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'A STRANGER TO ITS LAWS': FREEDOM, CIVIL RIGHTS, AND THE LEGAL AMBIGUITY OF ROMER V. EVANS (1996)

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In the modern world, incremental legal change was the true test of lasting constitutional civil rights litigation. Classical liberal ideology privileges legislative authorities to manage social change, but if these forums abrogated the rights of the needy, the judiciary would, in due time, use essential constitutional principles to set things right, to restore lost civil rights. Of course, the paradigmatic example of this process is the Supreme Court's rejection of segregation, and Plessy v. Ferguson (1896), in its 1954 Brown v. Board of Education decision. Even though it took fifty years, the judiciary ultimately corrected its own error and fomented fundamental social change.

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But in the postmodern era, the once confident American judiciary has found itself assailed by the strident objections of an increasing number of disenfranchised and disempowered communities. Perhaps no case better illustrates the complications of postmodernity for legal argumentation than the recent Supreme Court cases concerning the civil fights of gay and lesbian Americans. For much of American legal history, gays and lesbians have been invisible, and only recently have the courts openly discussed their civil rights. Most notably, in Bowers v. Hardwick (1986), the Supreme Court held, 5-4, that the "act of homosexual sodomy"[1] was not "protected as a fundamental right" because of the "millennia of moral" teachings that proscribed such behavior (p. 197). In the decade since Bowers, the federal courts have reached conflicting conclusions concerning the military service of gays and lesbians, child custody issues, same-sex marriages, and insurance discrimination. In most of these cases, gays and lesbians faced the Bowers precedent that often blocked egalitarian reform.

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Despite the Bowers decision, though, optimistic civil rights activists contend that change is forthcoming. Their optimism was buoyed by a 6-3 majority opinion of the Supreme Court in Romer v. Evans (1996), that strack down Colorado's Amendment 2 as an unconstitutional infringement of the "political" rights of gays and lesbians. One gay rights activist, Thomas Stoddard, claimed that "gay people will feel embraced by the highest judicial court of the land" (quoted in Nagourney, 1996, p. 4). A writer for the Wall Street Journal claimed that this ruling would mean that anti-bias legislation would be upheld in nine states and more than 100 cities ("The Supreme Court," 1996, p. 1). Detractors like Kevin Tebedo worried that the "homosexual political lobby" will increase "its efforts in the public schools, in the public square, to try and force this nation to affirm and legitimize open homosexuality" (qtd. in Moss, 1995, p. 28).

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Framed within the traditional discussions of liberalism, conservatism and American jurisprudence, the Romer decision is, seemingly, anomalous. Historically, gays and lesbians have not been considered a "suspect class," and most discriminatory legislation was upheld using the minimal rational relationship test.[2] Yet the Romer decision is praised as a watershed event in the evolution of gay and lesbian rights in the United States. Given the legally confusing nature of this case, and the praise it elicited from civil rights activists, how do rhetoricians

explain the Romer decision? We offer a reading of this case that eschews traditional and formalistic legal analysis in favor of more critical approaches to understanding the role of law in lived experience and communal life. In particular, we see Romer as an opportunity to engage in a "critical rhetoric," and specifically in a "critique of freedom" (McKerrow, 1989). We maintain that the praise for Romer is premature and ignores the contextual and legal factors that adhere to the case and that undermine its civil rights potential. As such, we believe Romer should be read skeptically, critically, and with pause given its place within the trajectory of legal rhetorics addressing the civil rights of gays and lesbians.

This analysis first considers the nature of "critical rhetoric" and the applicability of this theoretical perspective to legal rhetorics. Next, we outline some of the contradictory legal and public arguments that were used in *Bowers v. Hardwick* (1986) and that were found in the promotion of Colorado's Amendment 2. Third, we examine closely the arguments, briefs, and decisions in *Romer v. Evans* (1996) in order to explicate the need for skeptical treatments of these rhetorics. Finally, we advance some tentative conclusions about the judicial future of gay and lesbian rights given the presence of both *Bowers* and *Romer* in American law.

CRITICAL RHETORICS, LEGAL RHETORICS, AND THE CONSTRUCTION OF FREEDOM

In classical liberal theories of jurisprudence, a scholar's role in understanding the "role of law" involves uncovering the clear and consistent norms that guide correct legal behavior. In many cases, this is a hermeneutic exercise, where a jurist, lawyer or scholar is supposed to be an expert in understanding the rational paradigms that ought to govern conventional legal thinking. While pragmatically acknowledging the role that politics, power and prejudice might play in the discovery of legal rules, the believer in classical liberal theorizing still maintains that ideally the law should transcend these mundane squabbles and mandate the strict observance of neutral principles in dispensing justice.

Critics of liberal jurisprudential reasoning contend that scholars and legal practitioners need to sensitize themselves to the power relationships that are created by and through legal discourse. While formalists and other rationalists may search for the enduring legal principles or standards, their postmodern critics demand that the focus of scholarly attention shift to the sustenance of power relationships via legal discourse. Even the most polished and popular legal text, according to this perspective, is now treated as a temporary inventional document filled with malleable parts.

A recent theoretical move in rhetorical scholarship also advocates shifting the focus of criticism away from the generation of positivistic knowledge claims or historical "truths," and toward a critique of the exercise of power in collective life. The "critical rhetoric" turn urges rhetorical critics to engage in political, productive and performative acts that seek to undermine the power relationships so characteristic of collective existence (McKerrow, 1989). Moreover, the critical rhetorician also strives to critique the presence of "freedom" in collectivities with a skepticism that guards "against 'taken-for-granted' that endanger our freedom--our chance to consider new possibilities for action" (McKerrow, 1989, p. 97).

