Strangers to the Law

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Chapter 9

The U.S. Supreme Court

When the U.S. Supreme Court announced on February 21, 1995, that it would review the Colorado Supreme Court’s decision, the news came as no surprise to most court watchers. The Colorado court’s ruling had the requisites of a classic high court case: It involved an “important question of federal law,” and there was a proliferation of similar conflicts that ensured the issue would not go away. And it was no surprise on October 10, 1995, the morning the Court set to hear Romer v. Evans, that hundreds of people hoping to get into the courtroom to listen to attorneys for both sides present their arguments had formed a line so long it ran down the front steps, across the Court’s vast plaza and around the block. Many of those observers expressed surprise at the vigor with which some of the justices pursued the arguments—to the point that the justices were debating each other more than questioning the attorneys.

The issue before the Court as Colorado originally stated it in its brief requesting review was:

Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections.

On October 10, 1995, the issue on the Court’s own docket summary put it this way:

Does popularly enacted state constitutional amendment that prohibits state and local governments from conferring protected status on persons of ‘homosexual, lesbian or bisexual orientation’ violate Equal Protection Clause?
During the months before the oral argument, numerous briefs were filed with the Court laying out legal and policy arguments implicated in this question. In addition to the two primary parties in the case—the state of Colorado and the group of plaintiffs challenging the initiative—a large number of other people and organizations sought to shape the Court’s ultimate decision. The Court accepted more than two dozen friend-of-the-court briefs representing the official views of almost 100 organizations, cities, and individuals. The extraordinary array of organizations filing briefs in this case underscored the intensity and scope of the debate prompted by the case—civil rights organizations, teachers’ groups, religious denominations, unions, state and city governments. And the briefs themselves tackled the full range of issues examined at trial—the origin and immutability of sexual orientation, the history of discrimination, moral and religious views, the relative power of gay people politically, the purpose of civil rights legislation.

Best known among the authors of these friend-of-the-court briefs in support of Amendment 2 was Robert H. Bork, a former federal appeals court judge and solicitor general, as well as an unsuccessful nominee for the U.S. Supreme Court. Bork became involved in the case when Colorado first filed its petition to the U.S. Supreme Court seeking review. His brief, filed on behalf of Alabama, Idaho, and Virginia, had urged the Court to accept Colorado’s appeal, saying the Colorado Supreme Court ruling had created a “new fundamental right of breathtaking scope” (an argument that the state made in its own petition to the Court). He defended Amendment 2 as doing no more than removing “one issue”—which he identified as “homosexual and bisexual rights”—from the political process. And he argued that the equal protection claim being made by gay people in the Romer case was “identical in all material respects” to the claim made in a previous case, James v. Valtierra, which the Supreme Court rejected in 1971. The James case, out of California, also involved a voter-approved initiative to amend the state constitution—this one to block the enactment of any low-rent housing project unless the project first won approval by a majority of voters in a popular referendum. The U.S. Supreme Court had rejected the plaintiffs’ challenge in that case, ruling that the California initiative satisfied the requirements of the Constitution’s Equal Protection clause.

Bork’s brief in support of Colorado’s petition for review was largely reiterated in a final friend-of-the-court, or amicus curiae, brief filed for those three states and four others (California, Nebraska, South Carolina, and South Dakota) after the Court agreed to take the *Romer* case. The essential point of both briefs was that the Constitution guarantees the people the right to govern through majority rule as they see fit.

Several of the other briefs filed in support of Amendment 2 contended that the U.S. Supreme Court’s ruling in the *Bowers v. Hardwick* case—allowing states to outlaw some types of same-sex sexual relations—by extension meant that states could also outlaw protections for gay people.

Also filing in support of Amendment 2 were the Oregon Citizens’ Alliance and a group called Equal Rights, Not Special Rights, based in Cincinnati, each of which was promoting its own antigay initiative. In addition, several groups often linked to the religious right submitted their defenses of Amendment 2 to the high court, including the American Center for Law and Justice Family Life Project (a Pat Robertson affiliate), the Family Research Council, Concerned Women for America, the Christian Legal Society, Focus on the Family, and Colorado for Family Values. While presenting an array of arguments to the Court, these groups were united in the theme that recognition of civil rights for gay people would threaten religious freedom and the moral fiber of American society.

More than half of the amicus briefs submitted in the case took positions against Amendment 2. Represented in these were seven states (Oregon, Iowa, Maryland, Massachusetts, Minnesota, Nevada, and Washington) plus the District of Columbia, numerous cities, and such prestigious organizations as the American Bar Association, the National Association for the Advancement of Colored People’s (NAACP) Legal Defense and Educational Fund, a variety of religious groups, the National Education Association, and the Anti-Defamation League. They urged the Court that Amendment 2 was motivated by bias and prejudice and that it lacked a legitimate governmental purpose for its discriminatory impact.

Clearly responding to the Bork characterization of the case, one brief, from a group of state bar associations, organizations of lawyers, and others, argued that “no ’breathtaking’ principles were being foisted upon the public by the Colorado Supreme Court and no injury was being done to the right of the majority to govern as it sees fit.”
Bork’s counterpart on the opposite side of the case, constitutional law professor Laurence Tribe, also argued that the issue of whether sexual orientation is immutable was irrelevant to the legal conflict. What matters, said Tribe and other law professors who joined him in the brief, is that the Constitution’s guarantee of equal protection applies to “every person within the state’s jurisdiction, regardless of what the person might have done, and certainly regardless of what the person might be inclined to do.”

“Never since the enactment of the Fourteenth Amendment,” wrote Tribe, “has this Court confronted a measure quite like Amendment 2—a measure that, by its express terms, flatly excludes some of a state’s people from eligibility for legal protection from a category of wrongs.”

Echoing the trial testimony concerning scientific understanding of sexual orientation, the American Psychiatric Association, the American Psychological Association, and similar groups filed a brief opposing Amendment 2, arguing that “there is no basis for such discrimination” and that the initiative “rests on baseless stereotypes about gay people.” And in discussing which characteristics define the class of gay people, a brief filed by a number of national civil rights and gay political organizations, including the Human Rights Campaign Fund and the National Gay and Lesbian Task Force, argued that “logically, what defines the class of homosexuals and heterosexuals . . . is the gender of one’s partner.”

