide variety of disadvantages would seem to require a holding that laws involving that classification, like laws involving race or gender, warrant some form of heightened scrutiny.

5. SUSPECT CLASSIFICATION: SEX DISCRIMINATION?
IMMUTABILITY?

One route to heightened scrutiny was explored by the Colorado Supreme Court. This fundamental rights approach, however, is hard to justify in terms of the precedents and useful only in a narrow range of cases, those involving laws imposing broad-based disadvantages in the political process.

The suspect classification approach is thus to be preferred. But there are two interestingly different versions of that approach, and we must now ask which is the more promising.

First is what we may call the straightforward approach: argue that sexual orientation is, in and of itself, a suspect classification. This approach has a lot going for it, given that gays and lesbians can point to such a long and ugly history of discrimination. It has, however, repeatedly failed, because courts have been unwilling to grant that the traditional criteria of suspectness are present.

Some theorists have therefore tried out a different approach, the sex equality approach. Classifications involving sex already get intermediate scrutiny: so this approach is an attempt to include protection for gays and lesbians in this already recognized legal category. Here's how this approach goes, as defended by Andrew Koppelman, its most eloquent and tenacious advocate.

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Consider antimiscegenation laws: What tells us that these laws involve a racial classification is that if you change the race of one of the parties, the proposed union is permissible. Suppose John is black and Sally is white: they can't get married under such laws. But substitute Mary for Sally—and Mary happens to be black—and, lo and behold, John and Mary can get married. So, the classification is a suspect one, based on race. Similarly, let's take Jennifer and Susan. Jennifer and Susan live in a state that forbids adoption by same-sex couples, so they can't adopt a child. (I'm deliberately deferring, here, the difficult issue of same-sex marriage.) But just change Susan to Bob, and Bob happens to be male, and, lo and behold, the disability goes away: the change from one sex to another makes all the difference. Notice that we haven't even mentioned orientation: the point is that wherever a change of a male to a female or a female to a male makes a decisive legal difference, that law involves a classification based upon sex, and such classifications deserve heightened scrutiny.

This is a clever argument, but to many people it seems legalistic in the pejorative sense: that is, it finds a loophole, but it doesn't quite get at what is really going on. What's really going on when a disability is imposed on Jennifer and Susan is that the nature of their sexual orientation is being penalized. People think that their sexuality is bad, and they want to prevent children from growing up in that "pathological" atmosphere. The right way of thinking about the classification is that it involves sexual orientation, and it's really not discrimination against women as such. There is an analogy to the miscegenation laws, to be sure, but it is superficial: the argument doesn't reach deeply enough to get at the real source of the discrimination.

At this point, however, Koppelman has a fascinating reply. Look deeply into prejudice against homosexuals as such and you will find that indeed, at its root, it is all about sex discrimination: it's a way of maintaining binary divisions of the sexes and the patriarchal control of men over women. What is troubling about Jennifer and Susan is

that they have been able to evade this patriarchal control. So in a deep as well as a superficial sense, the discrimination they face is a form of sex discrimination.

Well, that's probably true—of a lot of prejudice against lesbians. Maybe such thinking even plays some part in explaining prejudice against gay men: Oscar Wilde's refusal of his patriarchal role, his choice of sex for pleasure, shocked the British. Perhaps in some instances prejudice against gay men takes the more general form of anxiety at the way in which their relationships confound gender distinctions. But prejudice against gay men—which is really what drives antigay efforts in America—taps, as well, and more centrally, profound anxieties about bodily penetrability and vulnerability (anxieties that are felt, above all, by men). Those deep bodily anxieties cannot be explained in terms of a fear of losing control over women. The fact that the antigay movement has from its inception almost totally ignored lesbians is difficult to reconcile with Koppelman's deeper thesis.

So I conclude (though with enormous respect for Koppelman's important work) that this thesis, although it indeed does identify one part of what is going on in discrimination against gays and lesbians,²² is seriously incomplete and therefore is not the most satisfactory way to get heightened protection for gays and lesbians under the Equal Protection Clause. We are back, then, to the straightforward approach. What argument might lead to its acceptance by courts?

We begin by noting that the traditional indicia of heightened scrutiny—history of discrimination, political powerlessness, and immutability—are indicia, not necessary conditions. They emerged gradually over time, and they have been found useful in a range of cases, but the Court has never held that all three have to be present.