The "critical rhetoric" project, and the plethora of responses, validations and criticisms it has provoked (e.g. Cloud, 1994; Charland, 1991; Gaonkar, 1993; Hariman, 1991; Kuypers, 1996; McKerrow, 1991, 1993; Murphy, 1995; Ono & Sloop, 1992; Owen & Ehrenhaus, 1993; Zompetti, 1997) are interesting for the orientation, the perspective that they call forth in the act of rhetorical criticism. This project puts forth, once again, the "radical" notion that criticism is political, that it should be political, because, like the rhetoric it scrutinizes, rhetorical criticism can and should have consequence. As such, to be a critical rhetorician is to recognize the power of rhetoric in communal, political life that Isocrates identified centuries ago, that Campbell (1972) maintained should inform our criticism of presidential rhetoric, that Wander (1983, 1984) suggested should ideologically turn our scholarship toward the voiceless and unheard, and that Ivie (1995) argued should result in productive criticism. The project is unique, perhaps, for McKerrow's (1989) ability to infuse American rhetorical studies with the critical theories of noted European thinkers. At bottom, though, critical rhetoric simply attempts to keep rhetorical criticism on the trajectory of sustained political, ideological engagement that has characterized much of the metacritical, meta-theoretical work in rhetorical studies for the last twenty-five years.

Legal rhetorics are, or should be, particularly susceptible to analysis governed by a "critical rhetoric" perspective precisely because of the materiality of language in the judicial/legal realm of discourse. In his discussion of Foucault's conceptions of power, McKerrow (1989) identifies judicial power that speaks "in terms of rights, obligations, and of the possibility of exchanging power through the legal mediation of conflicting interests" (p. 97). To understand and critique the exercise of this power, or any other type of power, the critical rhetorician attends to the "microphysics of power" to understand "what sustains social practices" (McKerrow, 1989, p. 98; cf. Cloud, 1994). Put another way, the critical analysis of legal rhetorics "seriously engage[s] the political and ideological implications of the relationship between rhetoric and law for life-in-society" (Lucaites, 1990, p. 445; cf. Brusckhe,

1995; Rountree, 1995).[3]

A critical analysis of legal rhetorics pays particular attention to the ability of such rhetorics to persuade audiences of the presence of freedom and rights. That is, such rhetorics exist significantly to express and demarcate the relationships of communal life, and to establish the precise nature of the social contract and the respective roles of the state and the individual. In so doing, such rhetorics enact tremendously powerful discourses of freedom and obligation. Within the prevailing ideological nature of Western, Anglo-American rhetoric, these constructions of freedom are influential and persuasive and often come to be naturalized and dehistoricized. A critical rhetoric seeks to uncover the contingent and constructive nature of these rhetorics, to cast a skeptical glance at their demarcative power, and to offer additional or substitute rhetorics of freedom and obligation that eschew existing relationships of domination and control. This is our task as we critically analyze the construction of civil rights for gays and lesbians in existing legal rhetorics.

REVISITING BOWERS V. HARDWICK (1986) AND THE CAMPAIGN FOR COLORADO'S AMENDMENT 2

In *Bowers v. Hardwick* (1986), the Supreme Court upheld the constitutionality of Georgia's criminalization of consensual sodomy.[4] Sinful acts by both the married and unmarried fell into the category of "sodomy." Until the late eighteenth century, almost all of the ecclesiastical and civil codes in AngloAmerican legal discourse considered "sodomy" an offense so serious that it was punishable by death (Murphy, 1990, p. 49). The facts of the case are fairly straightforward. In August of 1982, Michael Bowers was in his bedroom engaged in consensual oral sex with a man when a police officer, let onto the premises by Bowers' roommate, entered the bedroom and arrested Bowers for violating the Georgia statute (Copelon, 1990, p. 180). Justice Byron White's majority opinion revealed that five of the justices did not believe Bowers had a "fundamental right" to privacy resembling the sacrosanct rights traditionally tied to family relations, marriage or procreation (Bowers, 1986, pp. 190-191; see also Srader, 1994). Claiming that "proscriptions against [homosexual] conduct" had "ancient roots," Justice White observed that until 1961, all fifty states outlawed sodomy. Controversially, White invoked earlier historical prefigurations of "homosexual conduct" when he claimed that if gays and lesbians were provided constitutional protections, the Court would soon face claims for fights to adultery, incest, and other sexual crimes committed in the home (Bowers, 1986, pp. 195-196). The weight of historical and legal precedent and particularized conceptions of morality guided the majority's opinion, even with Justice Harry Blackmun's warning, in dissent, that the Georgia statute possibly violated the Eighth, Ninth, and Fourteenth Amendments (Bowers, 1986, p. 201).

From a traditional legal standpoint *Bowers v. Hardwick* (1986) resolved the issue of gay and lesbian fights, even if the opinion simply represented a temporary configuration of normative opinions based on several layers of contradictory meanings. The Bowers majority not only ignored the impact of Georgia's statute on both "heterosexuals" and gays and lesbians-it also used historical discrimination as proof of the traditions of ordered liberty rather than as evidence of the need for change.[5] The case also allowed the 1986 Court to narrow the meaning of privacy so that it became consubstantial with reproductive rights, thus implying that there can be no family or right of privacy that comes from the "perversion" of "natural" sexual relations. By recirculating old fears of degeneration in the guise of legal lexicons, the Court gave the impression that *Bowers* is an apolitical decision that simply deferred to the popular will expressed in the Georgia statute.

In many ways, *Bowers* empowered gays and lesbians because it reminded them that the Supreme Court was not the best or only recourse for extended civil rights. *Bowers* was not only a ruling about sexual privacy, but also a political stand reinforcing the notion that ancient proscriptions would continue to legitimate the criminalization of "homosexuality" (Hunter, 1992). Over the ensuing six years, activists tried to pass a series of measures designed to prohibit discrimination against gays and lesbians.