The American Bar Association’s brief, ghostwritten by Ruth Harlow, who at the time was on the staff of the ACLU’s Gay and Lesbian Rights Project, urged the Supreme Court to consider an argument that the Colorado courts did not consider: that Amendment 2 lacked any rational justification. Referring the Court to its 1985 decision in City of Cleburne v. Cleburne Living Center, the ABA further argued that “state purposes that embody such prejudice against a disfavored group cannot be countenanced.”

A coalition of religious organizations, including the American Jewish Committee, the United Church of Christ, and the Unitarian Universalist Association, submitted a brief arguing that the “avowed religious belief” of Amendment 2 proponents “that homosexual persons should be singled out for discrimination is not a universal religious belief and, in fact, is contrary to the religious beliefs” of the organizations filing the brief.

A coalition comprised of organizations fighting racial and ethnic discrimination, including the National Council of La Raza, the Asian
American Legal Defense and Education Fund, and the Japanese American Citizens League, filed a brief against Amendment 2, saying that it violated the rights of gay people in ways similar to how African-Americans were treated before the Civil War, and "as aliens, women, and illegitimate offspring were traditionally denied legal protection by the common law to varying degrees and under varying circumstances."

"Our own history, and the bloody course of the twentieth century, have taught us all too well what happens when minorities are denied legal protection—sooner or later individuals' very existence is at stake," wrote Pamela S. Karlan and Eben Moglen, attorneys for the seven groups that signed onto the brief. "The process of dehumanization begins with laws like this one."

A separate brief filed by the NAACP and Mexican American Legal Defense and Educational Funds and the Women's Legal Defense Fund argued that the claim by Colorado that Amendment 2 would help "assure that sufficient funds were available to enforce existing" civil rights laws was "utterly implausible." It likened the CFV's claims that Amendment 2 was necessary to fight "militant gay aggression" to "the canard voiced half a century ago that Jews . . . were somehow covertly exercising control over the nation's policies."

"Not since the heyday of Jim Crow," stated the brief, "have state officials attacked as a threat to the 'body politic' the enactment of minimal protections for an unpopular group."

The large and well-established set of groups lining up against Amendment 2 provided for an interesting contrast to the plaintiffs' arguments at trial that gay people lacked political power. Here, some of the nation's most respected and mainstream professional, political, and religious associations, along with a diverse set of civil rights supporters, had not backed off from the issue at hand simply because gay people were the targets. Certainly, some of the groups were involved because of their concern that Amendment 2 could lead to the erosion of civil rights for other minorities. But they were there and on the plaintiffs' side in this crucial dispute. Whether this support would translate into actual political power was unclear, but, however ironic, the message sent was a powerful one.

There was, at the same time, fallout over at least one powerful entity that did not file a brief in the case: the U.S. Department of Justice. President Clinton's administration was said to have been in a "raging" debate over whether to submit a brief in the case on the side of those
opposing Amendment 2. Eventually, U.S. Attorney Janet Reno announced the department would not file a brief because there "was not a federal statute or federal program involved" in the case. But most political observers speculated that the Clinton administration was simply trying to avoid any further political fallout for being publicly supportive of gay people.

Not surprisingly, there was significant debate among both legal teams about who would present each side’s argument in court. But, on the morning of October 10, the stage was set: Timothy Tymkovich, the Colorado Solicitor General who presented much of the state’s case at trial and before the Colorado Supreme Court, was in place to speak for Colorado’s majority of voters. Jean Dubofsky, who had acted as the lead attorney for the plaintiffs throughout the litigation, would represent the minority. The courtroom was packed with members of the legal teams, a number of the plaintiffs named in the case, interested attorneys and activists from both sides, and a full media galley.

Both parties were prepared to train their attention particularly on associate justices Sandra Day O’Connor and Anthony Kennedy, two Reagan appointees. Chief Justice William Rehnquist and associate justices Antonin Scalia and Clarence Thomas were the Court’s consistently conservative members, particularly on gay-related issues. By contrast, associate justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer were consistently more liberal. O’Connor and Kennedy were widely regarded by court observers as critical “swing” votes on cases, such as this one, where the Court was expected to be closely divided.

For the State

Timothy Tymkovich, for the state, came to the podium first to address the bench. He began his argument by saying that Amendment 2 simply "reserves to the state the decision of whether to extend special protections under state law on the basis of homosexual or bisexual conduct or orientation.” Making the same point that Bork’s brief had pressed, he

said the issue at stake in the 1971 *James v. Valtierra* case was "indistinguishable" from the issue in the *Romer* case and, consequently, that Supreme Court ruling "controls here."

Barely a minute into this opening argument, Justice Anthony Kennedy interrupted. Usually, he said, judges pondering the constitutionality of legislation such as Amendment 2 "measure the objective" of the legislation "against the class" that is singled out for discrimination by the law. In other words, courts consider why this particular class of people is singled out to bear the burden imposed by the legislation.

"Here," said Kennedy, "the classification seems to be adopted for its own sake," and not for the sake of any governmental objective. "I've never seen a case like this," he said. "Is there any precedent that you can cite to the court where we've upheld a law such as this?" In the view of many observers, the question was prompted by Tribe's amicus brief that stated that a measure has "never" before attempted the exclusion Amendment 2 attempted.

Again Tymkovich pointed to *James*.

"But the whole point of *James* was that we knew that it was low-income housing, and we could measure the need, the importance, the objectives of the legislature to control low-cost housing against the classification that was adopted. Here," Kennedy repeated, "the classification is just adopted for its own sake, with reference to all purposes of the law, so *James* doesn't work."

It was a serious blow to Colorado's argument, delivered only five minutes into Tymkovich's allotted half-hour. Tymkovich tried to save the *James* precedent by suggesting, as Bork had, that rather than targeting homosexual and bisexual people for "all purposes," Amendment 2 sought to resolve only "an issue of whether or not to extend special protections to homosexuals and bisexuals." That reference to "special protections" would soon come back to haunt him, but first he had to field a question from Justice Sandra Day O'Connor. She said the text of Amendment 2 was vague and that it "has never been actually interpreted" by the state courts.

"Does it mean that homosexuals are not covered by Colorado's laws of general applicability?" asked O'Connor, referring to laws that prohibit mistreatment generally, rather than laws that prohibit discrimination based on specific characteristics.

"No," they would not be excluded, said Tymkovich.

"How do we know that?" pressed O'Connor. "I mean, the literal
language would indicate that, for example, a public library could refuse to allow books to be borrowed by homosexuals and there would be no relief from that, apparently."

Tymkovich said the Colorado Supreme Court decision indicated that laws of general applicability would not be “displaced” by Amendment 2: “It absolutely changes no provisions under federal law in access to the court or vindication of one’s equal protection rights, nor does it affect the state. . . .”

