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PLAYING DEFENSE

Robert F. Nagel

Noting that the Romer opinion condemns the motives behind Amendment 2 without pausing even briefly to examine the social context in which it was enacted, Professor Nagel describes the decision as a model of the intolerant impulse in action. He traces this impulse to the Justices' unwillingness to examine their own role—and that of the rest of the constitutional law establishment—in creating the underlying conditions that produced Amendment 2.

In order to identify those conditions, Professor Nagel analyzes the primary document used by Colorado for Family Values during its campaign on behalf of the initiative. He argues that this document could have persuaded moderate, unprejudiced voters because its underlying themes resonate with realistic fears about the possibility that gay-rights activists might be able to induce a social revolution through law-reform strategies that bypass normal democratic processes.

Amendment 2, then, may be traceable to anxiety and alienation rather than animosity. Professor Nagel concludes that judges and legal commentators should evaluate their own role (including decisions like Romer) in shaping a political culture where large segments of the public feel unable to exercise meaningful control over sudden and massive changes that threaten deeply valued ways of life.

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I.

In Romer v. Evans, the majority's constitutional analysis begins in a tone of bewilderment. Speaking for the Court, Justice Kennedy complains that Amendment 2 "defies . . . conventional [judicial] inquiry." He goes on to say that because the Amendment imposes a broad disability on a single named group, it is "exceptional," "peculiar," and "inexplicable." Indeed, after reciting for comparative purposes some familiar and ordinary equal
protection cases, Justice Kennedy's opinion asserts that Amendment 2 is "unprecedented in our jurisprudence."\(^4\)

In law as in life, it is only a short distance from the recognition of strangeness to condemnation. Accordingly, the first sentence of the next paragraph states, "It is not within our constitutional tradition to enact laws of this sort."\(^5\) Condemnation yields many satisfactions, and one is the cessation of bewilderment. The opinion moves swiftly and confidently to describe the purposes of the Amendment: It was enacted to express "animosity" toward homosexuals and "to make them unequal to everyone else."\(^6\) Bewilderment is thus replaced by certainty. In fact, Amendment 2 turns out not to be so strange after all; at least, it does not defy traditional judicial inquiry. The Court concludes that the Amendment offends what it describes as the "conventional and venerable" principle that all laws must bear a rational relationship to a legitimate purpose.\(^7\)

The Court's exposition, then, is a fairly exact rhetorical expression of the psychological impulse of intolerance. The opinion conceives what is unusual to be foreign; it understands what is foreign to be evil; it sees what is evil to be threatening; it suppresses what is threatening. This, I hasten to add, is not in itself a criticism of Romer. Intolerance, as Lee Bollinger explained some years ago, can be "a sign of admirable moral strength . . ."\(^8\) If tolerance is restraint in the face of provocation,\(^9\) its advantages are limited and essentially intellectual. Tolerance allows for time and reflection, but it does not obviate the eventual necessity for moral decision and, sometimes, for condemnation.

From this perspective, what might be thought regrettable is the fact that the members of the majority found it sufficient to provide only one brief paragraph assessing the public purposes asserted for Amendment 2 by the State.\(^10\) Moreover, if the purposes marshaled in the State's brief (at least one of which the opinion does not mention)\(^11\) seemed, as the opinion claims, wholly improbable, then one might have expected that ordinary

\(^4\) Id. at 1628.  
\(^5\) Id.  
\(^6\) Id. at 1628-29.  
\(^7\) Id. at 1629.  
\(^9\) See id. at 186.  
\(^10\) See Romer, 116 S. Ct. at 1629.  
\(^11\) The Court identified two purposes as worthy of discussion—protecting freedom of association and conserving resources "to fight discrimination against other groups." Id. It ignored the State's claim that Amendment 2 would deter factionalism and support "stability and respect for the political process . . ." Brief for Petitioners at *47 n.34, Romer (No. 94-1039), 1995 WL 310026 (quoting Harvey Mansfield, Professor of Government at Harvard University).
curiosity would have prompted the Justices to speculate rather fully about what the citizens of Colorado could have been up to. After all, by the Court’s own account, the Amendment is both astonishingly broad and entirely unique. Surely when the people of a state enact such a law in an area of undoubted moral importance, some sustained thought about their objectives would be natural.

Of course, fuller reflection about the State’s purposes might only have led back to the Court’s harsh and spare conclusion. No doubt many in the legal academy regard this possibility as something close to an inevitability. Even assuming, however, that there was no escaping the word “animosity,” the Justices could have developed with specificity and care a depiction of the nature of the ill will that was capable of resulting in the unprecedented action under review. What prejudices, what fears, what hatreds combined in 1992—for the first time in our history—to impel the people of a state to attempt to make homosexuals “unequal to everyone else”?

On these questions, Romer is silent. Perhaps the majority was sketchy about the State’s objectives out of a sort of decorous sensitivity—a desire to inflict no more insult than necessary. If polite restraint is what accounts for the Court’s terseness, it is even more puzzling why the Court did not consider at greater length whether anything besides ill will could have accounted for Amendment 2. Especially if the majority were inclined to avoid or minimize moral condemnation, it would have been natural to canvas all ostensibly benign possibilities before concluding that an enactment endorsed by more than half a million diverse citizens was motivated by animosity. Some possibilities were available in Justice Scalia’s dissent (which the majority largely ignored) and in the Court’s own opinion in Bowers v. Hardwick (to which, as everyone has noticed, the majority did not even refer). If these sources were too confining, Richard John Neuhaus, for one, has argued that “five millennia of moral teaching about the right ordering of human sexuality” would have provided the Justices with some material.

While Neuhaus’s particular choice of words may be exasperating to some, it nevertheless remains true that Romer says almost nothing about history, religion, morality, psychology, politics, or culture. How, it must be asked, could the Court claim to discover the purpose behind Amendment 2, an enactment that it described as deeply puzzling and widely significant, without reference to the rich social context from which it emerged?

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12 Romer, 116 S. Ct. at 1629.
Providing rich social context is often thought to be a job for, well, the legal academy. Salmon, driven as they are to spawn, struggle each year against the rushing waters; and law professors, driven as they are to improve the world, write relentlessly in an effort to articulate what judges neglected to mention while busy doing justice.\textsuperscript{15} Predictably for a case like Romer, which is both cryptic and morally "progressive," an exotic array of constitutional doctrines already has been produced. Professor Schacter, for instance, proposes that because Amendment 2 "coerced gay invisibility," it offends a principle against "[s]ocial disenfranchisement and caste-like practices . . . ."\textsuperscript{16} Professor Eskridge argues (from history's rejection of Davis v. Beason\textsuperscript{17}) that Romer rests on the notion that the judiciary should guard "against Kulturkampf."\textsuperscript{18} Professors Farber and Sherry think the decision involves a "pariah principle."\textsuperscript{19} Somewhat similarly, Professor Sunstein discloses that "close to the heart of the matter" is a judgment that discriminations against homosexuals are "likely to reflect sharp 'we-they' distinctions and irrational hatred . . . a judgment that certain citizens should be treated as social outcasts."\textsuperscript{20} (Romer, along with some other recent cases, is such a challenge to Sunstein that he partially reconsiders his often-stated commitment to reason-giving; he urges that the judiciary's failure to provide reasons for its decisions is sometimes useful because, you see, this failure encourages legislatures to come up with reasons themselves).\textsuperscript{21} Professor Amar dusts off the Bill of Attainder Clause.\textsuperscript{22} The commentary contains wide variations, but it is probably fair to say in general that, while academicians are neither so spare nor so acontextual as the Justices, their efforts tend to resemble Romer in emphasizing that Amendment 2 would have imposed an extraordinarily pervasive set of social disabilities on homosexuals and in concluding that there was no adequate justification for this imposition.

No, I am not about to argue that there is an adequate justification for Amendment 2. While I do not think the reasons behind the Amendment are

\textsuperscript{15} See generally Steven Smith, Rationalizing the Constitution, 67 U. COLO. L. REV. 597 (1996).
\textsuperscript{17} 133 U.S. 333 (1890).
\textsuperscript{21} See generally id.
\textsuperscript{22} See Akhil Reed Amar, Attainder and Amendment 2: Romer's Rightness, 95 MICH. L. REV. 203 (1996).
irrational or hard to find, I freely acknowledge that the moral issues inherent in the adjective “adequate” are too deep for me. Rather, the point I want to develop in the remainder of this Essay is that it is odd in the extreme that either justices or professors should write as if a sympathetic account of the people’s purposes is either unimaginable or flimsy. The oddness arises from the fact that no one should know better than these constitutional lawyers what the voters in Colorado were doing. The voters were, as I shall elaborate below, playing defense. This was—or should have been—obvious to the legal establishment from the beginning, because no one plays offense more aggressively than legal commentators and jurists.