Colorado, as the headquarters for several conservative organizations, became a battleground for the legal conflict over gay and lesbian civil rights. In many ways, the state is split politically-the larger urban areas (e.g., Denver, Aspen, Boulder) are predominantly liberal and pro-gay rights while many of the rural communities are strongholds for antigay rights advocates. In the 1970s, highly controversial legislation protecting gays and lesbians from discrimination was passed in some of Colorado's major cities, and renewed debate ensued when legislators attempted to re-enact some of these ordinances (Coukos, 1994).

Led by organizations like Colorado for Family Values (CFV),[6] groups in Colorado Springs and other municipalities began a petition drive to place an amendment (later Amendment 2) on the 1992 election ballot.[7] The proposed amendment prohibited special rights for "homosexuals" and it attempted to ensure that no entitlements or quotas would be used to provide "preferences" based on status or claim of discrimination.[8]

In the months that preceded the election, voters heard repeated claims for "equal civil rights" for everyone and, conversely, the right to "free choice" in discrimination. Advocates of Amendment 2 spoke to local church groups,

made speeches on pedophilia and sadomasochism, and warned audiences that providing rights to gays and lesbians would increase risks to Colorado's children. Literature was distributed by CFV indicating that "homosexuality" was a lifestyle that could be altered and reversed. Even more inflammatory were campaign brochures claiming that "[m]ost Americans who got AIDS from contaminated blood as of 1992 received it from homosexuals" (qtd. in Stumbo, 1993, p. 79). Paul Cameron, director of the Family Research Institute, claimed that "homosexuality" was an addiction that caused an "octopus of infection stretching across the world" (qtd. in Brooke, 1995, p. A18). Significantly, mainstream liberals underestimated the power of conservative forces in Colorado, especially in the Eastern part of the state. In this mainly agricultural region, the anti-gay and lesbian messages from the right resonated with the religious values of many residents (Coukos, 1994). Adding to the controversy were the apparent position changes of Governor Roy Romer, who both issued an executive order barring discrimination based on sexual orientation in 1990 and then found himself defending Amendment 2 after its approval in 1992 (Savage, 1995).

After this protracted and stormy debate, Coloradans voted on November 3, 1992, to approve Amendment 2 with 53.4 percent voting yes (Evans v. Romer, 1993).[9] The CFV's Kevin Tebedo remarked that the election proved that "we can win without Denver and Boulder. We've proved it with Amendment 2, that thirty years of homosexual propaganda can be turned back-because there are more of us than them!" (qtd. in Stumbo, 1993, p. 80). Immediately after the victory, supporters began conducting weekly seminars in neighborhoods that taught local residents how to discover "homosexuality" in schools and businesses.

Amendment 2 would have voided all existing gay and lesbian rights ordinances in at least three municipalities in Colorado and it would have overturned an executive order prohibiting anti-gay discrimination in state employment (Moss, 1995). While the courts determined the propriety of an injunction, the controversies outside of the courtroom continued. By 1993, Colorado was known as the "Hate State," and cars throughout the state sported bumper stickers that announced "Hate is Not a Family Value," and "Faggot Free in '93." CFV was transformed into a center for anti-gay conservatives, and activists in the states of Arizona, California, Florida, Idaho, Michigan, Ohio, Oregon, and Washington began copying Amendment 2 (Stumbo, 1993). Liberals in Colorado found support from dozens of organizations, including the National Organization for Women and the American Library Association, that canceled any business in the state. Other boycotts followed the passage of Amendment 2, and some estimates conclude that Colorado lost at least \$100 million in business revenue as a result of the Amendment (Stumbo, 1993; cf. Johnson, 1994). Pro-Amendment 2 voices merely concluded that such losses were small compared to the victories won against deviance and immorality.

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On its face, Amendment 2 appeared neutral and fair, as it seemed to bar any single group from lobbying for change on its own behalf. As decontextualized, dehistoricized rhetorics, some audiences might plausibly believe that gays and lesbians were seeking "special rights" in Colorado and that Amendment 2 was a reasonable response. Rights and freedom, though, always have their discursive roots in the broader rhetorical culture and their contingent nature in this case is revealed in the hate-filled diatribes that surrounded the debate over Amendment 2.

These diatribes, this rhetoric, forms the contextual backdrop for the judicial challenges to Amendment 2. These challenges culminated with the United States Supreme Court's opinion in *Romer v. Evans* (1996) that struck down Amendment 2 as unconstitutional. Given the highly charged symbolic environment in Colorado, and nationally, that surrounds the issue of civil rights for gays and lesbians, the Court's opinion was significant. And its ruling was hailed as a watershed event for gays and lesbians. Our more skeptical reading of this ruling pays particular attention to the discursive, and ultimately unsatisfying, constructions of "freedom" in several of the legal rhetorics that addressed Colorado's Amendment 2. In particular, we examine the lower court opinions, an amicus curiae brief filed with the Supreme Court, and the opinion of the Court itself.