“Well, how do we know that?” asked O’Connor again. Again, she expressed her sense that the amendment’s text left the intent and reach of the measure unclear.

Tymkovich said the intent and reach was clear from the “legislative history” of the Amendment 2 campaign and the “intent of the proponents.” It affected only laws within the state of Colorado, not federal law, said Tymkovich.

But, interjected Justice Ruth Bader Ginsburg, “federal law is, of course, supreme.” She was apparently reminding him that state laws must comply with the U.S. Constitution’s mandates and with federal statutes written under the federal government’s legislative power. Continuing, Ginsburg underscored Justice Kennedy’s point about James, seeming to reject Tymkovich’s contention that Amendment 2 dealt with only one issue—that of antidiscrimination protections for gay people.

“James v. Valtierra,” she said, “dealt with one issue, low-cost housing. . . . But here, it’s everything. Thou shalt not have access to the ordinary legislative process for anything that will improve the condition of this particular group. And I would like to know whether in all of U.S. history, there has been any legislation like this that earmarks a group and says, ‘You will not be able to appeal to your state legislature to improve your status. You will need a constitutional change to do that?’”

Tymkovich conceded that Amendment 2 was “unusual,” but he said earlier Supreme Court decisions have allowed states to “withdraw authority over certain issues” from government decision makers.

Justice Antonin Scalia interrupted the discussion briefly to ask a question that seemed off that point at first. He wanted to know whether Amendment 2 applied to people with a homosexual “orientation” or just those who engage in sex with someone of the same gender. Tymkovich, who seemed somewhat bewildered by the question, said,
“It’s unclear from this text.” That was an odd answer. The text mentioned “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”

Tymkovich’s response thwarted Scalia’s apparent aim, which was to come to Tymkovich’s aid in finding a precedent for Amendment 2 in established law. So Scalia simply forged his point alone.

“If all ‘orientation’ means” is conduct, “then you have plenty of precedent,” he said bluntly. “Namely, state laws that absolutely criminalize such activity—bigamy, homosexuality. . . .”

“That’s right,” said Tymkovich, realizing Scalia’s point.

Then Ginsburg came back, speaking to Tymkovich, but clearly responding to Scalia.

“Colorado has no law that prohibits consensual homosexual conduct,” she noted.

“No,” Tymkovich conceded, and then he tried to fall back into the discussion about whom Amendment 2 affects, ultimately mumbling something about believing that “conduct is the best indicator of . . .”

“Is it the sole indicator?” asked Souter, in a swift and aggressive pounce. “Are you representing to this Court that Colorado’s position is that the class-defining characteristic is conduct as opposed to preference or proclivity or whatnot?” He seemed incredulous.

“No, your honor,” replied Tymkovich. That issue had been considered “immaterial” in the state courts’ discussion. Again, the answer seemed odd. The trial court had heard hours of testimony trying to define what “homosexual orientation” meant, distinguishing feelings from fantasy from conduct. Tymkovich did acknowledge this discussion briefly, but said it came up simply as part of “an attempt” by attorneys challenging Amendment 2 to prove that homosexual orientation constituted a suspect classification.

**Defining the Class**

“If the class of people affected by Amendment 2 is defined by more than just their conduct,” said Souter, then the Court has to assume that “orientation means something more than conduct or . . . I suppose we would have to send [the case] back and ask the courts of Colorado to tell us.” Then he asked if there was “a serious question” about whether orientation means something different from conduct.

Tymkovich said no.
“So orientation means something more than conduct,” said Souter, “and we have to assume that in ruling on this challenge, don’t we?”

Souter then quizzed Tymkovich about his opening remark—that Amendment 2 was simply withdrawing one issue from local levels of government and reserving it for statewide action.

“It seems to me that there are two things wrong with that characterization,” said Souter. “One of them has already been brought up—and that is, this is not merely a reservation for this particular subject to be dealt with, for example, by statewide referendum. It is, in fact, a provision that no law may be made addressing, or addressing for protective purposes, this kind of discrimination.” That statement appeared to align Souter’s concerns with those of Kennedy and Ginsburg, against Amendment 2.

“The second thing that seems to me inaccurate about the characterization you’re giving us,” said Souter, “is that this is not merely a reservation of a subject matter” because the subject matter was being reserved only for a certain class of people, raising a question of equal protection under the law.

“Your honor, there is a classification involved,” said Tymkovich, “but there is no invidious discrimination” in identifying that class. “That is not the case here. I think we’ve shown that there are reasons for the classification.” And because there are reasons, he said, the law can stand unless gay people are considered a suspect class or unless Amendment 2 is deemed to violate some fundamental constitutional right.

Souter repeated his original point—that the question at issue is more than just a “mere reservation” of an issue for “action at one level rather than another.” Tymkovich resisted, and soon Ginsburg jumped back in, reminding Tymkovich that, under the amendment, even the state legislature cannot address any issue involving protection or recognition of gay people. That, too, seemed to weaken his contention that Amendment 2 was merely reserving to the state the right to act on this issue.

“I was trying to think of something comparable to this,” said Ginsburg, “and what occurred to me is that this political means of going at the local level first is familiar in American politics. In fact, it was the way that the suffragists worked. When they were unable to achieve the vote statewide, they did it on a cities-first approach. And I take it from what you are arguing that if there had been a referendum that said no
local ordinance can give women the vote, that that would have been constitutional?"

Tymkovich said no.

“What is the difference?” asked Ginsburg.

“I think that that classification would be analyzed under this Court’s equal protection jurisprudence as a suspect . . . .”

“Well, cast your mind back to the days before the Nineteenth Amendment,” said Ginsburg, referring to the constitutional amendment which, in 1920, gave women the right to vote. Her remark provoked laughter in the quiet courtroom audience.

The analogy seemed to sting. Chief Justice William Rehnquist changed the subject. If Amendment 2 is upheld, he asked, it could be changed through another statewide referendum, right?

“That’s right, your honor.” Tymkovich added that opponents of Amendment 2 would have to do the same—and no more—to remove the law than proponents of Amendment 2 had to do to put the amendment in place. He then appeared to try to undermine Ginsburg’s analogy by suggesting that the antigay activists who won passage of Amendment 2 were more comparable to the suffragists than the gay activists who fought it.

“What the [opponents of Amendment 2] are saying is that those who oppose certain types of special protections here cannot get their policy preference vindicated through the legislative process unless they are able to successfully preempt or repeal such laws at the local level,” said Tymkovich.