Next, we should try to get at the intuitive idea behind these indicia. A key idea seems to be: when a group is so placed in society that there's a good bet that classifications involving that group will

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be in some way tainted by prejudice, we need to look more closely. Notice that this worry about prejudice is considerably broader than *Romer's* worry about animus. When a group has experienced a history of prejudice, often involving stereotyping, classifications involving that group may be tainted by those stereotypes even when nobody has malicious intentions toward the group. Classifications involving women, particularly, are likely to be prejudicial, relying on demeaning stereotypes, even without animus. As Justice Brennan wrote in *Frontiero v. Richardson*, the case that established heightened scrutiny for gender-based classifications:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.... As a result... our statute books gradually became laden with gross, stereotyped distinctions between the sexes.²³

Heightened scrutiny is warranted not because of malicious intent (after all, "romantic paternalism" was intended to be benign), but because of a history of deformed views of women that impede their full equality.

So it's the history of discrimination that makes us worry about such classifications, lest they be infected that way. That, I suggest, is and should be the central criterion of suspectness, the one that goes to the heart of why heightened scrutiny is felt to be needed in certain cases.

Political powerlessness is important, when it is, because of the history of discrimination: where there is a lot of prejudice, a group probably doesn't have much opportunity to influence legislators to take its own interests seriously, and of course that would give us a

reason to be suspicious of classifications disadvantaging that group. As Justice Brennan wrote in a 1985 case, "Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena."²⁴ If the key notion is that of prejudice-infected classification, however, we should not say that political powerlessness is a necessary condition of heightened scrutiny. Some groups might have done a lot of political mobilization and still be the targets of overwhelming prejudice and stereotyping. This is clearly true of women, even today. People with disabilities have organizations defending their interests, and they have been able to enact laws in their own interest; and yet, evidence of continuing discrimination against them is so strong that the case for some form of heightened scrutiny is strong. Gays and lesbians are in a similar situation: although they have been able to organize and engage in political action, there is still overwhelming prejudice and stigma associated with the classification, so the fact that such political action exists should not debar them from a form of heightened scrutiny.

What about immutability? This criterion has frequently been challenged, and we can see why. Suppose it were possible to take a pill and change one's race: does that make race-based discrimination less problematic? People can and do change their sex, but that does not alter the case for heightened scrutiny, given the history of discrimination against women. And of course religion is fully chosen and mutable, but that doesn't make us think any better of religion-based discrimination. (Of course religion, being protected under the First Amendment, does not figure in the traditional enumeration of equal protection categories, but the idea is what counts here.) So it might seem irrelevant whether sexual orientation is genetic or acquired during early childhood (probably some combination of both is the right answer), or even formed later on.

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Let's try to get at the idea underlying legal reference to immutability by looking at a key text: again, it is Justice Brennan's plurality opinion in *Frontiero*:

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

This paragraph makes it clear that what is really at issue is not immutability as such, but irrelevance to the purpose at hand. Justice Brennan expresses no view about whether intelligence is hereditary, and wisely too: nobody has yet managed to sort out the different environmental and hereditary factors contributing to intelligence, and we permissibly make intelligence relevant to employment without settling that question. In some cases—for example, musical ability—we have a pretty good idea that the basis of the ability is inherited and in that sense immutable—and yet we do not tell symphony orchestras that they may not hire people based on musical ability. The crucial thought has nothing to do with immutability as such; the thought is that women have for centuries been stereotyped as incapable in virtue of being women, without examining

the characteristics of an individual that may be relevant to a given job. That is why those classifications are suspect. They take one time-honored status, with which lots of stereotypes are associated, and they infer from it other characteristics, which may or may not follow, rather than focusing on the properties that are pertinent to the job at hand. The immutability of the status figures, here, as a reason why it has endured through time, in such a way that many stereotypes have grown up around it. But the key factor that makes the classification suspect is its irrelevance.

Let's now return to sexual orientation. The right way to think about that case in the light of *Frontiero* is to think of the many ways in which stereotypes of gays and lesbians cause people to ascribe to them all sorts of characteristics that make it seem acceptable to treat them badly. For example, gays and lesbians are often excluded from jobs involving teaching because of the stereotype of the gay or lesbian person as child molester. This stereotype is itself unsupported by evidence, and it leads to all sorts of unfair judgments about individuals. Instead, hiring institutions should examine the background of the individual (whether heterosexual or homosexual), asking whether anything gives reason for suspicion about that person's behavior with the young. The analogy with *Frontiero* is strong, and it is not about immutability as such. Immutability is relevant to the extent that the classification has endured over time and many prejudices have sprung up around it. But the key notion is the irrelevance of the status to the purposes for which (driven by prejudice) people use it.