The Colorado Courts and Amendment 2

The legal history of the disputes over Colorado's Amendment 2 are fascinating for the varied and subtle ways in which various courts employed different rationales to attack the legality of the amendment. At the District Court level, Judge H. Jeffrey Bayless issued a preliminary injunction that barred the enforcement of Amendment 2 to the Colorado Constitution (Evans v. Romer, 1993, p. 73, 833) In so doing, the judge concluded that the amendment did affect a "fundamental right of an identifiable class," and that there was a reasonable probability that the plaintiffs would later succeed in showing that this amendment violated the equal protection guarantees in the United States Constitution. In his opinion, Judge Bayless made the controversial claim that the fundamental

right that was involved in this case was the "right not to have the State endorse and give effect to private biases" (p. 73, 841).[10]

Interestingly, Judge Bayless recognized and made clear his awareness of the different audiences for his opinion. As he wrote in *Evans*,

[I] am aware of the interests in this case and the interests in this decision from non-legally trained folks, just the people of Colorado who voted on the Amendment. So what I have attempted to do in writing this is to write at two levels. One for the lawyers and one for the non-lawyers. And I hope that not to insult either. (*Evans v. Romer*, 1993, p. 73, 834)

After explaining for his readers both the plaintiffs' and the defendants' arguments, Bayless claimed that this was not a case that questioned the involvement of groups like CFV in the presentation of initiatives for state governments. Nor was his task to rule on the question of the constitutionality of Amendment 2 (*Evans v. Romer*, 1993, pp. 73, 834-73, 835). The primary question that he had to ask was whether the granting of the preliminary injunction served or disserved the public interest. Based on his reading of the "identifiable class" within Amendment 2 and his reading of constitutional law, Bayless concluded that he had to enjoin enforcement of this regulation because he believed that the plaintiff's had a "reasonable probability" of showing its unconstitutionality (p. 73, 841). In short, Bayless rightly avoided the question of constitutionality, recognizing instead that such questions would be handled by other courts at other times.

When the Colorado Supreme Court reviewed Bayless' decision six months later, they affirmed his entry of the preliminary injunction that enjoined the State of Colorado from enforcing Amendment 2. The opinion of Colorado's highest appellate court (*Evans I*) was delivered by Chief Justice Rovira, who noted that the plaintiffs wanted to move away from the Bayless' claim that there was a fundamental right "not to have the State endorse and give effect to private biases" (*Evans v. Romer*, 1993, p. 1274). Now Rovira and the other justices entertained the notion that if there was any such right involved, it was the "right to participate equally in the process of government" (p. 1276). Here was the real link to strict scrutiny, and Rovira concluded that gays and lesbians had been "fenced" out of this process by Amendment 2 (p. 1282). This did not mean that the plaintiffs had a right to successful participation, but rather that they could not be singled out without any compelling state interest.

This decision by Colorado's Supreme Court meant that the case went back to the District Court for a ruling on whether a permanent injunction would be granted to the plaintiffs. The same Judge Bayless decided that the burden was now on the defendants (the State of Colorado) to show that there was "at least one compelling state interest" involved in a statute that needed to be "narrowly drawn to support that interest" (*Evans v. Romer*, 1993, p. 77, 933). In order to make that determination, the lower court had to provide both findings of fact and conclusions of law regarding these issues. Bayless rejected the defendants' claims that Amendment 2 reduced factionalism or preserved the political process, despite the claims of CFV member Tony Marco that Colorado faced "militant gay aggression" (*Evans v. Romer*, 1993, p. 77, 934).

One of the most interesting arguments presented on behalf of defenders of Amendment 2 came from the testimony of civil rights activists and jurisprudential scholars who claimed that the state had a compelling interest in controlling scarce resources and avoiding the "dilution" of protection for existing suspect classes (*Evans v. Romer*, 1993, p. 77, 935). For example, Professor Joseph Broadus of the George Mason University School of Law espoused the belief that if gays and lesbians were added as a protected class to any statute, this would mean the lessening of "the public's respect for historic civil rights categories" (*Evans v. Romer*, 1993, p. 77, 935). To answer these claims, the plaintiffs presented testimony from witnesses who argued that sexual orientation cases made up a very small percentage of the total number of discrimination suits. Bayless concluded that on balance, this scarcity argument was not strong enough to be a compelling state interest.

Another rationale put forth by defendants involved the issue of governmental interference with personal, familial and religious privacy (*Evans v. Romer*, 1993, p. 77, 937). Bayless admitted that preserving religious freedom was a compelling state interest, but he argued that any "religious right to discriminate" could not "coexist" with their ["homosexuals"] right of participation in the political process" (*Evans v. Romer*, 1993, p. 77, 937). In the concluding sections of his opinion, he reminded his readers that even if there were compelling state interests involved (religious freedom and family privacy), the Amendment needed to be narrowly drawn to achieve that purpose. Bayless was unwilling to draw that conclusion.

While the plaintiffs had technically won their day in court, there were still issues that had been presented to Bayless that created a wealth of ambiguity at the trial court level of review. Apparently the plaintiffs wanted this sympathetic judge to be on record as supporting the claim that gays and lesbians were a "suspect class" or "quasi-suspect class." This he was unwilling to do. Bayless dispensed with this claim by pointing to other jurisdictions that had denied this claim (e. g., *High Tech Gays*, 1990). This particular jurist concurred with those authorities who believed that gays and lesbians were not politically powerless. In sum, Bayless was able to find that Amendment 2 was unconstitutional, that there was a fundamental right involved, and that the court needed to

turn a preliminary injunction into a permanent injunction. But he was unable or unwilling to take that final step and assure the freedom of gays and lesbians to fight discrimination as a "suspect class."