What Is Special?

Scalia used Tymkovich’s mention of “special protections” to change the subject again.

“When you talk about ‘special protection,’” said Justice Scalia, “. . . how do you interpret the term ‘minority status, quota preferences, protected status’?” Amendment 2 prohibited any governmental entity within Colorado from enacting any law or policy which “shall constitute . . . or entitle” a gay or bisexual person to “have or claim any minority status, quota preferences, protected status or claim of discrimination.”

“Protected status,” said Tymkovich, “would be a particular affirmative positive piece of legislation that granted some type of protection. . . .”
Scalia interrupted: “Special protection beyond what?”

“Beyond the Fourteenth Amendment,” said Tymkovich.

“Why wouldn’t that have been your answer?” asked Scalia, to Justice O’Connor’s early question about whether Amendment 2 would mean that libraries could prohibit gay people from checking out books. “No homosexual can be treated differently from other people,” said Scalia. “He simply cannot be given special protection by reason of that status.”

“That’s right,” said Tymkovich, again accepting an assist from Scalia. But the question was not settled. Justice John Paul Stevens was concerned about what “special protection” would mean in the context of places open to the public.

“Could an innkeeper refuse accommodations to a homosexual who was not engaging in any homosexual conduct but had admitted that he had that type of tendency?” asked Stevens.

“To the extent there was some tort law of general applicability in those circumstances about innkeeper’s duty,” Tymkovich said, “we don’t think that Amendment 2 would knock that out.” Stevens tried to translate Tymkovich’s point.

“So you would say the public accommodations protection is still available to homosexuals?”

Tymkovich’s answer was muddled: “Amendment 2 would carve out any special protections in the public accommodation area that had been extended to homosexuals.” Stevens seemed frustrated. Now, it seemed Tymkovich was saying gay people could be refused public accommodation.

“What would the rule be in Colorado?” Stevens asked again. “How do you understand the law there? Now, would a homosexual have a right to be served in a restaurant?” he asked, perhaps alluding to the days when restaurants commonly refused service to African-Americans.

“A homosexual would not have any claim of discrimination or special liability theory in a private setting after Amendment 2,” said Tymkovich. That seemed more clear. Stevens seemed satisfied. But then Tymkovich muddled the answer with an addendum: “Unless the court . . . and again we haven’t had a full construction of Amendment 2 yet from our state courts,” said Tymkovich. “Unless a state court construed the innkeeper’s duty to be a law of general applicability to . . .”
"Do you know what the law of Colorado is on that point?" asked Stevens.

"I do not," conceded Tymkovich.

"So we don't know whether homosexuals have a right to be served or not," concluded Stevens.

Tymkovich agreed, and that response seemed to throw Stevens into O'Connor's position of thinking the language of Amendment 2 had not been adequately interpreted by the state courts. It appeared there might be enough support on the bench to send the case back to the state courts for a more definitive interpretation, an option that would keep antigay initiatives alive for months to come. But Stevens was not finished. He took a swipe at Scalia's characterization of protection for gay people as being "special" protection.

"If they do have a right to be served" in a hotel or restaurant, asked Stevens, "would that be an affirmative right, then, as in the distinction Justice Scalia was drawing, or would that be just being treated like everybody else?"

"I think it would be treated just like any other characteristic or classification that has not gotten the special benefits of the civil rights law," said Tymkovich.

Stevens's question, and Tymkovich's response, seemed to puncture Scalia's "special protections" balloon. But again, Stevens wasn't finished.

**What Is the Purpose?**

"One last question: What is the rational basis for this statute?" It was the question opponents of Amendment 2 most wanted asked.

"The purpose of this statute," said Tymkovich, "was to preempt state and local laws that extended special protections. It was a response to political activism by a political group that wanted to seek special affirmative protections under the law."

"Well, it went further" than preemption, noted Stevens, "because there were political groups that had already—as I understand it, Aspen had a protective statute of some kind."

"That's correct," conceded Tymkovich.

So what, asked Stevens, is the rational basis for "the people outside of Aspen telling the people in Aspen they cannot have that statute?"
When Tymkovich tried to sidestep the question, Stevens repeated it: "What's the rational basis for the people outside of Aspen telling the people in Aspen they cannot have this nondiscriminatory provision?"

Tymkovich fumbled, then asserted that "the rational basis for that substantive decision in our view was a political response to what the people [of the entire state] might have perceived as laws going too far or being too intrusive."

This time, Rehnquist rescued Tymkovich.

"The state of Virginia has a very broad state preemption doctrine," he noted. The law there prevents any local government from passing laws that provide rights beyond what the state law already dictates. Called the Dillon Rule, it has been used by some to argue that localities cannot prohibit discrimination based on any category, such as sexual orientation, not already recognized by state law. "I suppose the rational basis for that is just that the people generally would prefer to have the rules set by the state at large rather than by local governments," remarked Rehnquist.

"That's correct, your honor," said Tymkovich, again jumping on the assist. "And there's nothing wrong, especially in this area of civil rights and statewide protections, in making that an issue of statewide concern. And that's simply what Colorado was...."

But Souter jumped on what he apparently saw as a flaw in that argument. Yes, generally speaking, a state can reserve certain subject matters to itself, as Virginia does. But that is not what Colorado was doing with Amendment 2. Colorado was reserving to the constitutional amendment process all subject matters pertaining to gay people but not to other people, such as senior citizens or people with disabilities. The question, said Souter, is what is the rational basis for making that distinction and singling out gay people?

"Your honor," said Tymkovich, "that's a quintessential political judgment on how you provide protection to relative groups."

"Well, it's a judgment that is made politically, but that doesn't state a rational basis," said Souter. "The question that's being asked here is: Why is discrimination against one group dealt with under state law differently from discrimination against other groups? And your rational basis answer, it seems to me, has got to go to a justification for the classification. It isn't enough simply to say, 'Oh, well, that's what politics decided.'"

Tymkovich fell back on two of the reasons the state had offered at
trial: that the state wanted "uniformity" in its laws on this matter, and that there were "other liberty interests," such as the religious liberty of people who objected to homosexuality. But then he conceded that the state courts also felt that Amendment 2 had not been "narrowly tailored" to advance the religious liberty concern. Scalia interrupted.

"Mr. Tymkovich," said Scalia. "If this is an ordinary equal protection challenge and there's no heightened scrutiny, isn't it an adequate answer to Justice Souter's question to say, 'This is the only area in which we've had a problem'?