Intolerance can be an appropriate consequence of moral clarity, but it can also be, as advocates of all sides of the gay rights question recognize some of the time, a protection against self-knowledge. My position is not so much that the legal establishment has been blind to the concerns of a large segment of their fellow citizens, as that it has resolutely closed its eyes.

II.

At an early stage of the litigation, the plaintiffs’ brief characterized the proponents of Amendment 2 as a loose conspiracy of national organizations—a web of right-wingers and religious fanatics with a far-reaching agenda. Some characterizations went so far as to compare their “pro-family” program with “Hitler’s appeals to traditional German family values.” According to the plaintiffs’ brief, this dangerous and shadowy group used an ostensibly local organization called Colorado for Family Values (CFV) as a kind of front. The plaintiffs’ depiction of sinister political forces served vaguely as a basis for their claim that the popular vote for Amendment 2 was an expression of “antipathy” and “prejudice.” By the time the case reached the Supreme Court, the sociological evidence adduced for this conclusion had been pared down considerably. It consisted of the observation that CFV, in common with anti-gay-rights campaigns “across the country,” had asserted that homosexuality is associated with pedophilia and had relied

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23 For an exception, see Andrew Koppelman, Romer v. Evans and Invidious Intent, 6 WM. & MARY BILL RTS. J. 89 (1997).
24 See BOLLINGER, supra note 8, at 126-30 & passim.
25 See Brief in Support of Plaintiffs’ Motion for Preliminary Injunction at 6-9, Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (Civil Action No. 92CV7223).
26 Id. at 7, n. 13. For a fuller account, see ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 125-26 (1994).
27 See Brief in Support of Plaintiffs’ Motion for Preliminary Injunction, supra note 25, at 4, 8.
28 Id. at 39-42.
for this proposition on Paul Cameron, a psychologist who allegedly had been sanctioned for misuse of data by various professional organizations.29

Perhaps because of the rather yawning gap between Paul Cameron’s professional problems and the motivations of over 500,000 Colorado voters, the Supreme Court did not refer to this piece of evidence when it declared Amendment 2 had been born of animosity. Relying on its own analysis of the text of the Amendment rather than a sociological description, the majority denied that there could be any legitimate purpose for permitting the exclusion of homosexuals “from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”30

Given the nature of legal training, it is tempting to accept the Court’s invitation to convert an empirical issue into a question of logic. Nevertheless, mustering our capacity for restraint in the face of provocation, it might be instructive to examine briefly the efforts of CFV to persuade Colorado voters to enact Amendment 2. Of course, this examination has its limitations. It cannot tell us about the covert purposes of either CFV or any national organizations that might have been using CFV. And it cannot tell us anything certain about the reasons a majority of the voters enacted the Amendment. There is no question, however, that CFV is responsible for the language of the Amendment and for the major part of the campaign in its behalf.31 Its public arguments surely are one important source for understanding the purposes of the law.

The most influential single publication from CFV was an eight page “tabloid.”32 CFV volunteers distributed some 750,000 copies to registered voters across the state.33 The tabloid is described by an observer sympathetic to CFV as “the single greatest contribution to the ’92 campaign.”34

The tabloid is white with some blue and some black printing. As might be expected of campaign material, it makes liberal use of exclamation points. The main headline on page 1 reads, “STOP special class status for homosexuality.”35 The other headlines on the front page include: “Equal Rights—Not Special Rights!”; “Vote YES! on AMENDMENT 2”; “Colorado civil-rights leaders say ‘YES!’ on Amendment 2”; and “Are homosexuals

30 Romer, 116 S. Ct. at 1627.
31 For an insider’s account, see Stephen Bransford, Gay Politics vs. Colorado and America (1994).
32 Colorado for Family Values, Equal Rights—Not Special Rights! (1992) [hereinafter CFV Tabloid]. The CFV tabloid is reprinted in its entirety at Appendix A.
33 See Bransford, supra note 31, at 145.
34 Id.
35 CFV Tabloid, supra note 32, at 1.
a ‘disadvantaged’ minority? You decide!’ A block inset reads, “TURN INSIDE FOR THE SHOCKING TRUTH!” and lists the following as a table of contents:

- Gay propaganda in the schools ........................................ p. 2
- Target: children .............................................. p. 2
- Lies from the laboratory ........................................... p. 4
- Attacks on Colorado ............................................... p. 5
- Home rule and Amendment 2 ...................................... p. 3
- Homosexual affluence ........................................... p. 1
- Free speech—an endangered right! ................................ p. 7
- Attack on the Family ............................................ p. 4
- Businesses lose their rights ....................................... p. 6
- Churches attacked nationwide .................................... p. 5
- Homosexual behavior and you ..................................... p. 4
- The truth about “discrimination” ................................ p. 3
- Hate Really Isn’t A Family Value! .............................. p. 3
- Ethnic “Civil Rights” Destroyed! ................................. p. 1

Also on the front page is a block inset stating:

If you do one thing to prepare yourself for this November 3rd election—please . . . arm yourself with the facts about Amendment 2. Militant homosexuals have flooded Colorado’s media with claims that they’re only after “equal protection”. Truth is, they already share that with all Americans. What they really want will shock and alarm you. Please—read this tabloid carefully, cover to cover. We’ve packed it with astonishing, fully-documented reports on the actual goals of homosexual extremists . . .

This front page is worth describing in some detail partly because it is likely to have been the most influential section, and partly because it is, I think, a reasonably accurate indicator of what is in the rest of the tabloid. As can be seen, one major theme that appears on this page is that homosexuality is harmful, avoidable behavior. Here and throughout the tabloid, CFV pro-

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36 Id.
37 Id.
38 Id.
39 Id.
40 See, e.g., CFV TABLOID, supra note 32, at 2 (“Homosexual indoctrination in the schools?”); id. at 4 (“Don’t believe the lies from the laboratory: Homosexuality isn’t something you ‘are,’ it’s something you ‘do’”).
claims that homosexuality is linked to pedophilia, disease, and promiscuity. Another theme is that Amendment 2 is not animated by hatred and will only prohibit "special rights." In several places the tabloid argues that the Amendment will not prevent homosexuals from "asking for or receiving protection from . . . basic discrimination" because they are "American citizens."

The material related to the first theme—that homosexuality is harmful, avoidable behavior—is blunt and inflammatory, and it is safe to say that many people would characterize some of it as exaggerated or false. The second theme—that Amendment 2 was not animated by hatred and will prohibit only "special rights"—is far less combative, but its reassurances can, of course, be regarded as disingenuous.

In any event, the dominant theme in the tabloid is different from either of the two themes just described. The main theme is that "homosexual extremists" are powerful and have an agenda. This set of claims not only accounts for most of the print space but is developed from many angles, in considerable detail, and with a sense of great urgency. Thus, the tabloid contains charges to the effect that homosexuals want to legalize pedophilia, promote homosexuality in public schools, legalize public sexual behavior, induce Congress to enact a "national 'gay-rights' law," abolish the traditional family, suppress "non-'politically correct'" speech, alter the hiring practices of churches, limit the freedoms of business owners, and, of course, establish "protected class status." The immediacy of these supposed threats is emphasized by claims about the financial and political resources of homosexuals and by numerous specific anecdotes—about local ordinances already enacted, national laws already proposed, educational literature already distributed, sensitivity training already ordered, preferences already demanded, and so on. Moreover, the tabloid insists that this complex, broadscale agenda ("the shocking truth") had been hidden because "militant homosexuals" had been issuing misleading claims through "their friends in the press."

Having tolerated my review of CFV's tabloid, perhaps some readers now expect me to begin a condemnation. And a detailed and careful assessment of the contents of the tabloid might conclude by characterizing many of its claims as inaccurate, harsh, conspiratorial, and alarmist. Even assum-

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41 For example, the heading on each page states, "Equal Rights—Not Special Rights!"
42 CFV TABLOID, supra note 32, at 6-8.
43 Id. at 4.
44 Id. at 5.
45 Id. at 7.
46 Id. at 1.
ing this, I think the tabloid should not be dismissed simply as evidence of animosity or prejudice.

To see why, consider the position of the various jurists who read the characterizations of CFV in the plaintiffs' briefs. As I already indicated, some of this material might, if studied, also be characterized as inaccurate, harsh, conspiratorial, and alarmist. Presumably, the judges who invalidated Amendment 2 (as well as others interested in an understanding of the purposes of the gay rights movement) did not shut off thought at their first encounter with the plaintiffs' claims. Rather, assuming they did not automatically and blindly accept these claims as true, readers of the briefs must have looked past any particular inaccuracies and engaged in an effort to determine whether some basic, defensible position might be found somewhere in the plaintiffs' writings despite their tone. This would have been a sensible reaction because everyone knows that important underlying truths can sometimes be found in the midst of exaggeration and simplification. Similarly, the tabloid might have a logic that resonated with more moderate and qualified beliefs found among the general voting population.