In 1994, the Colorado Supreme Court (Evans II) once again reviewed Judge Bayless's decisions, attempting to finalize the state's legal position regarding Amendment 2 and the permanent injunction against its enforcement. Chief Justice Rovira once again wrote the majority opinion. After noting that the plaintiffs had not appealed the trial court's denial of suspect class status (Evans v. Romer, 1994, p. 1341 n. 3), the Colorado Supreme Court reaffirmed their holding that Amendment 2 had triggered the strict scrutiny standard of review. The rest of the Rovira opinion dealt with the compelling interest claims of Governor Romer and the other defendants. The religious based objections were answered by the claims that the Amendment was not narrowly tailored to serve the state's interests in ensuring religious liberty (Evans v. Romer, 1994, pp. 1342-1343). Rovira was also not convinced that the preservation of resources was a compelling state interest (Evans v. Romer, 1994, p. 1345), and he similarly dealt with the issues of state endorsement of political objectives, factionalism, and the Tenth Amendment. Ultimately, the Colorado Supreme Court had little difficulty deciding that they would affirm the trial court's entry of a permanent injunction barring the enforcement of Amendment 2.

Quite clearly, the Colorado courts dealt Amendment 2 a severe legal blow, but did so without addressing fundamental questions of constitutionality and personal freedom. Most notably, these courts ignored the Bowers v. Hardwick (1986) decision and were able to avoid the issue of gays and lesbians as a "suspect class" because of the plaintiffs' decision (of perhaps a tactical nature) to waive that question. These questions lingered in the background of the legal debate over Colorado's Amendment 2, and would remain significant as the case was appealed to the United States Supreme Court.

The Tribe Brief

In many ways, one of the most important rhetorics put forth in this controversy was an amici curiae brief submitted by several elite law professors, including Lawrence Tribe, John Hart Ely, Gerald Gunther, Philip Kurland, and Kathleen M. Sullivan (1995). Jean Dubofsky, one of the lawyers who argued the case for the plaintiffs, later remarked in an interview that the Tribe brief had a major impact on the oral argument before the justices (Toobin, 1996, p. 45). Dripps (1996) similarly opined that the High Court majority "swallowed" some of the arguments in the brief "hook, line, and sinker" (p. 18).

Although only 13 pages long, this brief tried to persuade the Supreme Court that there was a way to resolve the Colorado Amendment 2 controversy without directly having to overturn the Bowers decision. Claiming that they had an argument that was "quite different from and more basic than the one relied upon by the Colorado Supreme Court," these brief writers maintained that Colorado's Amendment 2 was a "per se" violation of the Equal Protection Clause of the Fourteenth Amendment" (Tribe et al., 1995, p. 1).

In the introductory summary of their argument, Tribe and his colleagues contended that when Colorado declared "some people" ineligible for the "equal protection under the laws," this constituted a violation of the Equal Protection Clause of the Fourteenth Amendment (p. 1). While acknowledging that "states have no affirmative duty to enact special laws for each individual or group who might be victimized by discriminatory treatment," the brief goes on to claim that this does mean that state constitutions can preclude the "possibility" of legal protection from a "whole category of harmful conduct" (p. 2).

This is a legally and rhetorically powerful position for several reasons. First, it is a stance that does not depend on a defense of the right of privacy or the need to overturn Bowers. Second, it recognizes the ancient taboo of providing "special" rights to anyone, a legal position that is as old as Justice Bradley's arguments in the Civil Rights Cases (1883). The arguments in the brief thus appear to provide a parallel and symmetrical reason why the courts cannot hold out any group for "special" denial of protections. By arguing that Colorado's Amendment 2 is a per se violation, it also avoids the problems associated with having to prove that gays and lesbians are a suspect class. As Dworkin (1996) recently observed, this "ingenious brief" was crafted in a way that "bypassed the elaborate structures and categories" associated with "suspect classes, fundamental rights, and different levels of scrutiny" (p. 49). Tribe and the other brief writers metaphorically claimed that this legislation created "a unique hole in the state's fabric of existing and potential legal protections against" discrimination (1995,p. 2). This type of stance appeared to be neutral because it was the type of reasoning that could be using "for literally any characteristic" (p. 2). In sum, this section of the brief claimed that:

All the Court needs to decide in order to affirm the judgment below is that a state's constitution by definition denies equal protection of the laws when it decrees that homosexuality, or indeed any identifying characteristic the state uses to select a person or class of persons from the population at large, may never be invoked as the basis of any claim of discrimination by such persons under any present or future law or regulation enacted by the state, its agencies, or its localities. (p. 3)

Some of this legal argumentation appears almost verbatim in the majority opinion of the Supreme Court in *Romer*.

The rest of the brief provides the historical precedents and legal arguments that support this interpretation of Colorado's Amendment 2. Rather than dealing with specific instances of past discrimination, the brief continually reiterates the claim that any "selective preclusion" violates the Equal Protection Clause (p. 4). For example, Tribe and the others noted that if robbers and blackmailers were all denied equal protection guarantees, this was obvious discrimination. While a state might decide not to legislate against discrimination, once it decided to afford some protection then it had the obligation of providing it equally to everyone. (p. 5).

To be effective, this brief had to answer the issue of "special rights" for gays and lesbians, and some of the best strategizing takes place in the middle part of the brief. Tribe and his cohorts try to illustrate how Colorado's Amendment 2 treated "heterosexuality" and "homosexuality" differently. In a footnote, the authors noted that this legislation did not bar all claims of discrimination by heterosexuals, making gays and lesbians worse off than "hot dog vendors, optometrists, left-handed people, and every other group that remains free to claim discrimination" (p. 6). According to the brief, this legislative drafting was a problem that was exacerbated by Colorado's use of its state constitution in this case, which allowed for an affirmation of these policies. Such laws affected not only state discriminatory legislation, but many other common law protections as well.

The authors then linked this discussion of special impediments with an attack on the very rationality of any "governmental" actions that disadvantaged gays and lesbians (p. 8). Furthermore, there had to be reasons why legal redress should be denied those who went to court because of "privately" inflicted wrongs. For Tribe and his colleagues, this was a statute that seemed to be "motivated by anti-homosexual prejudice" (p. 9). The brief makes the claim that even "outlaws" have equal protection rights (pp. 9-10).