Tymkovich, again, agreed, but Justice Souter challenged him to explain what "the problem" with gay people had been.

"I think the problem that the voters saw—they were presented with an opportunity to preempt and make a decision at a statewide level for laws that raise particular and sensitive liberty concerns," said Tymkovich. He was fumbling again, with no clear response. And again, Scalia came to the rescue.

"State subdivisions giving preferences which the majority of the people in the state did not think desirable for social reasons—isn't that the problem that was seen?" asked Scalia, though his "question" was clearly a response to Souter's question.

"That's right," said Tymkovich.

Scalia continued the argument.

"And if they should start giving preferences for some other reason that the majority of the state did not consider desirable—let's say bigamy, special preferences to bigamist couples—there would be a law on that subject as well. Isn't that your answer? This is the only area where the people apparently saw a problem, which is enough [of a rational basis] for equal protection."

"It is," said Tymkovich, trying to pick up the ball Scalia had given him. "And this is an area where there have been piecemeal additions of special protections."

"What is the special preference at stake here?" asked Stevens, again undercutting Tymkovich's attempt to regain composure. "What is the special preference that a homosexual gets?"

Tymkovich said "homosexuals are entitled to every other protection" available to others plus "a cause of action on the basis" of sexual orientation "that's not available" to others.

But, noted Ginsburg, Tymkovich had already conceded that a restaurant could refuse service to gay people. Presumably a hospital
could, she said, refuse a gay person treatment on a kidney dialysis machine, saying that the machine was a scarce resource. What if some wanted to ration its use by cutting only gay people off the waiting list? What cause of action, she asked, would a gay person have?

Tymkovich had to concede again: He did not know.

The final question for Tymkovich came from Justice Steven Breyer. Only he and Justice Clarence Thomas had stayed out of the discussion thus far, and Thomas would, as he typically had in the Supreme Court oral arguments, not become engaged in the discussion.

Like O'Connor, Breyer was confused about some of the amendment's specific language. He wanted to know what the initiative language meant when it said that no entity of the state could adopt or enforce "any statute, regulation, ordinance or policy" concerning protections for gay people. If a local police department has a "policy" against gay bashing or a librarian has a "policy" of allowing gay people to use the library, he asked, does Amendment 2 undo those policies? Tymkovich said Amendment 2 "would not prohibit that."

"Then what does the word 'policy' prohibit?" asked Breyer.

Again, Tymkovich fell back on Scalia's "special" preferences mantra.

"Policy," he said, "prohibits the enactment of some special entitlement . . . ."

But Breyer interrupted him.

"What is 'policy,'" he asked, "if it isn't the policy of the department saying, 'Do not discriminate against gays'?"

Scalia tried to help.

"Mr. Tymkovich," he prompted, "I assume in your state you're not allowed to bash nongays either, are you?"

"No," said Tymkovich, following Scalia's lead. But by that point, Scalia seemed to have given up on Tymkovich being able to follow his lead adequately. When Tymkovich tried to continue that thought, Scalia simply interrupted him.

"The criminal law," said Tymkovich, "is . . . ."

"So prohibiting the bashing of gays," continued Scalia, "would not be a special protection, would it? It would just be enforcing the general law."

"Yes," said Tymkovich, who tried again to pursue the point. "And Amendment 2 does nothing to restrict the applicable . . . ."

"Isn't that," interrupted Scalia again, "the response to Justice . . . ."
“That’s right,” said Tymkovich.

“Fine,” said Scalia, and the courtroom again erupted in laughter.

But Breyer clearly felt he had not gotten an answer to his question about “policy.” What does the word “policy” prohibit, then?

“It prohibits any type of special protection or a liability claim that somebody might have under that policy,” said Tymkovich.

Kennedy reentered the fray at this point to note that Tymkovich’s answer was “inconsistent” with the Colorado Supreme Court ruling, which said Amendment 2 would void state health insurance antidiscrimination policies as they pertain to gay people.

When Breyer went back to his police department example again, Tymkovich inexplicably suggested that police policy could prohibit discrimination against lesbians and gay men. His time was nearly up, and he stepped down from the podium, saving his final minute for rebuttal of Dubofsky’s arguments on behalf of plaintiffs.

For the Plaintiffs

As she went to the podium, plaintiffs’ counsel Jean Dubofsky felt confident the case had already been won against Amendment 2. Justice Kennedy’s comment to Tymkovich that James “doesn’t work” in the Romer case, was, she believed, tantamount to victory. A respected attorney with experience before the Supreme Court had advised her, she said, “that the argument in the Supreme Court would be about what Amendment 2 means.” And that advice had already proven itself on the mark.

But when Dubofsky launched her argument against Amendment 2 by saying that the initiative is “vertically broad”—that it prohibits “all levels of government in the state,” including police departments, from providing protection to gay people, both Rehnquist and Kennedy immediately shot two holes in the argument, noting that voters can and the state courts may be able to take action.

Breyer picked up on Dubofsky’s disagreement with Tymkovich’s sudden claim that Amendment 2 did not prevent a police department policy and asked her about it. In response, Dubofsky pointed out that the Colorado Supreme Court ruling noted examples of such policies as among those that would be repealed by the measure and precluded from future enactment.

Scalia then suggested that Dubofsky was overreaching with these
examples. The proper interpretation of the Colorado Supreme Court ruling, he said, was that Amendment 2 would prohibit only "special protection" for gay people. He asked whether Dubofsky was suggesting that, under Amendment 2, no general laws—such as those criminalizing murder and "bashing"—could protect gay people the same as they protect all citizens.

Dubofsky said she thought Amendment 2 could, in fact, undo the application of general laws to gay people but conceded that the Colorado Supreme Court did not "go that far in its interpretation."

"I think they interpreted it to refer to special protections accorded to homosexuals," said Scalia, "and not to [general protections for] the public at large."

"I think we're having trouble a little bit with semantics," said Dubofsky. Part of the trouble, she said, was Scalia's use of the term special protection.

"I don't think there is such a thing as special rights or special protections," said Dubofsky. "I think there's a right which everyone has to be free from arbitrary discrimination."

"No, but if I go and ask a homeowner to take me in on a bed and breakfast or boarding house, and the homeowner says, 'I don't like Italians,' that's my tough luck," said Scalia, "unless there's a law against it. It's that person's house and that person is entitled not to like Italians and not to rent rooms to Italians."