Putting aside for a moment the specific claims made in the CFV tabloid, then, what is the underlying structure of its argument? And could that structure have appealed to any moderate voters who might have helped enact Amendment 2?

The argument of the tabloid can be broken down into six elements. (1) A movement exists to further a set of goals called "gay rights." (2) This set of goals represents a danger to the values or way of life of a sizable community. (3) This sizable community does not yet appreciate the extent or nature of the threat to its way of life because (a) although the immediate, discrete goals are linked together so as to implicate much broader cultural changes, this linkage is nonobvious, and (b) the proponents of the discrete changes behave strategically to deny the linkages. (4) Many of the discrete changes are underway, and it is realistic to believe that the more radical cultural change could be achieved imminently. (5) The community that is at risk from these changes cannot effectively defend itself through ordinary mechanisms of self-government. (6) A state constitutional amendment is a potentially effective way to forestall both the specific goals and the larger cultural changes. In short, the tabloid might resonate with those who believe it desirable to erect a legalistic defense against something called "the gay rights movement."

Now, it goes without saying that a person who is moved to oppose "the agenda" of the gay rights movement could well hold animosity toward ho-

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48 On the tendency of leaders and activists to take more extreme positions than their followers, see JAMES DAVISON HUNTER, CULTURE WARS 160-61 (1991).
mossexuals. But it is just as plain that opposition need not be based on animosity. To take what is probably the least controversial example, imagine a person who concedes that the gay rights agenda may be morally right. The most that can be said is that this person is uncertain about the morality of the goals of the gay rights movement. Uncertainty, it should go without saying, is not the same as animosity or hatred, yet an uncertain person could be persuaded by the tabloid’s underlying argument. Suppose (as is surely realistic in our culture) that our imagined individual is convinced that there are important moral virtues inherent in traditional heterosexual families and in the aspects of society associated with them. The “gay rights agenda” depicted in the tabloid would be disturbing to this person because that agenda, which the person regards as having possible virtues, is presented as a threat to an existing way of life that he or she views as definitely having virtues. In short, support for Amendment 2 could have been based on uncertainty about the morality and the possible consequences of the gay rights movement.

It might be objected that an unwillingness to take any risk on behalf of another person or group of persons can be the equivalent of animosity. Hardheartedness can be close enough to hatred for practical purposes, but this objection would be strongest at the extreme—that is, under circumstances in which an individual will not take even a very small risk to reduce another’s very great burden. However, given the long history (characteristic of an array of different cultures) of legal protections for heterosexual family life and given the enormous significance this life has had for the most sensitive and pivotal relationships, it is surely implausible to assume that Coloradans perceived the risk presented by the gay rights movement as slight. Nevertheless, as both courts and commentators are inclined to say, the specific method of defense proposed in the tabloid might indicate animosity. There are many ways to avoid risk; the question is whether a nonhostile voter could be persuaded to support the method represented by Amendment 2.

Recall now the argument of the tabloid: A valued way of life is said to be threatened by an “agenda” consisting of discrete moves that are largely hidden and removed from ordinary political control. What could the connection be between this diagnosis and the proposed remedy? The Amendment created the possibility that a large range of discrimination claims would be barred by a legal rule having constitutional status. If enough people were to respond to this rule by discriminating against homosexuals, the result could

49 By way of contrast, consider the claim that it was legitimate for voters to intend to “seiz[e] from gays the expressive machinery of the state” in order to propound the view that homosexual conduct “is intrinsically evil and corrupting . . . .” Koppelman, supra note 23, at 116, 115.
50 See supra notes 16, 18-20.
have been to isolate homosexuals psychologically and culturally and, eventually, politically. This possibility does not make Amendment 2 unprecedented. On the contrary, it tends to assimilate the Amendment into a miserable history of extreme and punitive defensive measures. As we all know, acting under the belief that their ways of life were being threatened, dominant coalitions have long used violence, imprisonment, segregation, and expulsion against various minority groups. Moreover, on occasion, these methods have been legitimized by the highest legal authorities. In comparison with such measures, Amendment 2 has an oddly abstract, legalistic quality. Techniques like expulsion and segregation isolate physically. In contrast, all that can be said with certainty about Amendment 2 is that it would have established a legal disability against claims of discrimination based on homosexual orientation.

Although both the Supreme Court and many commentators have claimed that the motive for creating this legal disability was to establish actual isolation roughly equivalent to banishment, nothing in Amendment 2 required people to engage in pervasive discrimination. It is at least possible, therefore, that voters did not anticipate or intend to create an outcast status for homosexuals. But many judges and commentators seem to have reasoned that supporters of the measure must have intended to induce pervasive acts of discrimination because that was the method by which the Amendment would accomplish its objective. This point is persuasive only on the assumption that there was no other way in which voters could have anticipated Amendment 2 achieving its defensive purposes. The question thus becomes: If voters did not intend to establish a regime of pervasive discrimination against homosexuals, could they nevertheless have thought that the Amendment would protect the way of life that they valued?

Here the tabloid is most instructive. Its theme that homosexual “extremists” are powerful and have an agenda is developed, as I have said, with considerable specificity. And the specific agenda described depends in virtually all respects upon the alteration of legal rules. On the one hand, “militants” are said to want to legalize pedophilia and public sexual behavior and homosexual marriage. On the other hand, they are said to seek the restriction of contractual freedoms and religious practices and non-politically correct speech directed at homosexuality. Moreover, the tabloid argues that

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51 See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); Plessy v. Ferguson, 163 U.S. 537 (1896); Davis v. Beason, 133 U.S. 333 (1890).

52 See Romer, 116 S. Ct. at 1628.

53 E.g., supra notes 16, 18-20.

54 Interestingly, at one stage in the litigation the plaintiffs actually argued that Amendment 2 contradicted “the moral views of the people of Colorado.” Plaintiffs’-Appellees’ Brief, supra note 29, at 46-47. They observed that, according to public opinion polls, Coloradans tended to disapprove of the very kinds of discrimination authorized by Amendment 2. See id.
these discrete legal objectives have as their linchpin another change in the law: the establishment of "special class status." Thus the tabloid claims that a broad threat to heterosexual society arises from a discrete series of legal "reforms" and that all of these legal changes will tend to follow from one central alteration in the law of discrimination.

To the extent that they accepted this argument, voters could certainly have seen Amendment 2 as an effective defense even if they did not intend for it to result in an operational regime of pervasive discrimination against homosexuals. Under the logic of the tabloid, the establishment of a key legal disability by itself would tend to protect the way of life thought to be endangered. Even if virtually no one actually took advantage of the right to discriminate against homosexuals, the preclusion of the linchpin of the gay rights strategy could have been thought likely to preclude other related changes in the law and therefore likely to prevent the feared revolution in social norms and practices. That is, if voters held the thoroughly American assumption that radical social change can be induced by law reform, they could have been persuaded that radical change could also be defended against by nothing more than a preemptive change in the law. In short, given the perceived nature of the "militants" strategy, Amendment 2 could have been seen as an effective defense even if no one anticipated that it would turn homosexuals into societal outcasts.

In fact, Amendment 2 could not work as an effective defense unless homosexuals were included as part of the political community in at least one important respect. As explained in the tabloid, the law reform strategy of gay rights activists was powerful in that it was both disguised and largely beyond ordinary political control. The precise fear that the tabloid played on, then, was not fear of change per se, but fear of surreptitious change. That fear would have been potent for anyone who, like our imagined voter, saw the gay rights agenda as presenting risks for profoundly important social institutions. Without adequate opportunity for notice, debate, and consent, risk is magnified. To put it another way, there is reassurance in the knowledge that change will not be undertaken until sizable numbers of people have been convinced that the risk is tolerable. Under Amendment 2, the gay rights movement could still pursue the linchpin of its strategy—but only by way of further amendment of the state constitution. Thus, the CFV proposal would allow for social revolution, but only with some assurance of high visibility and direct majoritarian control. Amendment 2 could achieve its objectives by forcing "militant" gay-rights advocates to operate openly as a part of an accountable political system. What is manifest, therefore, in one of the bluntest and most effective pieces of propaganda on behalf of Amendment 2 is that supporters could have been acting, not from animosity,
but from a desire to establish popular control over the risk-filled decision of whether to start down a road of social revolution.

At this point an exasperated reader might reply that, while such a motivation might have been possible, the truth is that voters simply hated homosexuals. This may be. I do not know for sure what Colorado voters intended and neither does anyone else. My own assumption is that almost all complex decisions have mixed motivations that include morally flawed components. The Court, however, purported to base its knowledge about the purpose behind Amendment 2 on the ground that no alternative, nonmalignant explanation for enacting it was imaginable. I think I have demonstrated that this is a measure of the thinness of the Justices' imaginations (or the level of their intolerance) and not a measure of the motives of the people who voted in favor of the Amendment.

