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## 1995-96 SUPREME COURT PREVIEW: MOCK ARGUMENTS IN *ROMER v. EVANS*

Michael J. Gerhardt\*

Tracey Maclin\*\*

### INTRODUCTION

On September 22, 1995, the Institute of Bill of Rights Law at the College of William & Mary Law School held its eighth annual Supreme Court Preview. Each year, legal scholars and journalists from around the country gather to survey the upcoming Supreme Court term. This year's Preview began with a moot court argument of *Romer v. Evans*,<sup>1</sup> Colorado's appeal to the United States Supreme Court that was heard on October 10, 1995.

In November 1992, the Colorado electorate voted 53.4% to 46.6% to include Amendment 2 in the Colorado Constitution.<sup>2</sup> As adopted, Amendment 2 states:

**No protected status based on homosexual, lesbian, or bisexual orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>3</sup>

The immediate result of Amendment 2 would have been to void local antidiscrimination legislation in three Colorado cities—Aspen, Boulder and Denver—and to prevent the enactment of any future protective legislation

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<sup>1</sup> *Romer v. Evans*, 115 S. Ct. 1092 (1995), *granting cert. to* 882 P.2d 1335 (Colo. 1994).

<sup>2</sup> *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995).

<sup>3</sup> COLO. CONST. art. II, § 30b (enforcement stayed pending appeal).

for the benefit of homosexuals absent a change in the Colorado Constitution.<sup>4</sup>

On November 12, 1992, respondents filed suit in state court.<sup>5</sup> The trial court issued a preliminary injunction against enforcement of the Amendment, concluding that the Amendment infringed on the fundamental "right not to have the State endorse and give effect to private biases" affecting an identifiable class.<sup>6</sup> On appeal, the Colorado Supreme Court affirmed, but rejected the lower court's reasoning, instead concluding that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest."<sup>7</sup> Accordingly, the Colorado Supreme Court held that Amendment 2 was violative of the respondents' "fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny."<sup>8</sup> Applying the Colorado Supreme Court's standard, the trial court permanently enjoined Amendment 2, concluding that although the State had several compelling interests, the Amendment was not sufficiently tailored so as to justify the burden on the respondents' fundamental rights.<sup>9</sup> The Colorado Supreme Court affirmed.<sup>10</sup>

The trial court litigated the issue of whether homosexuals and bisexuals constituted a suspect or quasi-suspect class, but determined they were not.<sup>11</sup> The respondents did not appeal this issue to the Colorado Supreme Court, and the Colorado court did not address the issue.<sup>12</sup>

In the mock argument, Professor Michael Gerhardt represented the State of Colorado, the petitioner, and Professor Tracey Maclin represented the respondents. A panel of nine journalists played the part of the United States Supreme Court.<sup>13</sup> It is important to stress that the legal arguments presented do not necessarily represent beliefs and opinions of Professors Gerhardt

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<sup>4</sup> *Evans*, 882 P.2d at 1339; *id.* at 1364 (Erickson, J., dissenting).

<sup>5</sup> *Id.* at 1339.

<sup>6</sup> *Evans v. Romer*, 854 P.2d 1270, 1273-74 (Colo. 1993).

<sup>7</sup> *Id.* at 1279.

<sup>8</sup> *Id.* at 1282.

<sup>9</sup> *Evans*, 882 P.2d at 1340.

<sup>10</sup> *Id.* at 1350.

<sup>11</sup> *Id.* at 1341 n.3.

<sup>12</sup> *Id.*

<sup>13</sup> The panel was made up of the following participants: Bill Banks, Professor of Law, Syracuse University School of Law; Paul Barrett, *Wall Street Journal*; Joan Biskupic, *Washington Post*; Richard Carelli, Associated Press; Aaron Epstein, Knight-Ridder Newspapers; Jill Fisch, Associate Professor of Law, Fordham University School of Law; Linda Greenhouse, *New York Times*; Tony Mauro, *USA Today*; and David Savage, *Los Angeles Times*.

and Maclin; the decision as to which professor would argue which side was determined by a toss of a coin.