Returning to Scalia's "special protections" terminology, Dubofsky argued that laws that prohibit discrimination based on sexual orientation provide protection generally, to "everyone"; Amendment 2 preempts these laws, Dubofsky said, "only on the basis that they" protect gay or bisexual people.

"But they are laws that provide special protection for that particular category of person," said Scalia, "which they don't provide to people at large... Special protection is given by this law which [gay people] cite by reason of homosexual orientation or conduct. Is that not special?"

Justice Kennedy soon jumped in to explore ways in which Amendment 2 might not preclude protection for gay people. If a city has a law against barring people from a public accommodation for any "arbitrary or unreasonable" reason, could not a court in Colorado still declare, under Amendment 2, that barring a person because of sexual orienta-
tion constitutes such an "unreasonable or arbitrary" reason?, he wondered.

Dubofsky said she thought a court could do that. But if the person was denied the accommodation because he or she is a gay person, then a court might not be able to grant relief.

Ginsburg apparently felt Dubofsky was straying.

"But isn't the very purpose of [Amendment 2] to say, 'It's not arbitrary to leave out of a catalog of protection against discrimination, it's _not_ arbitrary to leave out . . . persons of homosexual, lesbian, or bisexual orientation?" she asked.

"Amendment 2, if interpreted at its broadest, would authorize that type of discrimination," said Dubofsky.

Now Souter seemed to think she had misstepped.

"But even on a narrower interpretation, even for example if Amendment 2 didn't touch the courts," said Souter, "wouldn't it be very difficult for the courts of Colorado to say that that was an irrational or an arbitrary basis for discrimination with Amendment 2 on the books—even if Amendment 2 was narrowly construed?"

"Yes," said Dubofsky, "it would be, I believe . . . But the Colorado Supreme Court," she pointed out eventually, "didn't think it was necessary to go that far in order to find the amendment unconstitutional."

**How Far the Reach?**

That prompted Justice O'Connor to reiterate her concern: that the state courts had not given Amendment 2 a "definitive interpretation . . . of how far this amendment would go."

"I think the arguments and responses this morning," she said, "are illustrative of the fact that we're not sure."

 Dubofsky tried to disagree, pointing out one section of the Colorado Supreme Court ruling, but O'Connor dismissed that section.

"I looked at that," she said, "and I just thought that that wasn't definitive. There are still questions about how far it would go and the extent to which it reaches courts, and so forth and so on."

Specifically how far the amendment reaches, suggested Rehnquist, might not be important given that the case challenges the measure's constitutionality on its own—and not as applied to any specific instance. Dubofsky agreed.
Scalia saw a hole. If this was a so-called facial argument, he noted, then Dubofsky would have to show that “there are not applications in which the statute can be constitutional.”

“It doesn’t necessarily mean that there are no applications that would be constitutional,” said Dubofsky, apparently fearing that Scalia would proffer one. “It just means that those are irrelevant.”

“Well, that’s not what our case law involving facial challenges says,” said Scalia.

This time, Ginsburg held out an assist.

“Ms. Dubofsky,” she said, “do I understand correctly what you’re saying about what the Colorado Supreme Court said—at a minimum, this amendment immediately repeals all of the laws that are listed, and this group of people cannot be reinstated into this group of laws without a constitutional amendment—and that is what you say is unconstitutional under federal equal protection?”

Dubofsky attempted to respond, then found herself in another skirmish with Scalia, who pointed out that Colorado’s antidiscrimination laws did not prohibit all forms of arbitrary discrimination. After saying that Scalia “could be right,” Dubofsky described antidiscrimination ordinances as “general prophylactic rules” and attempted to distinguish such rules from Scalia’s critique.

Breyer jumped in, suggesting that Dubofsky meant to explain that laws against arbitrary discrimination are still undone, as they apply to gay people, under Amendment 2.

“That’s correct,” said Dubofsky.

“Seems a Little Odd”

Kennedy again sought a way of interpreting Amendment 2 that might not preclude general protection for gay people.

“Suppose that Colorado is concerned that one city has passed an ordinance giving preference to gays in employment hiring, and, for any number of reasons, the citizens of Colorado do not want that. Some people say they want ‘uniform’ laws because it’s easier on employers,” suggested Justice Kennedy. “Could the citizens of Colorado, by referendum, repeal that ordinance?”

“Yes, they could repeal that ordinance,” said Dubofsky.

“Could they also provide that no such ordinance shall be adopted in the future?”
No, said Dubofsky, and that was the crux of the argument for opponents of Amendment 2—that the prohibition on future laws interfered with the right of gay people to participate equally in the political process. She did not get a chance, however, to explain that argument.

“Well, it would seem a little odd,” said Justice Kennedy; “there could be an ordinance enacted, then repealed by the referendum, then the ordinance is enacted again, then repealed. It just goes back and forth. That seems a little odd.”

Then Justice O’Connor offered a hypothetical: “Could Colorado adopt a law that says any law in our state dealing with discrimination on any ground has to be passed at the state level?”

“It could,” conceded Dubofsky. “There are other problems with dealing with civil rights protections and generally, but let’s say they passed Amendment 2 but it didn’t target gay people; it simply said that no one can obtain any protection from discrimination, arbitrary discrimination, for any reason. That,” said Dubofsky, “would not present the problem that Amendment 2 presents. Amendment 2 is very selective. It targets only one group of people, and that’s where it encounters equal protection difficulties.”

“What group does it target?” asked Scalia, saying he was reiterating to her his question to Tymkovich about what does “orientation” mean—to whom does it apply?

Dubofsky said that, since “heterosexual people are not identified exclusively by heterosexual conduct,” homosexual orientation would include more than just those people who engage in homosexual sex.

But Ginsburg interrupted this discourse to point out that the language of Amendment 2 refers to people with both a homosexual “orientation” and “conduct.” And Souter returned Dubofsky to her “political participation” argument.

“Let’s say there were an ordinance in a given city saying there will be no discrimination based on age, handicap, or sexual orientation,” said Souter, “and there were a political move in that city to repeal the reference to sexual orientation. That would be targeted at homosexuals, but it would not run afoul of what I understand your position to be here, is that correct?”

“No,” said Dubofsky, after a long pause. But before Dubofsky could take up the opportunity to discuss political participation, Rehnquist interrupted with yet another hypothetical. If “dissident Mormons” wanted to repeal a law against polygamy, he said, and the Con-
stitution says polygamy will always be a felony, “does that fence out these people?”

“Not necessarily,” said Dubofsky, because that law or constitutional provision deals with “much more of a discrete issue. It’s not restructuring the political process.”