Critics of Amendment 2 might nevertheless insist that, even on the assumption that popular motives included the kinds of considerations suggested by the underlying logic of the tabloid, these considerations were almost insanely conspiratorial. To the extent that voters conceived of a scheme for social revolution that would be initiated by a single change in the law of discrimination—and to the extent that they attributed that scheme to a crafty cabal of gay-rights "militants"—it might seem that voters were possessed by something close to paranoia. The improbability of the tabloid's argument, then, could itself be said to be evidence of prejudice and hatred. This objection brings me back to my central theme, for it seems apparent to me that the charge of paranoia can be made by the constitutional law establishment only if its members first manage a truly strange mental feat. To conclude that the underlying logic in the tabloid was unhinged, legal academicians and judges must first pretend that, if they just shut their eyes tight, they can remove themselves from the scene. This is necessary because, as I shall now attempt to explain, the establishment's influence on our current political culture is one of the crucial factors making the argument in the tabloid believable.

III.

Viewed from one angle, believing that a single alteration in a legal rule can ultimately produce a social revolution does seem unrealistic, if not crazy.56 Even recognizing that one change can induce a whole row of legal dominoes to fall, the gap between written prescription and political reality just seems too great. How will the rules bind the enforcers? How will the enforcers, even if motivated, get the resources? How will the resources be deployed to alter the behavior, let alone the beliefs, of millions of people?

From this angle, the content of legal rules is likely to be epiphenomenal, apparently powerful only because the rules are carried along on some vast tide of economic change or cultural transformation.\(^{57}\)

This common sense view is not, however, fully accepted, and nowhere is it resisted more vigorously than among the constitutional law establishment. Many sophisticated law professors and judges have long believed that Brown v. Board of Education\(^{58}\) precipitated school desegregation directly and that this ended Jim Crow laws indirectly. Indeed, the notion that popular resistance and political pressure were mainly responsible for triumphs in these areas is often treated as something close to a sacrilege.

Race discrimination is not a special case. It is common for constitutional lawyers to speak breathlessly about the profound social significance of "landmark" cases. Consider the terms used by the Justices themselves in some of our most revered cases. The Court's decision in Miranda v. Arizona\(^{59}\) was aimed at dispelling throughout the country "the compelling atmosphere of the [in-custody] interrogation," and this in turn would help maintain "the respect a government . . . must accord to the dignity and integrity of its citizens."\(^{60}\) New York Times v. Sullivan\(^{61}\) was intended as a central part of a campaign to make debate on public issues "uninhibited, robust, and wide-open . . . ."\(^{62}\) The essential holding in Roe v. Wade\(^{63}\) protected a woman's capacity to define "her own conception of her spiritual imperatives and her place in society" and was expected to "call the contending sides of [the abortion] controversy to end their national division . . . ."\(^{64}\) Such talk is not restricted to Justices trying to justify their decisions in a few extraordinary cases. Scholarly commentators have argued that lowly Reed v. Reed\(^{65}\) initiated a revolution in sex roles\(^{66}\) and that United States v. Lopez\(^{67}\) will usher in (that word again) a revolution in federal/state relations.\(^{68}\)

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60 Id. at 460.
62 Id. at 270.
63 410 U.S. 113 (1973).
I do not mean that the romance of social reform through constitutional adjudication is entirely modern nor that it is entirely unconvincing. The idea of a landmark case goes back at least to the beginnings of the nation. Indeed, its roots are entwined with the American faith in written constitutionalism itself. Even those like me, who see much superstition and exaggeration in it, cannot doubt the continuing power of this tradition.

To acknowledge this power is to acknowledge the American fascination with the formulation of legal rules. And, not surprisingly, the legal profession is where that fascination is worked out most intensely. Here, worlds turn on the specific wording of phrases, aphorisms, standards, and doctrines. Here, the relationship between a single holding and future lines of cases has intellectual presence and reality. Here, a decision is a precedent, a doctrine is a web of possibilities, a reason is a principle. The professionals who think this way for a living should not be astonished at CFV’s claim that the establishment of “special class status” for homosexuals would have wide legal and social implications. Surely, we cannot be puzzled by that claim at the same time that we debate whether Romer itself—with all of its limitations and vagueness—might represent the beginning of a judicially led movement on behalf of gay rights.

If the idea of a law reform agenda that begins with a single pivotal move is familiar and even powerful to members of the legal profession, it is difficult to see why CFV could not reasonably have subscribed to the same idea. Even so, the notion that “special class status” could be a linchpin is not necessarily plausible. Since the tabloid is a piece of political propaganda rather than a legal brief, it does not fully explain all the causal connections upon which its argument depends. Lawyers, however, should have no trouble filling in the gaps.

Special class status in the area of employment discrimination would presumably entitle homosexuals to protection against a “hostile work environment.” The moral predicate for this kind of protection could encourage sensitivity programs not only in employment settings but also in educational institutions. The social stature thereby gained (not to mention the specific

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Jane S. Schacter argues that, while Romer does not mandate inclusion of homosexuals into civic life, it does implicate larger ideas “about caste and anti-gay animus,” which, in turn, have implications for shaping “social norms and cultural meanings.” Schacter, supra note 16, at 382-83, 403. She concludes that “Romer can powerfully enable, but cannot itself deliver, meaningful democratic equality for gay men and lesbians.” Id. at 410. William N. Eskridge, Jr. sees in Romer some potential for the Court to discourage “the political process from focusing on sexual orientation as an obsessional classification.” Eskridge, supra note 18, at 443. Cass R. Sunstein sees the possibility that courts will build from Romer to strike down, on a case-by-case basis, a variety of “irrational” discriminations against gays, and he even acknowledges that the decision could serve as a basis for an attack on prohibitions against same-sex marriage laws. Sunstein, supra note 20, at 96-98.
doctrinal implications) could eventually make it difficult to justify a range of
discriminations and restrictions, including the kinds of restrictions on public
displays of homosexual affection highlighted in the CFV tabloid and the
exclusion of homosexuals from state marriage laws. Other possibili-
ties—such as legalizing pedophilia—become at least arguable once the non-
discrimination principle has been applied to sexual behavior or orientation.

Some of these possibilities seem fanciful now, but readers of the tabloid
were presumably entitled to remember that legal rights, once established,
can profoundly alter our sense of what is beyond the pale. They might have
recalled, for instance, that the rights to sexual privacy and abortion, striking
enough in themselves, were quickly extended to minors. Perhaps more im-
portantly, readers of the tabloid were entitled to recognize that even in the
absence of such extensions, the logic supporting the existence of a right
rapidly opens up new political arguments and legitimizes new political ob-
jectives. The Equal Rights Amendment may have been defeated in part
because of the (then) startling specter of females in combat, but the assim-
ilation of women into the military moves inexorably on, carried along in a
tide of cases that have helped to sweep away the idea of sexual differentia-
tion. Even without establishing “special class status” for homosexuals,
Romer v. Evans will be one more factor pushing the concept of same-sex
marriage, in many quarters unthinkable not long ago, to the forefront of
serious public debate. In any event, while the tabloid may well have been
wrong in some of its predictions about the eventual implications of special
class status for homosexuals, its underlying claim that this change would be
legally pivotal certainly cannot be dismissed as a sign of hysteria.

Nevertheless, it must be acknowledged that the tabloid may have vastly
overstated the scope of the “threat” posed by gay rights law reform stra-
egies. It could happen—indeed it would be distinctively American if it did
happen—that even radical reforms ensuing from the establishment of special
class status would assimilate homosexuals into the mainstream culture rather
than destroy or transform existing social institutions. This is one plausible
prediction, but it is surely not necessarily a sign of delusional hatred to
anticipate a different outcome. In fact, many gay rights advocates within the
legal profession intend a different, more revolutionary outcome. Professor
Eskridge acknowledges that to some extent “gaylaw sees itself as a move-
ment to destabilize traditional legal and cultural norms . . . .”70 While he
describes this aspiration as romantic, his own argument for legalization of
same-sex marriages notes that “what has been socially constructed can be
socially reconstructed.”71 Professor Cain forthrightly urges that litigation be

70 William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419,
71 William N. Eskridge, Jr., A Social Constructionist Critique of Posner’s Sex and
Reason: Steps Toward a Gaylegal Agenda, 102 YALE L.J. 333, 385 (1992). In the
aimed at "the deconstruction of the categories homosexual and heterosexual as those categories have been constructed by dominant forces in society."\textsuperscript{72}

So if the argument in CFV's tabloid is evidence of prejudice and hatred, the hysterical aspect of that argument must consist of something other than the basic fear of strategically linked legal changes leading to sweeping social change. The prime alternative possibility is the conspiratorial cast of the argument—and the tabloid does overestimate the cohesiveness of the "militants' agenda." It is too simple, of course, to say that "special class status" is the linchpin of the gay rights strategy. Some activists do emphasize changes in the law of discrimination, but important equal protection proposals center on same-sex marriage, not "special class status."\textsuperscript{73} Moreover, other advocates see sodomy laws as the "bedrock" of discrimination against homosexuals.\textsuperscript{74} There is lively disagreement within the literature about such questions as the centrality of gay participation in the military and whether the civil rights model is appropriate or useful.\textsuperscript{75}

Even granting that the gay rights movement is far less intellectually monolithic than CFV claimed, the tabloid is hardly delusional in this respect. There are ample indications that important gay rights advocates, like Eskridge, believe that homosexuals should enlist the government "to fight social oppression . . . through antidiscrimination statutes, hate crime laws, and sex education programs."\textsuperscript{76} Nor is there any doubt that efforts to implement the "affirmative policies"\textsuperscript{77} of this egalitarian strategy have been underway for some years at both the national and state levels. It is arguable that CFV, in reacting to this strategy, misidentified the most significant legal threat to its way of life. Perhaps it should have focused on the law of privacy or some other potentially expansive legal theory. But this seems more a matter of complex political and legal calculation than blind hatred.