The real genius of the brief comes in the historical discussion of the Civil Rights Cases (1883) and the scope and limitations of the Equal Protection Clause. This case is usually a stumbling block for anyone who wants to extend the scope of constitutional protections for the disempowered. In particular, the Civil Rights Cases (1883) do not account for "private" discrimination and there is a condemnation here for the extension of "special rights." In dealing with this case, Tribe and his colleagues used multiple strategic arguments. First, they argued that the Civil Rights Cases "obviously did not present the Court with any measure remotely analogous to Amendment 2" (p. 11). Then they claimed that if there were going to be any such analogies, the Supreme Court needed to look at the "premises" that were involved "underlying" that older opinion. The brief claimed that one of the key premises of the Civil Rights Cases was that there could be no "selective preclusion of access to state law for redress" (p. 11).

To support their interpretation of the Equal Protection Clause, Tribe and his colleagues focused on the way the word "deny" had been used in the Congressional debates following the passage of the Fourteenth Amendment (pp. 11-12). These critics argued that it was not just legislative action that triggered Equal Protection violations—"omissions" could also constitute a denial of constitutional protection. Faced with such historical precedent, Colorado's Amendment 2—characterized as explicit denial of access of state laws for selected persons seemed to be a question with which the "Court has never been presented" (p. 13).

Romer v. Evans

Justice Anthony Kennedy penned the majority opinion in *Romer v. Evans* (1996) and was joined by five other justices in his decision.[11] Although some argue that the case declared unconstitutional Colorado's nullification of "civil rights" for gays and lesbians ("Excerpts," 1996), a close reading of the case reveals that the findings were much narrower. Most of Kennedy's arguments prohibit the creation of any "class" precluded from participation at "any level of state or local government" (*Romer v. Evans*, 1996, p. 4353; see p. 4355). Following the precedent of the Colorado Supreme Court, the majority in *Romer* highlighted the ways in which the Fourteenth Amendment protects the rights of gays and lesbians to "participate" in the political process.[12]

In many ways, Kennedy's opinion breaks from the traditional approaches toward gay and lesbian rights that tied those rights to questions of the "family" and reproductive freedom. He symbolically begins the opinion with a reference to Justice John Harlan's lone dissent to *Plessy v. Ferguson* (1896), the decision that legitimated the "separate but equal" principle. Of course, by introducing the question of race, Kennedy raises the confusing question of "strict scrutiny" and its extension to gays and lesbians. In addition, Kennedy's focus on the denial of political safeguards invites the scrutiny of the "animus" of Coloradans who passed Amendment 2 rather than the more difficult issue of the "sodomy" practiced by "homosexuals." The majority opinion thus legally humanizes gays and lesbians, treating them as "persons" in need of the benevolent protection of the Court. Essentially, Kennedy argues that Amendment 2 is imminently unreasonable according to minimal standards of rationality,

allowing him to skillfully avoid the more thorny issues of "strict scrutiny" and the legal status of gays and lesbians as a "suspect class." As such, the opinion rhetorically lectures the voters who passed Amendment 2 in one of its most controversial passages:

[L]aws of the kind [Amendment 2] before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[If] the constitutional conceptions 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" [quoting *Department of Agriculture v. Moicho*, 1973, p 534] Amendment 2 ... in making a general pronouncement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.... A State cannot so deem a class of persons a stranger to its laws. (*Romer v. Evans*, 1996, pp. 4356-4357)

What is interesting about *Romer* is not only its outcome, but the multiple and contradictory positions that were taken in the decision. Remarkably, the *Romer* court seemed to implicitly narrow the scope of the *Bowers* case by now allowing gays and lesbians the civil and political rights necessary to effect political change in Colorado (and elsewhere). Nevertheless, *Bowers* is conspicuous by its absence, and Kennedy's discussion of "animus" may be directed not only toward the voters in Colorado, but at an earlier Supreme Court as well. At the same time that the decision denies the need to find that gays and lesbians are a "suspect class," it simultaneously articulates the position that this is a group of citizens that has suffered historical and contemporary discrimination. Clearly, the majority tries to have the best of both worlds by appropriating the egalitarian language of the Equal Protection clause without taking the radical approach of accepting gays and lesbians as members of a "suspect class." Moreover, the Court trivializes the arguments of the State of Colorado and treats this discourse as mere subterfuge for the "animus" that purportedly motivated Amendment 2. At bottom, *Romer* articulates a moderate/conservative position that legitimates the political rights of gays and lesbians in the public sphere without fully guaranteeing their civil rights under the Constitution.

In contrast, the dissent to *Romer v. Evans* (1996), written by Justice Antonin Scalia and joined by Justices Rehnquist and Thomas, takes a more radically conservative view of the Constitution and of gays and lesbians. Scalia defends the rights of the majority of Coloradans to "preserve traditional sexual mores" against the onslaught of a "politically powerful minority" (*Romer v. Evans*, 1996, p. 4357). Scalia upholds the value of judicial restraint in the dissent and he excoriates the majority for mistaking a "Kulturkampf for a fit of spite" (*Romer v. Evans*, 1996, p. 4357). Supporting a marketplace view of the political sphere, the dissent contends that gays and lesbians are an "elite class" who do not have any need for special fundamental rights. While acknowledging that all Americans have a right to political participation, Scalia nonetheless maintained that a democracy cannot function when it confers benefits on all clamoring minorities.