“That is different from this case,” she elaborated, “because this case is targeting a particular group of people on a personal characteristic.”

As Dubofsky seemed to settle that hypothetical, Scalia took his final swipe. He wanted to know whether she was asking the Supreme Court to overrule its 1986 decision in *Bowers v. Hardwick*, upholding Georgia’s sodomy law as it applied to same-sex partners. Although the plaintiffs would certainly have welcomed such an action by the Court, they had not asked for that in their briefs, believing it was both risky and unnecessary to winning their case in *Romer*. But Scalia apparently wanted a clear statement on the record to that effect.

“No, I am not,” said Dubofsky.

Since the Supreme Court said in *Hardwick* that “homosexual conduct” can be made criminal, said Scalia, “Why can’t a state not take a step short of that and say, ‘We’re certainly not going to make it criminal but on the other hand, we certainly don’t want to encourage it, and therefore, we will neither have a state law giving it special protection, nor will we allow any municipalities to give it special protection.”

“It seems to me,” said Scalia, “... if you can criminalize it, surely you can take that latter step, can’t you?”

“What you’ve done,” said Dubofsky, “is deprived people, based on their homosexual orientation, of a whole opportunity to seek protection from discrimination, which is a very different thing.”

Amendment 2, interjected Justice Stevens, applies to gay people “even if they abstain from the prohibited conduct.”

Justice Ginsburg returned Dubofsky to Justice Kennedy’s point that, if Amendment 2 could not prevent the enactment of future legislation, then the state might be in a situation where a city council passed antidiscrimination and voters repealed it, over and over again.

“Isn’t the state entitled to end a ping-pong game?” asked Ginsburg.

Dubofsky tried again to suggest simply that preempting future legislation is “different” than repealing existing legislation. Then Justice Souter jumped in with the answer: The state, he suggested, could
“end the ping-pong” game if it ends it with respect to protection against all people, not just gay people.

Dubofsky’s time was up. Tymkovich had one minute remaining and tried again to emphasize that Amendment 2 was taking one “issue”—and not gay people—out of the political process. But again Souter made clear he was unpersuaded, saying the initiative “speaks both in terms of issue, i.e., basis for claim, and group.”

“It refers to both, doesn’t it?” asked Souter. “You can’t have one without the other. . . .”

“It Refers to Both”

Seven months later, on May 20, 1996, the U.S. Supreme Court agreed that the initiative was excluding “both”—gay people and protections for gay people—from the political process. It affirmed the Colorado Supreme Court decision, striking down Amendment 2 as unconstitutional. But where the state court said the initiative violated a fundamental constitutional right to participate in the political process, the Supreme Court noted that it was deciding the case on “other grounds.” In a 6 to 3 decision, the Court held Amendment 2 violated the constitutional right to equal protection because it violated the literal guarantee to equal protection of the laws and because it lacked a rational basis for its classification of gay people. The reasons the state offered to justify its infringement of gay people’s ability to seek protection against discrimination from government, said the majority, were “implausible.” The initiative seemed to be motivated by nothing but “animus” for gay people, and animosity could not be a legitimate reason to discriminate against any group.

Justice Kennedy wrote the majority opinion and was joined by Justices John Paul Stevens, Sandra Day O’Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. The majority opinion was 14 pages long, approximately the same length as the majority opinion ten years earlier in Bowers v. Hardwick and, following an eloquent and symbolically significant nod to previous cases, it explained the Amendment’s constitutional flaw.

“One century ago,” wrote Kennedy, in the ruling’s first paragraph, “the first Justice Harlan admonished this Court [in his dissent to Plessy v. Ferguson, a ruling upholding racial segregation] that the Constitution ‘neither knows nor tolerates classes among citizens.’
Unheeded then, those words now are understood to state a commit­
ment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution." (It is interesting to note that, of all the briefs filed in the case—citing numerous cases from the history of the civil rights struggle of African-Americans from the earliest civil rights cases to school deseg­reg­ation cases to cases challenging antimiscegenation laws—only one brief [and the concurring opinion at the Colorado Supreme Court] mentioned Plessy v. Ferguson. That brief, a secondary brief from attor­neys for the City of Aspen, quoted the same statement from Harlan's dissent.) By invoking this powerful, historic lesson at the outset of the opinion, the majority was sending a clear message that the Court con­sidered the type of discrimination imposed by Amendment 2 as offensive as society now considers the racial segregation permitted by the Plessy majority.

The opinion then turned quickly to the present to explore the meaning of Amendment 2. Noting that the state had argued Amend­ment 2 simply denies gay people "special rights," Kennedy wrote, "This reading of the amendment’s language is implausible.” Instead, said Kennedy, the amendment’s impact is “sweeping and comprehen­sive.” Through Amendment 2, gay people would be “put in a solitary class” in relation to government and in private activities.

"The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies,” said the majority. The impact of this is “far-reaching” and has "a severe consequence.”

The initiative would not only bar gay people from securing pro­tection under laws prohibiting discrimination based on sexual orienta­tion, but it also “deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in gov­ernmental and private settings.”

"Even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amend­ment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights,” said the majority. “To the con­trary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”
Turning its full force on the "special rights" rhetoric that had been successfully used to promote Amendment 2, the Court said, "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."

Having identified the amendment's effect, the Court then turned to assess its constitutionality. The state of Colorado, said the majority, failed to satisfy the judicial system's most lenient equal protection scrutiny applied to laws that single out a group of people for discriminatory treatment.

"First," wrote Kennedy, "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group. . . ." And, "second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."

Concerning the singling out of a group, noted the majority, courts must see a nexus between the class singled out and "the object" of the law affecting that class differently.

"In the ordinary case," wrote Kennedy, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."

On the first point—targeting a "single named group," Amendment 2, which the Court characterized as "unprecedented in our jurisprudence," "identifies persons by a single trait and then denies them protection across the board." The Court said, "A law declaring in general that it shall be more difficult for one group of citizens than for all others to seek aid from government is itself a denial of equal protection of the laws in the most literal sense."

On the second point—targeting for reasons of "animus"—the majority said that Amendment 2 "inflicts on [gay people] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."
In short, "a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not."

The Court noted that Colorado claimed that Amendment 2 respects the religious freedom and freedom of association of those people who have "personal or religious objections to homosexuality." It also noted Colorado's claim that Amendment 2 helped conserve the state's financial resources for fighting discrimination against other groups. But the breadth of the initiative, said the Court, "is so far removed from these particular justifications that we find it impossible to credit them."