\textsuperscript{73} See, e.g., Eskridge, supra note 71, at 378-80, 384.
\textsuperscript{74} Cain, supra note 72, at 1587.
\textsuperscript{76} Eskridge, supra note 71, at 384.
\textsuperscript{77} \textit{Id.} at 385.
A second rather conspiratorial aspect to the tabloid's argument is its insistence that both gay rights activists and their supporters in the press were systematically and effectively denying their ultimate objectives. Advocates within the constitutional law establishment might cheerfully admit that social revolution can come from key legal pronouncements but deny that there is anything masked about this process. The Supreme Court, after all, publishes its opinions, the Congress openly debates changes in civil rights laws, and the curriculum designed by the local school board must become public in order to be utilized. Even academic strategizing is done in law reviews that (while arcane) are available.

All this may be true, yet it misses something real and important about the level of suspicion in modern political life. To appreciate what is missing, turn the issue around and consider the suspicions of the opponents of Amendment 2. This enactment was a very public event, as was the strenuous argumentation made by CFV on its behalf. As the tabloid makes clear, CFV argued that the Amendment was not motivated by animosity nor was it intended to bar homosexuals, as American citizens, from making "basic" claims of discrimination. These assurances, which were in varying degrees buttressed by the Colorado Attorney General and by the Colorado Supreme Court, were widely disbelieved. They were disbelieved not only by gay rights advocates but by most of the constitutional law establishment, including a majority of the Supreme Court. These critics of Amendment 2 are not commonly depicted as paranoid and hate-filled for attributing secretive, duplicitous objectives to the supporters of the Amendment. Indeed, especially when society is torn by fundamental disputes and moral vocabularies seem inadequate, to view public assurances as diversions and covers can be a measure of political realism.

Covert agendas have always, of course, been a part of politics. But the law reform tradition within the constitutional law establishment has, I think, added new force and sophistication to the tactics of secrecy and denial. While it is true that at one level law reformers openly discuss grand objectives, the very process of adjudication tends to deny these objectives at a different level. All that is formally at stake in a lawsuit is the issue at hand. School desegregation was argued in Brown, not Jim Crow. The issue in

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78 See CFV TABLOID, supra note 32, at 6 ("Amendment 2 will not keep gays from legal recourse, or equal protection!").
79 The Court said that the State's claim that Amendment 2 was intended only to deny homosexuals special rights was "implausible." Romer v. Evans, 116 S. Ct. 1620, 1624 (1996). The Court also doubted the Colorado Supreme Court's conclusion that the Amendment was not intended to affect antidiscrimination laws protecting non-suspect classes. Id. at 1626.
80 See id. at 1624.
81 See generally HUNTER, supra note 48.
82 For an account of the NAACP's strategic "Plessy-doesn't-matter argument," see
Reed was the rationality of sex discrimination in the selection of executors, not whether traditional sex roles should be abolished one after another. Romer itself emphasizes the extraordinary nature of Amendment 2 and intimates nothing about whether homosexuality should be a suspect classification or whether heterosexual marriage may be unconstitutional. There can be little question, nevertheless, that many advocates intend for the limited arguments accepted in Romer to be an opening wedge in a campaign for the rights of homosexuals. A kind of indirection or deniability resides in the very nature of modern law reform adjudication. Law reform litigation promotes suspiciousness in another way as well. Something about the urgency and intense moralism of constitutional argumentation in the adversary system produces a heedlessness bordering on lawlessness. Litigation unleashes the same kinds of unrestrained energy and commitment as warfare. This is precisely why sophisticated gay rights advocates can urge "ongoing guerrilla warfare against bigoted precedents, laws, and policies." It is also why CFV's tabloid characterized their opponents' law reform agenda as a series of attacks by "militants."

In the campaigns conducted by litigators (it goes without saying), the opinions of the majority are deprecated and their political efforts are set aside. In the process, history can be distorted, precedent can be forgotten, facts can be selected, and costs can be ignored—all for a "higher good." To some degree this heedlessness not only frustrates but infects the political process. Perversely, our legal institutions teach ordinary people the scary lesson that anything can be done with words. Consequently, the repetition and overreaching in the phrasing of Amendment 2 can be understood as a consequence of realistic distrust, not of paranoia. The inclusion of a prohibition against "any claim of discrimination," which caused the Court such consternation, could have reflected the suspicion that, no matter how clear the words and the legislative intent in the absence of this phrase, judges would convert claims of discrimination into demands for preference, as they had in interpreting the Civil Rights Act of 1964. More generally, the fears

RICHARD KLUGER, SIMPLE JUSTICE 564-69 (1976).

For an account of Justice Ruth Bader Ginsburg's unapologetic argument for indirection or, perhaps, disingenuousness in the sex discrimination cases, see Robert F. Nagel, Is "Rationality Review" Rational?, 116 PUB. INTEREST 75, 82-85 (1994).

See supra note 69.

Alexander Bickel went so far as to trace excesses of the Nixon presidency to the heedless moralism of the Warren Court. See ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 120-23 (1975).

COLO. CONST. art. II, § 306.

See United Steel Workers of America v. Weber, 443 U.S. 193, 201-07 (1979) (holding that the Title VII prohibition against racial discrimination did not invalidate all private, voluntary, race-conscious affirmative action plans).
behind the Amendment as a whole—the fear of indirection, of false assurances, of an agenda pushed heedlessly—are not necessarily unrealistic in politics and certainly not in a political system shaped in part by the methods of legal argument.

I have urged that the main elements of the tabloid's argument—the depiction of a threat from a quasi-covert, legalistic strategy for social revolution—could have resonated with realistic, unprejudiced voters. Even if this is true, it might be that the tabloid displayed hysteria in its assessment of the immediacy of the changes proposed by gay-rights "militants."

The tabloid claimed that a number of specific legal reforms in the gay-rights "agenda" were either already partially accomplished or imminent. Moreover, the overall tone of the argument clearly implied that the larger social revolution to be precipitated by these changes was also a realistic possibility. Let us assume that the tabloid exaggerated the significance of the legal changes that had already been accomplished. Antidiscrimination protections in Aspen and Boulder, for instance, might well have signified little about statewide trends; zealous enforcement of an open-housing ordinance in Wisconsin might have been an aberration; and so on. Even on this assumption, the tabloid's basic claims cannot be considered unrealistic. Clearly, important gay rights advocates intend far-reaching changes, such as the establishment of same-sex marriage, to be accomplished in the near future. Nor is it a sign of hysteria for voters to recognize that in recent years issues surrounding homosexuality have become visible politically and that the homosexual movement has made significant alliances and gains. We live in an era in which enormous changes—involving, for instance, race relations, marriage, education, standards of public decency, and attitudes toward tobacco use, to name a few—have swept swiftly and sometimes unexpectedly across the entire nation. Some of these changes, such as those induced in workplaces across the country by innovations in the law of sexual harassment, began as improbable academic theorizing. In such an era, it

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89 See, e.g., CFV TABLOID, supra note 32, at 2 ("Homosexual indoctrination in the schools? IT'S HAPPENING IN COLORADO!"); id. at 5 ("Gay-rights abuses here in Colorado!").

90 See, e.g., id. at 7 ("Why 'Gay-rights' threaten your Church"); id. at 6 ("Under 'gay-rights', free speech becomes an endangered species"); id. at 5 ("'Gay-rights' destroys basic freedoms!").

91 The tabloid details the experience of two women in Madison, Wisconsin who were subjected to interrogation, fines, "sensitivity classes," and periodic monitoring of their lifestyle, all as the result of their declining to consider a lesbian woman who had answered their classified advertisement seeking a roommate. Id. at 5.