There's another very different thought that immutability also introduces: the idea of depth and centrality in someone's way of life. Why is it that believing that sexual orientation is innate sometimes causes people to be more sympathetic to gays and lesbians, more willing to oppose prejudice against them? I think the connection goes like this. We used to think that being gay or lesbian was an unwise choice, like smoking. Admittedly, such chosen behaviors

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can be difficult to change, as smoking surely is, but we think it's reasonable to pass laws disadvantaging smokers, because we think that smokers can learn to restrain themselves, or to change. Of course smoking harms nonconsenting parties and homosexuality does not (or does so, like heterosexuality, only when someone engages in nonconsensual behavior). So the analogy is far from perfect. The person who thought that homosexuality was like smoking should think again! Still, let's now imagine such a person learning that homosexual orientation is either based in the genes or fixed in very early childhood, or some combination of the two. Now the person is likely to think differently: we can hardly expect people to change, if that's how it is. So it seems punitive to pass laws disadvantaging people for what they can't help about themselves.

However, that thought remains incomplete without a further thought: sex is central to the pursuit of happiness. Suppose we discovered that some people have a genetically based orientation that makes them more likely than others to prefer risky behavior. We would not necessarily feel (I think) that we should drop laws that limit the risks people may run in ways that do not impinge on the well-being of others (such as laws requiring motorcycle helmets). Some will support such laws and others will consider them intrusive or silly. But they don't seem to raise fundamental liberty issues. The difference is that we just don't believe that riding a motorcycle without a helmet is central to the meaning of life. We are not crippling people's personalities by asking them to wear a helmet. Sexual orientation, by contrast, seems to lie deep in the structure of people's personalities, in ways that are crucial to their pursuit of happiness. Therefore, to ask people to change in that respect, or not to express their orientation, is to impose a very crippling burden. In estimating the costs imposed, we naturally ask what alternatives the person has, and here the idea that the orientation in question is set very early and is difficult to change becomes significant. But the main

idea is one of depth and importance. (As we shall see in chapter 5, the Iowa Supreme Court makes this point well.)

Once again, this reasoning does not really concern immutability—for we already saw in chapter 2 that we reason in a very similar way about religion, which is intimate and central, but not immutable. Perhaps a little extra work is done by *immutability*, in reminding us of how punitive it is to disadvantage people (in a matter central to the meaning of life) when they can't change.

So the legal notion of immutability is confused, but it leads us to two good ideas, both pertinent to our question: the idea of relevance and the idea of depth or centrality. With respect to both of those ideas, the case for heightened scrutiny for sexual orientation is very strong. Sexual orientation, like being female, is irrelevant to many things for which society confusedly holds it to be relevant. It is also deep and central in people's lives, like religion, in a way that makes us think asking people to give up acting on their orientation is a kind of cruelty.

Judges are understandably reluctant to multiply the number of classifications that get heightened scrutiny. One benefit of looking in such detail at the history of Amendment 2, however, is that it tells us how extensive the record of discrimination against gays and lesbians actually is. In that case, the law did not even pass rational basis review because of the overwhelming evidence of illicit intent. In many other cases, however, the history of discrimination and the pervasiveness of the stereotype, rather than malicious intent, influence the classification; people may just be going along with historical stereotypes rather than having animus against the group in question. To root out discrimination in such cases, we need heightened scrutiny.

Romer shows us a lot about how majority social attitudes put pressure on minorities. Amendment 2 was a classic example of Devlinesque

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politics: the indignation and disgust of the average person enabled the law, and a vulnerable minority was deprived, in a sweeping way, of privileges and entitlements that are the ordinary stuff of democratic politics. The result in *Romer*, like the result in *Lawrence*, was a victory for the "politics of humanity," a politics based on equal respect and on an attempt to move beyond stereotypes to an honest confrontation with the real lives of the group and its members. It was also, in a closely connected way, a victory for the general approach to politics mapped out by John Stuart Mill, one in which majority attitudes are not allowed to deprive minorities of equal rights.

Romer was a narrow result. Much remains to be done to get clear about what is and is not permissible in this area. Judges can and should contribute to this progress: as I've argued, the narrow notion of animus needs to be extended by the development of a clearly defined idea of heightened scrutiny. Good legislation, however, is also essential. Many states and municipalities have antidiscrimination laws for sexual orientation, but the United States as such has none, and too few political resources have been devoted to the effort to enact one. Many Americans who abhor the idea of same-sex marriage are ready to grant that gays and lesbians should be protected from discrimination in housing, employment, and other areas of daily life. It is a pity that women and people with disabilities enjoy such protections at the federal level while gays and lesbians do not.

Romer was, however, a decisive moment. Rarely had disgust been so openly on display in a Supreme Court case, and rarely has the Court rejected its politics so plainly.

NOTES

1. Significantly, the website highlights interracial families: CFV has always tried to make common cause with groups representing the interests of racial minorities, as the campaign for Amendment 2 shows.