Scalia pointedly highlights the majority's unwillingness to discuss *Bowers* and he contends that if a state can criminalize "homosexual conduct," it is surely constitutionally allowed to pass laws that merely disfavor the same conduct. The dissent specifically labels Amendment 2 "eminently reasonable" and find that there is no special "animosity" directed toward gays and lesbians in this case. Scalia references the fact that Colorado was one of the first of 25 states to repeal anti-sodomy laws in support of Amendment 2. Concurrently, the dissent notes that just because there is less criminal punishment for "homosexual" acts does not mean that society has abandoned the principle that "homosexuality is morally wrong and socially harmful" (*Romer v. Evans*, 1996, p. 4359). Scalia defends the proscription of behavior when he argues,

Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible--murder, for example, or polygamy, or cruelty to animals--and could exhibit even "animus" toward such conduct.... The Colorado Amendment ... prohibits giving them favored status because of their homosexual conduct.... (*Romer v. Evans*, 1996, p. 4359)

By highlighting the *Bowers* arguments supporting the right of states to criminalize human behavior deemed immoral, the dissenters are able to claim that the *Romer* majority was employing a "novel ... doctrine" that had "no foundation in American constitutional law" (*Romer v. Evans*, 1996, p. 4362).

Scalia's dissent successfully invokes judicial precedent (*Bowers*), defers to the judgments of citizens, and maintains a persona of "judicial restraint," all to the rhetorical/legal advantage of the arguments he puts forth. Yet there are several layers of argument and subtexts that betray his conscious or unconscious prejudices. For instance, Scalia maintains that Colorado does not have to ignore the "distinctive health insurance risks associated with homosexuality" (*Romer v. Evans*, 1996, p. 4358), thus reinforcing powerful, though inaccurate, stereotypes about gay and lesbian conduct; conduct that the state, according to this reasoning, has the power to prohibit.

Scalia's dissent, furthermore, is structured as a victimage tale, where the citizens of Colorado are the victims of a Supreme Court willing to impose a minority position onto an American majority. The dissent characterizes gays

and lesbians as a group with "disproportionate" power in the public marketplace.[13] Invoking Bowers, Scalia upholds the rights of majority populations to prohibit "homosexual" conduct on the basis of morality. Within his victimage tale, this is their only recourse, especially given the validation by the Court's majority in Romer. As he argues here, Scalia finds no manifestation of a desire to harm gays and lesbians in Amendment 2. He finds instead, in the response of the Court and gay and lesbian community, a politically powerful minority trying to revise the mores of the country.

Ultimately, Scalia's dissent highlights the significant lapses of the majority--lapses that should give critics pause before hailing the decision as a significant extension of civil rights to gays and lesbians. The majority was content to simply overrule Amendment 2 on the basis of the animosity it expressed toward a group of citizens. The dissent rightly points out that that position is inconsistent with the Bowers precedent that specifically singles out conduct on moral grounds and prohibits that conduct. Thus, what is present in Romer v. Evans is not only a dispute about the formal rules of judicial reasoning, but also the crafting of decisions that reconfigure and manipulate characterizations and arguments present in the broader public sphere.

IMPLICATIONS AND CONCLUSIONS

To take a "critical rhetoric" approach to discourse is to be free of any predominant method, to be unfettered by an apolitical, theoretical framework. Rather, this perspective invites sustained and trenchant engagement with discourse so as to explore its material power and influence in public life and to perform alternative rhetorics of discovery and renewal. That is what we hope this critical rhetoric accomplishes--a serious and political engagement with an important and consequential example of legal argumentation.

The temptation is strong to applaud the Supreme Court for recognizing the political fights of gays and lesbians and for striking down Amendment 2. Finally, we might conclude, the highest court in the land has spoken affirmatively about the rights of gays and lesbians and thwarted the animosity and fear of those Americans who, in an ignorant and/or bigoted manner, seek to deny constitutional rights and freedoms to an entire group of citizens. Such is the way Romer v. Evans (1996) was received by many.

We hope, conversely, that this analysis rekindles the skepticism that yields a more critical and probing understanding of what the Court has rhetorically accomplished with Romer v. Evans(1996). We are troubled, as are some liberals, by the Court's unwillingness to repudiate Bowers v. Hardwick (1986) and to move American jurisprudence away from outdated and troubling stereotypes about gays and lesbians. By failing to confront the Bowers case directly, Justice Kennedy may have achieved his majority, but the cost was the perpetuation of the public and legal belief that the criminalization of sodomy is constitutionally permissible. Romer is, thus, an exercise in deferral, where the gloss of legal lexicons is used to avoid debating the merits of a broad range of gay and lesbian rights.

The other message conveyed by Romer v. Evans(1996) is a paternalistic rhetoric wherein the Court protects the "political rights" of disadvantaged groups as long as they are not confused with the categories of "social" rights. Romer is an invitation to accept half a loaf. On issues of voting and political participation in the "marketplace of ideas," the Court maintained, the "rule of law" demands that there be due process and equal protection for all "homosexuals." In return, gays and lesbians are expected to acquiesce in legal constructions that celebrate the historical protection of reproductive rights and the "normal" heterosexual family. This bargain is explicitly stated in cases like Bowers, which uphold the criminalization and punishment of sodomy, and implicitly stated in cases like Romer that assiduously avoid the issues of gay marriages, child custody rights, and expanding the right of "privacy."

Two possible outcomes from Romer v. Evans (1996) emerge from this critical engagement with its discourse. It is possible that the case might create the type of momentum necessary for large campaigns associated with major social reforms. Romer may open the door for more laws that offer civil rights protection from discrimination based on sexual orientation in such areas as adoption, child custody, domestic partner benefits, employment, marriage, and military service. Using the language of Romer, it might be possible to argue that just as Amendment 2 made gays and lesbians strangers in the eyes of the law, so to does the "don't ask, don't tell" policy in the armed forces or the Defense of Marriage Act of 1996. Such discriminatory acts, this rhetoric would maintain, are not consistent with a national and legal heritage that does not allow for the exclusion of whole groups of people from participation in social activities.