92 See, e.g., Eskridge, supra note 71, at 386 (urging that a radical gay/lesbian agenda aims at having its concerns addressed "now"); Eskridge, supra note 70, at 1504 (urging that exclusion of homosexuals from marriage be ended "abruptly").
would be profoundly unrealistic not to take seriously the possibility of radical change in the social status of homosexuals within a state.

The tabloid also claimed that the agenda of gay-rights “militants” could not be effectively defended against in the normal political process. This claim is certainly questionable in light of the fact that many of the specific gains itemized by the tabloid were the responsibility of politically accountable office-holders. However, if a feeling of powerlessness is a sign of prejudice, then a vast number of Americans—including many gay-rights advocates, and also, more generally, many “progressive” law professors—must be prejudiced. Indeed, why Colorado voters apparently feel so cut off not only from the President and the Congress but also from their Governor, their legislature, and their school boards is one of the truly intriguing and important inquiries overlooked by the Supreme Court in its rush to condemn the motives behind Amendment 2.

A number of explanations for this sense of alienation that have nothing to do with hatred can be suggested. For example, high mobility rates and pervasive communication systems make it difficult for communities to remain stable and intact. Thus, virtually any way of life may seem vulnerable to change, and anxiety from this precariousness may translate into a general sense of powerlessness. Moreover, the rise of the professional class has in fact diluted popular influence over ostensibly accountable institutions.93

The vastly expanded jurisdiction of the national government has removed many issues from local control, and this may have created a confused but understandable sense that all public issues are now resolved in some remote place accessible only through money or television. Moreover, the feeling of powerlessness may grow with increases in political appetite; the more needs we expect government at any level to fulfill, the more we may fear—and notice—our inability to affect government.94

These explanations are all partial and debatable, but they raise an important possibility. That possibility is that the national judiciary may be one of the significant causes of the kinds of anxiety that prompted Amendment 2. From the penetration of local communities by an unregulated internet95 to the enhanced influence of the knowledge class, from the expanded jurisdiction of the national government to dramatic increments in public appetite

94 On insatiability, see id. at 52; see also EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY ch. 5 (John A. Spaulding & George Simpson trans., George Simpson ed., The Free Press 1951).
95 See Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997) (holding that content-based restrictions on speech like those contained in the Communications Decency Act, which prohibited the transmission of obscene, indecent, or patently offensive material via the internet to persons under the age of 18, were not properly a time, place, or manner restriction and were facially overbroad, thus constituting a First Amendment violation).
whetted by the "rights explosion"—these are all matters for which the courts and the legal elite have some specific responsibility. Indeed, the *Romer* decision itself is a rather direct indication of how lawyers help to make people feel cut-off from government. Here is a decision that sets aside a popular initiative with hardly a thought about the nature of the fears that drove it or about the role of litigation in exacerbating those fears.

**CONCLUSION**

Although immediately concerned with state law, those who supported Amendment 2 were to some significant degree children of the national constitutional law establishment. Their effort to protect their way of life may or may not have been evidence of hatred, but it certainly was evidence of the touchingly innocent American commitment to legalism. It is quite clear that at least the leaders of CFV believed that if the rules permitted an offense, they would also permit a defense—and that a neutral arbiter would say so. Even in their suspiciousness and alienation, therefore, the proponents of Amendment 2 did not fully recognize whom they were playing against. They effaced the Justices. But in this, too, they were children of legalism, mimicking the Justices' instinct to efface themselves, an instinct that perversely became essential to the conclusion that only animosity could explain Amendment 2.

Perhaps it is a sign of prejudice for a fearful people, buffeted by rapid change and stripped of a sense of control, to play defense against reformist aspirations. Perhaps it is wrong and unenlightened to try to protect a way of life. I do not think, though, that those who frequently—and with full-throated predictions of calamity—use interpretations of the national Constitution to block social experimentation are in much of a position to say so. In any event, it is difficult to see on what basis anyone could say so. Change is inevitable, but progress is not; there is nothing necessarily unenlightened about attempting to protect what has been of value in the past.

However that may be, what the Justices in *Romer* did not want to think about is worth thinking about. It seems quite possible that in the years ahead the pace of social transformation will only accelerate and that many Americans, caught up in powerful forces beyond their control, will feel increasingly frightened, isolated, and unable to shape their lives. Moreover, lawyers

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96 Before the Supreme Court’s ruling in *Romer*, members of CFV repeatedly expressed guarded optimism that their Amendment would be upheld on the ground that its wording had been carefully reviewed by experts to assure that the language “would pass every . . . test in existence.” BRANSFORD, supra note 31, at 210.

97 For a brief account of the kinds of anxieties that drive the interpretations supported by the constitutional law establishment, see Robert F. Nagel, *The Term Limits Dissent: What Nerve*, 38 ARIZ. L. REV. 843, 856-57 (1996).
and judges seem likely to continue to play a role in producing this destabilization and alienation. Among other questions, the legal establishment might wonder what people in such a condition will do if their naive faith in legalistic defenses is destroyed.
APPENDIX A

EQUAL RIGHTS—NOT SPECIAL RIGHTS!*

Equal Rights—Not Special Rights!

STOP special class status for homosexuality

Vote YES! on AMENDMENT 2

If you do one thing to prepare yourself for this November 3rd election — prepare yourself with the facts about Amendment 2. Militant homosexuals have flooded Colorado's media with claims that they're only after "equal protection". Truth is, they already share that with all Americans. What they really want will shock and alarm you. Please — read this tabloid carefully, cover to cover. We've packed it with astonishing, fully-documented reports on the actual goals of homosexual extremists. Information they — and their friends in the press — desperately want to keep from you. So please read on. Because an educated decision on Amendment 3 may be the most important contribution you can give to the future of civil rights in Colorado ... and the future of our children.

Colorado civil-rights leaders say "YES!" on Amendment 2:

Question: How does special class status for gays threaten the hard-won gains of disadvantaged minorities?

Mr. Ignacio Rodrigues
Former Chairman of the Colorado Civil Rights Commission
"For many years, there were hard-fought battles to establish minority status and protection under civil rights law for certain identifiable groups of people... If we include a group of people who are generally identified as a deviant group sexually, it would erode, and seriously damage the legitimate civil rights protections that have been gained by ethnic minorities."

Mr. Tim Duran
Well-known state civil rights professional
"I don't see gay photonics. I don't see the gay homeless. I don't see the gays being discriminated politically or economically. I don't think that they are in the same class as the traditional minority groups, Hispanic or Indian women.

Mr. Franklin
Former chairman and 4 year commissioner, Colorado Civil Rights Commission
"Making sexual preference a protected class does a disservice to all those people presently being discriminated against or mistrusted, by diluting the significance of civil rights protection. I hate to see resources taken away from those who are truly in need of protection."

QUESTION: "Does denying protected class status to homosexuals endanger in any way the legitimate rights of Colorado's minorities?"

Mr. Rodrigues
"I think the reverse is true. I think that if gays and lesbians are afforded protected status, it will erode civil rights the way it eroded the Church..."

Mr. Duran
"...This movement would negatively impact people already receiving protection."

Mr. Franklin
"I have been an attorney for almost 18 years and have been involved heavily in civil rights issues for the last 12 years. It's an insult to me to say that because I am in favor of this amendment that I will be in favor of further erosion of civil rights laws. The laws of this country are very clear as to protections that have been placed upon the economically disadvantaged citizens of this country. We are not asking people to take a step backwards."

Are homosexuals a "disadvantaged" minority? You decide!

Records show that even now, not only are gays not economically disadvantaged, they're actually one of the most affluent groups in America!

On July 18, 1981, the Wall Street Journal reported the results of a nation-wide marketing survey about gay income levels. The survey reported that gays' average income was more than $30,000 over that of the average Americans. Gays were over three times more likely to be college graduates. Three times as likely to hold professional or managerial positions. Four times as likely to be overseas travelers. These are people with tons of discretionary income!

Please turn to page 2

VOTE YES! ON AMENDMENT 2.
**EQUAL RIGHTS—NOT SPECIAL RIGHTS!**

Sound like an oppressed minority to you? Judge for yourself—Take a look at the hardships Black Americans have had to face. Then see if homosexuals compare. Special rights for homosexuals just isn’t fair—especially to disadvantaged minorities in Colorado. Please vote YES! on Amendment 2.