\* \* \*

**ROY ROMER,**  
*Petitioner,*

—vs.—

**No. 94-1039**

**RICHARD G. EVANS,**  
*Respondent.*

**Williamsburg, Virginia**  
**Friday, September 22, 1995**

Oral Argument in the above-entitled matter:

**BEFORE:**

BILL BANKS, *Chief Justice*  
PAUL BARRETT, *Associate Justice*  
JOAN BISKUPIC, *Associate Justice*  
RICHARD CARELLI, *Associate Justice*  
AARON EPSTEIN, *Associate Justice*  
JILL FISCH, *Associate Justice*  
LINDA GREENHOUSE, *Associate Justice*  
TONY MAURO, *Associate Justice*  
DAVID SAVAGE, *Associate Justice*

**APPEARANCES:**

PROFESSOR MICHAEL GERHARDT, *William & Mary Law School,*  
*on behalf of Petitioner.*

PROFESSOR TRACEY MACLIN, *Visiting Professor of Law 1995-96,*  
*Harvard Law School; Professor of Law, Boston University School of*  
*Law, on behalf of Respondents.*

## PROCEEDINGS

ORAL ARGUMENT OF  
PROFESSOR MICHAEL GERHARDT  
ON BEHALF OF PETITIONER

MR. GERHARDT: May it please the Court. As this Court well knows, the Fourteenth Amendment sets a floor with respect to equal protection below which no state law may go.<sup>14</sup> In this case, the question is whether the Fourteenth Amendment prohibits the state from also using that floor as a ceiling. Our answer is no. In our system of federalism, the state or its people have the final say on how to fill the space above the floor set by the United States Constitution.

In this case, neither the state of Colorado nor its political subdivisions are under any constitutional compulsion to pass legislation to grant special status to gays, lesbians and bisexuals. These groups won political victories for themselves in certain state agencies and political subdivisions. For example, three Colorado cities enacted sexual orientation ordinances regulating employment, housing and public accommodations.<sup>15</sup> The state Civil Rights Commission had voted to recommend that the General Assembly expand the state's Civil Rights Act to ban discrimination based on sexual orientation—<sup>16</sup>

THE COURT: Counselor.

MR. GERHARDT: Yes?

THE COURT: Because of Colorado's Amendment 2, how would somebody then be able to bring any kind of discrimination case against an employer in the city where he

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<sup>14</sup> U.S. CONST. amend. XIV.

<sup>15</sup> See *Evans*, 882 P.2d at 1364 (Erickson, J., dissenting). Aspen, Denver, and Boulder had enacted ordinances protecting against discrimination on the basis of sexual orientation. *Id.* (Erickson, J., dissenting).

<sup>16</sup> *Id.* at 1364 n.7 (Erickson, J., dissenting).

might previously have been able to bring such a case under those ordinances? How would this exactly work now, as you have explained the ordinances?

MR. GERHARDT: Well, the purpose of the Amendment, plain and simple, was to allow the state to occupy a neutral position with respect to the preferred status of gays, lesbians, and bisexuals. Consequently, the recourse left open to those groups is to go through the same referendum process that they opposed and lost—and it was a political loss. The critical aspect is that it was a process previously set up by Colorado law. It's a legitimate process.

THE COURT: But are you saying that before Amendment 2, somebody who would have been denied a job because of his sexual orientation, or denied housing because of sexual orientation, could have sued under these various city ordinances, and now they wouldn't be able to? I'm trying to figure out in terms of a discrimination case.

MR. GERHARDT: In terms of a discrimination case, any local laws that allow any discrimination case to be brought on the basis of sexual orientation have been superseded by this referendum, which has now been enshrined in the state constitution.<sup>17</sup> Consequently, anyone who is interested in bringing a discrimination case against the state government still has recourse under the Fourteenth Amendment. If the complaint of discrimination is against private individuals, the case has no basis in state law at present.

THE COURT: Doesn't this amendment drop homosexuals, bisexuals below that floor? Doesn't it make them unequal because only they—not any other group in the state of Colorado—cannot participate in the political process with any hope of success.

MR. GERHARDT: We don't think so, Your Honor. In fact, what this case represents is a fundamental aspect of federalism. There are always winners and losers in the political

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<sup>17</sup> COLO. CONST. art. II, § 30b (1994) (enforcement stayed pending appeal).

process, and in this case, gays, lesbians, and bisexuals won various political victories across the state. They have now suffered a loss, and seek constitutional immunity from suffering the consequences of that loss.