Unfortunately, when it comes to issues of sexuality that are perceived as threats to the family, there is little tolerance on the part of many heterosexuals, as the Scalia dissent tellingly illustrates. It is therefore not surprising that the Defense of Marriage Act elicited so little outrage despite the rather obvious and invidious motives of those who feared the possibility that Hawaii's courts might legalize same-sex marriages. Moreover, measures similar to Amendment 2 are frequently introduced and passed in communities nationwide. Ultimately, the

majoritarian defenses used in *Romer* may mean that cases in the future will have to confront not only the definitions of "homosexuality," but also the "limitations on plebiscitary democracy" (Rosen, 1995, p. 24). And as Hunter (1992) observes, "unless or until it is narrowed or overruled," Bowers "will dominate the law concerning government regulation of sexuality" (p. 531). Despite *Romer*, until a sufficient number of Americans (and Supreme Court justices) accept the possibility that Bowers was incorrectly decided, gays and lesbians in this country will remain "stranger[s] to its laws."

Critical rhetorics seek, reflexively, to illuminate material rhetorical practices so as to alter the political culture in which they are enacted. To this extent, such rhetorics are political and performative. This particular critical rhetoric works to engage the evolving legal argumentation regarding civil rights for gays and lesbians. It explores particular examples of discourse so as to reveal how such discourses present arguments that subvert the quest for equality and civil rights in the United States. By reaching beyond the range of the casual consumer of discourse, this analysis works to explain how the arguments used to deny full civil liberties for gays and lesbians are constructed and how they are powerful. While the shortcomings of the *Romer* decision may not be that difficult to discern, this critical rhetoric attempts to explain how those shortcomings were molded, their impact for gays and lesbians, and their consequences for future legal arguments on this matter.

Jasinski (1990) maintains that rhetorical and argumentation critics "attend to the ways symbolic action produces transformations (change, assent, or more generally, movement and development) in assumptions, beliefs, practices, and affiliations" (p. 53). Certainly most rhetorical analysis privileges and highlights that discourse that is transformational, or those features of discourse that produce change and assent. Such a perspective, may, unfortunately, deflect attention from symbolic action that does not transform. More invidious, perhaps, this focus on transformation might privilege change or movement that is, in material terms, a diversion from an unprogressive or reactionary motives and consequences. Such is the case, we believe, with *Romer v. Evans* (1996). The perspective of "critical rhetoric" allows for the awareness of such diversion, such argumentative subterfuge, and invites those who encounter it to persuasively and powerfully resist its power.

1. The term "homosexual" is itself contested as it is socially constructed and loaded with negative connotations. Throughout this essay, we use the term only when using direct quotations.
2. Some of the leading formalistic criteria for what makes up a "suspect class" for group discrimination date back to the case of *United States v. Carolene Products Co.* (1938). Since that time, litigation has revolved around the issues of whether a community is identifiable, politically disempowered, and has a history of discrimination. So far, the Court has found only three suspect classes: race, national origin, and alien status (Maguire, 1996, p. 53).
3. The goal of exposing or critiquing the exercise and misuse of power in the law is the mission of the Critical Legal Studies movement and has resulted in many critiques of legal discourse (see Hutchinson, 1989; Unger, 1986). A useful analysis of the critical and theoretical failures of the Critical Legal Studies project is offered by Hasian, Condit & Lucaites (1996).
4. It is important to recognize the historical and legal ambiguity of the term "sodomy." Hunter (1992) identifies "sodomy" as a "cultural chameleon," with shifting meanings over the span of Western history (p. 532). The first meanings of the term are Biblical, emanating from the story of the destruction of Sodom because of the sins committed there (Murphy, 1990, p. 49).
5. Of note is Justice Lewis Powell's admission that he may have wrongly decided Bowers (Agreshwar, 1990; Cathcart & Wolfson, 1993).
6. CFV was organized by two Christian fundamentalists, Tony Marce and Kevin Tebedo (Stumbo, 1993).
7. Some of the legislation affected by Amendment 2 involved both legislative ordinances and executive orders. Aspen, Boulder, and Denver all prohibited discrimination in employment, housing, and public accommodations on the basis of sexual orientation (*Evans v. Romer*, 1993, p. 1284; Wagner, 1993). Part of the debate over this amendment is fueled by the absence of a sodomy law in Colorado. Such a statute was repealed in 1972.

8. The text of Amendment 2 contains the following: Neither the state of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Some interpretations of this Amendment construed it as a measure protecting employers, admissions officers, landlords, etc. from having the burden of proof in affirmative action cases (Maguire, 1996, p. 53).

- 9 813,966 votes were cast in favor of Amendment 2, while 710,151 voters were against the amendment.
- 10 Commentators have criticized this conclusion by the trial judge. For instance, Dworkin (1996) argues that Bayless' discussion of freedom from state endorsement directly conflicts with Justice White's arguments in *Bowers v. Hardwick* (1996).
- 11 The justices who joined Kennedy were John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. For the increasingly influential role of Justice Kennedy in civil rights cases, see Greenhouse (1996).
- 12 A reading of earlier Kennedy opinions should warn observers who automatically assume that the opening in *Romer* of the political process means a move away from the legitimacy of all other types of "homosexual" proscriptions. When Kennedy was a federal judge for the ninth circuit, he upheld one of the Navy's regulations against gays and lesbians as a "reasonable effort to accommodate the needs of the Government with the interests of the individual" (*Beller v. Middendorf*, 1980, p. 812; see also Stoddard, 1992).
- 13 This is a common argument in the federal courts. See *High Tech Gays* (1990).

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