<table>
<thead>
<tr>
<th>Historically Accepted Evidences of Discrimination</th>
<th>Black Americans</th>
<th>Homosexuals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ever denied the right to vote?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Ever faced legal segregation?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Ever denied access by law to public drinking fountains, restrooms</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Evidence of systematic discrimination in housing and jobs in Colorado today?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Verifiable economic hardship as a result of discrimination? (see page 3)</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

**TARGET: CHILDREN**

Lately, America's been hearing a lot about the subject of childhood sexual abuse. This terrible epidemic has scarred countless young lives and destroyed thousands of families. But what militant homosexuals don't want you to know is the large role they play in this epidemic. In fact, pedophilia (the sexual molestation of children) is actually an accepted part of the homosexual community!

David Thorstad, founding member of the gay organization called the North American Man-Boy Love Association, a group whose motto is "Sex by eight, or it's too late" and a former president of the Gay Activist Alliance of New York, writes:

"The issue of man-boy love has intersected the gay movement since the late nineteenth century. Thorstad complains that pedophilia is being swept under the rug by the gay-rights movement, which seeks to sanctify the image of homosexuality to facilitate its entrance into the social mainstream." (M. A. Fricke, "Man-Boy Love and the American Gay Movement," from The Journal of Homosexuality, 20, 1990, pp. 251-252.)

Two homosexual researchers writing in The Gay Report reported that 73% of homosexuals surveyed had at some time had sex with boys sixteen to nineteen years of age or younger!

The British Journal of Sexual Medicine (April 1987) published a study in which homosexuals statistically 18 times more likely to engage in sex with minors than heterosexuals.

The North American Man-Boy Love Association, an accepted member of the homosexual community, praises an article in gay-pulse magazine 'Gay for Rights, Or It's Too Late.' And they're dedicated to removing age-of-consent laws.

Homosexual indoctrination in the schools? IT'S HAPPENING IN COLORADO!

<table>
<thead>
<tr>
<th>Homosexual Indoctrination in the Schools?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. It's possible your heterosexuality is just a phase you may outgrow?</td>
</tr>
<tr>
<td>2. Is it possible that all you need is a good gay book?</td>
</tr>
<tr>
<td>3. If you were never raped by a person of the same sex, how do you know that you would prefer to do so?</td>
</tr>
<tr>
<td>4. How can you hope to improve your self-esteem if you internalize homosexual object choice and assume the identity of your worst, unhealthy, homosexual potential?</td>
</tr>
</tbody>
</table>

And the brochure goes on to aggressively promoting acceptance of homosexuality, bisexuals, lesbians and random sex, complete with graphs, "how-to" descriptions. It also suggests that teachers distribute to children pamphlets containing photocopied numbers of possible adult gay men who are living openly with children and encourage children to experiment with gay behavior. Ingersoll tip: "Keep your own money"—it's not cheating, and it's not stealing. (H. E. Apostrophe, "The Gay Rights Platform," 1972, pp. 327-331.)

Psychological Reports (1986, #5, pp. 327-331) published a report revealing that homosexuals, who represent perhaps 2% of the population, perpetrate more than one-third of all reported child molestations!

VOTE YES! ON AMENDMENT 2.
**Does Amendment 2 “write discrimination” into the Constitution?**

Hate is not a family value — we agree 100 percent!

Opponents of Amendment 2 have been plastering the state with posters saying “Hate is Not A Family Value.” But Colorado for Family Values, sponsor of Amendment 2, agree with that statement 100 percent! That’s exactly why we’ve filled this handful with “the facts.” Because facts don’t hate, they just are.

We agree that Hate Is Not A Family Value as much nearly a year ago we announced and implemented the statewide “No Room for Hatred” campaign, to let every Coloradan know how and clear that there was no room on either side of this debate for hatred of any kind.

Unfortunately, our opponents didn’t get the message. Although we worked with them on sending a strong, unified no-hate sentiment to the people of Colorado, after one letter suggesting any interest, they continuously refused to respond to our repeated attempts to follow through. Obviously, coming out against hatred wasn’t on their agenda back then.

Soon after that, it was obvious that hate literature supposedly written by us was being circulated by our opponents.

Militant gays started spreading obsequious CVF meet-
ing.

Men in drag started showing up outside our meetings, solicit-
ing money in CVF’s name.

Desperate and threatening threats started becoming daily occurrences at our headquarters.

One EPC leader repeated her frequently-expressed hope that we all “not in half” are threatened, “we’re gonna get you (explorative deleted).”

Colorado for Family Values, on the other hand, made “No Room for Hatred” a cornerstone of our successful and completely peaceful, petition drive:

- We’ve declined to attend rallies where the chance of unpleasantness existed.
- We’ve encouraged gay-rights opponents to stay away from so-called “pride” parades to ensure that the peace was kept.
- We’ve published a Resolution in Support of Principled Debates, which EPC received and ignored.
- We’ve stuck to the facts.
- We’ve delivered on our promise to make our case logically and honestly to the people of Colorado. And we continue today. We’ve filled this handful with facts about the militant gay agenda not to make you hate them, but to warn you about the danger their agenda poses to you and your children’s rights. As proof that the gay lifestyle has nothing in common with the kinds of traits and behaviors America has protected in its civil rights laws. And as proof that it isn’t the kind of behavior society needs to reward with special class status. So please — if you stand with us against hatred toward any fellow Coloradan — vote YES on November 3rd on Amendment 2.

The truth about “home rule” and a “Yes!” vote on Amendment 2.

**Home rule** has always been an important, legitimate part of how Coloradans govern themselves. But lately, militant gay leaders have been crying that Amendment 2 would violate this important concept. They want you to believe that voting “Yes” on Amendment 2 means no one will ever be able to vote on a local issue again.

That’s ridiculous. Here’s a little truth about Amendment 2 and the home rule issue:
- Everyone knows some issues are “home rule” in nature, and some aren’t. It’s common sense. Some areas are local in scope, others are statewide or national. If the people had no right to vote their conscience on a statewide or national level, then why would we have a State Legislature or a U.S. Congress?
- The hateful “Jim Crow” laws that once oppressed African/Americans in the South were “home rule” laws — enacted locally, by racist city and county officials, to keep people of color “in their place.” Thankfully the Civil Rights Act of 1964 said No to Jim Crow” laws and declared legal and clear that civil rights aren’t a local, “home rule” issue. They’re for a whole state, even a whole nation, to decide on. Should local authorities reign complete control over civil rights?

VOTE YES ON AMENDMENT 2.
Militant gays want government to give their lifestyle special class status — but what kind of government do a few of whom want to know what kind of lifestyle they want your tax dollars to endorse? You may already know that the sexual practices of some of the most prominent of Colorado's population differ — and the dangerous perversion they involve — may shock you!

Let's start with number of sexual partners. 1982 U.S. Centers for Disease Control figures put the lifetime total for typical homosexual at 500. AIDS sufferers individually studied: 1:100. In a Kinsey Institute survey, 48% of white men had 500 or more, 75% 100 or more, 28% over 1,000. 79% said all of their partners were strangers. A survey by two homosexual researchers reports 28% of lesbians having between 11 and over 300 lifetime partners.

"Monogamy" is virtually unknown in the gay lifestyle. One university-sponsored study shows that 3% of homosexuals have had fewer than 10 lifetime partners. Only 2% could be classified as monomorphic or semi-monomorphic (although "monogamy" in gay terms is hardly permanent — lasting any where between 9 to 60 months).

Gays' have been unwilling (or unable) to curb their voracious, uncensored sex practices in the face of HIV. A 1985 study of 65 San Francisco gay men in the American Journal of Public Health reported that "knowledge of health guidelines and the anti-family activists had no relation to sexual behavior."

59% had been unprocted, passive recipients of oral intercourse in the month before the survey. The Washington Post (June 1990) and Time Magazine (July 1990) both report that despite the threat of AIDS, gays have not restrained themselves. The Journal reported last October a study in which 45% of gay men remained sexually active after learning that they were HIVs, and incredibly, 65% of them did not inform their partners!

Overall, surveys show that 90% of gay men engage in anal intercourse — the most high-risk sexual behavior in society today. (No wonder 92% of Colorado AIDS cases have occurred in gay males — it's a tragedy, but it's true.) About 60% of gay men surveyed have engaged in oral sex upon the anus of partners. Well over a third of gays in 1977 admitted to "fisting". In the largest study of gay men ever conducted, 29% admitted participating in "golden showers".

Gays live shorter lives. In a study of 2,011 obituaries from gay journals compared to obituaries from regular newspapers, gay who did not die of AIDS had a median age of death of 42 years old. (And rarely AIDS was the cause.) Lesbians surveyed had a median age of death of 45.

Is this the kind of lifestyle we want to reward with special protection, and protected ethnic status? Gay activists want you to think they're "just like you" — but these statistics point out how false that is. So please remember — gays deserve, and have, human rights. But there's no way this lifestyle deserves special rights. Please vote YES on Amendment 2.

Don't believe lies from the laboratory

Homosexuality isn't something you "are"; it's something you "do".