"We cannot say that Amendment 2 is directed at any identifiable legitimate purpose or discrete objective," wrote Kennedy. "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit . . .

"We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else," concluded Kennedy. "This Colorado cannot do. A state cannot so deem a class of persons a stranger to its laws."

Impassioned Dissent

In dissent, three justices made prominent mention of their upset over the legal and political consequences of the decision.

"In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision [Bowers v. Hardwick], unchallenged here, pronounced only 10 years ago, and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias," wrote Justice Antonin Scalia.

Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, accused the majority of taking sides in the "Kulturkampf"—cultural war—over homosexuality.

Amendment 2, wrote Scalia, was not an expression of hatred toward gay people but "rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."
The cultural war, wrote Scalia, revolves around the question of whether discrimination against gay people "is as reprehensible as racial or religious bias." Since there is "nothing about this subject" in the Constitution, he said, "it is left to be resolved by normal democratic means," such as through initiatives.

"This Court," wrote Scalia, "has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality is evil." (The notion of an "elite" class being "free of democracy in order to impose the values of an elite upon the rest of us" was proffered in 1989 by Robert Bork.)

"The amendment prohibits special treatment of homosexuals, and nothing more," said Scalia. If a gay person worked for the state, he said, that person would, like all other employees, be eligible for a pension at retirement. All Amendment 2 would do, he said, would be to prevent the state from paying the "life partner" of a gay employee a death benefit "when it does not make such payments to the longtime roommate of a nonhomosexual employee."

Scalia did not mention that the "nonhomosexual employee," unlike the gay one, has the option of making his or her longtime roommate a legally married spouse to obtain those death benefits.

To the dissent, the problem was not Amendment 2 but laws prohibiting discrimination based on sexual orientation, or presumably any other characteristic. These laws, said Scalia, bestow "preferential treatment" on certain groups, since these groups, like all Americans, already have the Constitution's guarantee of equal protection of the laws. He made this viewpoint even clearer later when he explained that Amendment 2 did not "prohibit giving favored status to people who are homosexuals; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct—that is, it prohibits favored status for homosexuality." What Scalia did not address was that human rights laws do not address just discrimination against racial minorities, but discrimination based on the characteristic of race—any race. And they do not prohibit discrimination against only those people with a homosexual orientation but

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rather discrimination based on sexual orientation itself—any sexual orientation. What Amendment 2 sought to do was limit the law so that it would protect only those people with a heterosexual orientation. Under Amendment 2, if any group was getting “special” protection or treatment, it was, in fact, people with a heterosexual orientation.

Nevertheless, Scalia said Colorado had ample basis for withdrawing “special protection” from gay people. First, he said, the Court’s ruling in Bowers v. Hardwick justifies treating gay people differently.

“If it is constitutionally permissible for a State to make homosexual conduct criminal,” wrote Scalia, “surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.” (His words closely paralleled those in a brief filed in support of Amendment 2 by the Concerned Women for America: “It follows that if Colorado may criminalize sodomy . . . it may constitutionally preclude the adoption of special homosexual rights laws.”)

Where the majority of justices saw a “status-based” targeting, Scalia saw no distinction between a person who is gay and a person who engages in “homosexual conduct.” Even if a person with a homosexual orientation did not engage in “homosexual conduct,” said Scalia, the Hardwick rationale for upholding Amendment 2 suffices.

“If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”

“Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct,” asserted Scalia. Because the lawsuit was a “facial” challenge to the initiative, he reasoned, the plaintiffs could not prove, as required by law, that there was no set of circumstances under which Amendment 2 would be valid.

Concerning the majority opinion’s claim that Amendment 2 was motivated by “animus,” Scalia argued that “our moral heritage” teaches that “one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.”

“Surely,” wrote Scalia, “that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct.”

Scalia acknowledged that Colorado had repealed its law against sodomy—or, as he put it, “homosexual conduct”—in 1971. But, he said, “the society that eliminates criminal punishment for homosexual acts
does not necessarily abandon the view that homosexuality is morally wrong and socially harmful.” The repeal of sodomy laws often reflects the view that enforcement of such laws “involves unseemly intrusion into the intimate lives of citizens,” he said. The problem in such societies, he wrote, is that gay activists organize to pass laws to prohibit discrimination based on sexual orientation, using the legal system “for reinforcement of their moral sentiments.” People who do not approve of homosexuality, he said, indicating that he believes they constitute the majority of people, counter this with measures like Amendment 2.

Scalia argued that this sort of majority countermove to “preserve traditional American moral values” was at work with laws that prohibit polygamy.

“Polygamists, and those who have a polygamous ‘orientation,’ have been ‘singled out’ by these provisions for much more severe treatment than merely denial of favored status,” wrote Scalia. The only remedy polygamists have to regain legal favor is to amend state constitutions and U.S. law that required that state constitutions ban polygamy, he added.

While the political branches are in the business to “take sides in this culture war,” said Scalia, the courts should not. “But the Court today has done so,” said Scalia, “by verbally disparaging as bigotry adherence to traditional attitudes.”

“When the Court takes sides in the culture wars,” it tends to be with “the knights rather than the villeins [commoners],” wrote Scalia.

“Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will.”

Some immediately hailed Justice Scalia as a truth-sayer, while others saw his scathing words as the venomous tirade of a defeated jurist. Likewise, some saluted Justice Kennedy as a great defender of core constitutional principles, while others critiqued the majority opinion as long on rhetoric but short on law. Responding to that critique, some scholars observed in the aftermath that, when it is writing to convey a principle not only to other lawyers but also to the public at large, the high court will deliberately craft an opinion that is brief and easily understood by nonlawyers to alert readers to the dramatic import of its
ruling. One thing was certain, however: Despite Scalia’s passionate ora-
tion in announcing his dissent from the bench, his points had been
firmly rejected by a majority of the Supreme Court.

The Romer decision was a strong, stunning legal victory for the gay
civil rights movement. Though Colorado Solicitor General Tymkovich
and Colorado for Family Values officials said they might try to rewrite
the initiative to pass constitutional muster, the decision did not offer
hope that such an effort would succeed. The Court had found the pro-
ffered reasons for the initiative—whether religious, moral, or eco-
nomic—to be not just weak but “implausible.” The measure was clearly
motivated by hatred for gay people and designed to put gay people at
disadvantage—to make them “strangers to the law.” That, said the
high court, a state cannot do.