We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies. We shall seduce them in your schools, in your dormitories, in your gymnasiums, in your locker rooms, in your sports arenas, in your seminaries, in your youth groups.

...The family unit — which only dampens imaginations and curbs free will, must be eliminated.

...All churches who condemn us will be closed. Our only gods are handsome young men...

— Michael Swift, "Gay Revolutionary" writing in Gay Community News

LeVay doesn't know anything about the sexual orientation of his control group, the 16 persons "presumed heterosexual." A sloppy control like this is enough by itself to invalidate the study.

...most important of all: do these supposed differences point to a cause or a result of homosexuality? "Scientific" LeVay, an avowed homosexual who has now become a gay activist himself, answered, on national television, "I don't know... But I'll bet the house that it's cause." How's that for scientific fairness?

...like "gay twins" study, which claims to show that identical twins are more likely to both become homosexual, ignore the fact that identical twins share their environments even more closely than other twins, and actually recruited in subjects from gay magazines! More damaging still, when the study's subjects actually spoke for themselves, there was no difference between identical twins and adopted brothers.

We could go on, but you get the point: these "scientific studies" are nothing more than political propaganda, laboratory-style — "research" twisted to fit a pre-arranged conclusion. Don't fall for such easy tricks — being gay isn't like being born Black or Hispanic, or a Woman, or even being physically disabled. That's yet another reason why they don't deserve protected status. Please — to safeguard civil rights for the truly disadvantaeged, vote YES on Amendment 2.
**Equal Rights—Not Special Rights!**

Gays rights destroys basic freedoms!

 Churches attacked nationwide!

Ann Lockwood should have known better. Ann's lock inside Coronado High School is the symbol of association was still allowed in Madison, Wisconsin, where Ann put a notice in the classifieds for a second roommate. But Ann didn't count on Madison's gays rights ordinance. When an open lesbian answered Ann's ad and was politely declined by Ann and her heterosexual roommate, the lesbian filed a complaint.

'Gay rights' suddenly showed their true colors.

Ann and her roommate were:

- summoned before a "fact-finding" board
- interrogated for hours
- assessed fines totaling $1500
- assigned to "sensitivity" classes, taught by lesbians, designed to realign their "politically incorrect" views on homosexuality.

Ann pleaded that the fines would bankrupt her. "That's not our problem," she was told.

Finally, both were ordered to report periodically to the city for monitoring of their lifestyle — for the next three years.

But this isn't just some exceptional, one-in-a-million" tale of justice betrayed:

- In Minnesota, the Catholic Archdiocese was assessed $35,000 in fines and damages for refusing to open Church facilities to a homosexual club.
- In Hawaii, churches have been warned that regardless of their beliefs, all staff positions save the pastor must be made available to homosexuals.
- Again in Minnesota, a Catholic priest was sued, in a case that dragged on for years, simply for refusing to hire a homosexual to teach in a Catholic school.
- A 1992 "gay rights" statute in New Jersey prohibits employers from discriminating on the basis of sexual orientation in hiring and firing. The same law could force churches to unite homosexuals in marriage.
- In Minneapolis, Big Brothens was prosecuted merely for telling one mother that a prospective Big Brother was homosexual. After years of legal harassment, Big Brothers has adopted a national policy of "accepting gay men as prospective Big Brothers to fatherless youth."

Constitutional attorneys estimate the cost of fighting charges filed under "gay rights" legislation to Supreme Court decision as nearly $250,000.

It goes on and on. Cut through the gushy slogans about "tolerance" and "freedom," and you discover actions saying exactly the opposite. Actions revealing a concerted attack on the right of any American to hold, speak or live out non-politically correct beliefs.

Amendment 2 will safeguard your right to disagree with the militant gay mindset. Please — vote "YES" on 3 November third.
Under "gay-rights", free-speech becomes an endangered species!

☑ You probably remember the orchestrated attack that gay militants and their supporters hurled on Coach McCartney this year for speaking his mind. Simply for stating his beliefs, in response to reporters' constant questions, he was subjected to a wave of media and pro-gay-rights abuse. It was as if the First Amendment has suddenly been suspended in the state of Colorado! But don't think that was an isolated occurrence.

☑ Last year, an ethnic harassment bill (which was thankfully defeated in committee) would have made it a felony hate crime to speak negatively about homosexuality! Even a member of the clergy could have faced criminal penalties for preaching against the homosexual lifestyle. Yes, it can happen in America.

☑ Several public figures who have made known their support for Amendment 2 have received specific, serious death threats. Others have been threatened in their careers. Some have been forced to move from offices or homes. Others have had to hire extra security—all because they spoke in favor of Amendment 2.

Don't let this attack on the free-speech rights of all Coloradans succeed! Stand up for freedom of speech by voting "YES" on Amendment 2.

Amendment 2 doesn't hinge on religion or morality. And it certainly isn't about hatred.

It's about fairness.

What's fair about an affluent group gaining minority privileges simply for what they do in bed? What's fair about making someone's opinion illegal just because it isn't "politically correct"? What's fair about people who enjoy all the rights and privileges of American citizenship asking for special status—just because they're unhappy with the rights they already have?

Nothing, we say. If you agree with us, we ask you to please vote "Yes" on Amendment 2 in November.

Making Sense Out of "Discrimination"

Historically, anti-discrimination laws were written for specially protected classes—and nobody else. Caucasian males under forty aren't protected against those laws. Millionaires-born that way aren't protected by those laws. These issues were made to protect enlightened, well-educated and politically powerful people because of how they behave or what kind of leisurely desires they have. If you're not a would-be employee who can be tagged, politically powerless people because of how they behave or what kind of leisurely desires they have, you have the privilege of claiming discrimination just because people don't like your behavior or desires.

Militant gays want to create a whole new category of anti-discrimination protections. Now they want rich, funny, politically powerful brokers to enjoy special protection from discrimination.

They're counting on Americans to not know what "discrimination" really means. Show the gay extremists that you know what it means—vote YES on Amendment 2.
EQUAL RIGHTS—NOT SPECIAL RIGHTS!

Homosexuals' drive to grab "protected class" status threatens more Coloradans than any other political issue today. "gay-rights" threaten...

✓ Parents, who fear the influence of homosexuals on their children
✓ School administrators and teachers, both public and private, against whom enormous pressure is now being exerted, both to hire gay teachers and to teach children that homosexuality is "normal and healthy"
✓ Employees, forced by their companies to "value" homosexuals, in violation of their convictions, or lose their jobs
✓ Health care providers and workers, vulnerable to disease because of: "privacy" given to homosexuals, in violation of their vows of confidentiality
✓ Bankers and insurance companies, compelled to endorse and protect homosexual behavior financially
✓ Disadvantaged minority groups, who stand to lose status and benefits by associating their ethnicity with homosexuality
✓ Landlords, forced to rent to homosexuals, no matter what their personal beliefs may be on sexuality
✓ Day-care owners, compelled to hire homosexuals for care-giving of small children
✓ Churches, pastors, congregations, and parachurch ministries, threatened with having to hire homosexuals and with severe consequences if they dare to speak out against homosexuality
✓ Government workers, compelled to promote homosexuals and their agenda on all levels of government.

Homosexuals deserve equal rights — not special rights. Please: on November 3rd, vote "YES" on Amendment 2.

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"WHAT HOMOSEXUALS DO AMONG THEMSELVES IN PRIVATE, THAT'S UP TO THEM. I JUST DON'T THINK IT OUGHT TO GET 'EM SPECIAL RIGHTS, THAT'S ALL."

—That's what one crusty Coloradan told us during our petition drive. We couldn't have put it better ourselves. Coloradans understand that protected class status shouldn't be given to just anyone who asks for it. That wouldn't be fair.

Amendment 2 says basically one thing: that homosexuals, like all Americans, deserve equal rights. But nothing about their circumstances, their lifestyle or their political power rates them as a group in need of special rights. Don't let "political correctness" and Hollywood values carry the day. Vote "YES" on Amendment 2 and cast a vote for the true meaning of civil rights.

VOTE YES! ON AMENDMENT 2.
The largest pro-gay special rights organization calls itself "EPOC", or the "Equal Protection Only Campaign" (an intentionally deceptive title, since the organization is clearly after protected class status for homosexuals, a far cry from "equal protection only", and deceptive because Amendment 2 will leave all basic, "equal" protections homosexuals enjoy in place. If you're paying close attention to the debate over Amendment 2, you've probably run across some of EPOC's scare tactics and inaccurate claims. We call them "EPOC's fables"—but don't take our word for it. For honest-to-goodness facts about the issues surrounding Amendment 2 and the claims "EPOC" is making, consult the table below and check out the pages enclosed. It may be a real "eye-opening" experience.

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<td>&quot;Minorities should oppose Amendment 2&quot;</td>
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Vote YES on AMENDMENT 2!

November 3rd

equal rights—not special rights