THE COURT:

Counselor, as I think Justice Epstein was suggesting, doesn't the whole concept of your argument about floors and ceilings, and so on, assume the answer to the question that we are here to answer? And that is, before we get to federalism, state sovereignty, all that kind of stuff, what is the Fourteenth Amendment floor?

Let me ask you a question. Suppose the city of Boulder, Colorado had an ordinance which said that police shall enforce the law against assault unless the victim of the assault happens to be gay. In that case, the police may not enforce the law against assault. Would that be constitutional under the Fourteenth Amendment?

MR. GERHARDT:

I think that obviously would be subjected to a rational basis test.<sup>18</sup> I suspect the answer would be no. Police are state actors. State actors still must comply with the Fourteenth Amendment.

I might also add though, that—with respect to the assault law—assault in general is prohibited against all citizens of the state.<sup>19</sup> Gays and lesbians are still citizens of the state, and as such they are on the same plane. They now occupy an equal status with other citizens of the state. They simply don't have a preferred status from other citizens. All citizens are protected from assault. These same citizens are protected from assault.

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<sup>18</sup> Under the rational basis test, two prongs must be satisfied. First, the purpose of the statute must be legitimate. Second, the means must be rationally related to the ends. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *see also Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981).

<sup>19</sup> COLO. REV. STAT. §§ 18-3-201 to 18-3-204 (1994).

- THE COURT: Now you talk about preferred status—special status, I think you said. Aren't we rather talking about special disabilities?
- MR. GERHARDT: I don't think so, Your Honor. I think the whole purpose of the people's referendum was in fact to remove the special status that was only granted through law—through the laws that had been passed by various cities, the governor's actions, and the General Assembly.
- THE COURT: Can you name any other group in the state of Colorado—strippers, telemarketers, left-handed people—who can or who cannot do what the homosexuals here are denied?
- MR. GERHARDT: I think, frankly, every group you mentioned, Your Honor, is in the same status as these groups.
- THE COURT: Except that only the homosexual group, only the gay group, is prohibited from passing an ordinance to protect them against discrimination.
- MR. GERHARDT: That's true.
- THE COURT: The others are not, are they?
- MR. GERHARDT: It's true that the referendum has that consequence, Your Honor, except for the fact there is still a process by which that referendum can be overridden. That referendum itself was properly processed, and the fact remains that I think none of those other groups are likely to win a political victory of the sort that these people won in order to gain special status.
- THE COURT: Is there any other group in Colorado that's so disadvantaged?
- MR. GERHARDT: I can't say off the top of my head whether that's true or not, although I suspect that none of the groups you mentioned, Your Honor, are any likelier to be able to obtain special status in either the cities or across the state.

- THE COURT: But Justice Epstein's point is that the Boy Scouts could obtain an ordinance, but the gays and lesbians would need to amend the state constitution to gain that status.
- MR. GERHARDT: I think that's of no consequence, Your Honor. I think that the reality is that most citizens occupy a status in which they are not given preferred treatment, in a variety of contexts, against both state action and private action. What this referendum tries to achieve, through plain language, is to simply even the playing field. The reality is that the respondents used the political process to obtain advantages for themselves. They've lost those advantages for themselves as a consequence of the referendum. The only way to win back those advantages, that is to say the only way to win back a status superior to that of other citizens, is through the referendum process.
- THE COURT: Before we go further, could you clarify for us what the state's interest is here in the enactment of the amendment. What's being accomplished?
- MR. GERHARDT: Well, for one thing, what's being accomplished is what I have just stated—the removal of the special status. The people are trying to achieve as best as possible a neutral position for the state under these circumstances. In other words the people are leaving to the political process—
- THE COURT: But there's some affirmative interest that the state has identified here. Is there not something having to do with familial privacy or something like that?
- MR. GERHARDT: Well, there are a variety of state interests that are implicated here, one of which is what I have just stated. Another is, obviously, that the people just may have decided, like those of any state may, that the experiment of granting special privileges hasn't worked out.
- THE COURT: There's been some moral judgment here, has there not? Are you saying there have been no moral judgments behind Amendment 2?

MR. GERHARDT: There are many reasons that are legitimate to support this referendum, one of which is, as the record reflects, that the people of Colorado decided that the special status of various laws granted to these groups in a sense coerced other people to interact with them privately, other people who may not have wanted to, and so there are—

THE COURT: Could you give me a factual example of this coerced interaction?

MR. GERHARDT: Sure. As the record reflects, for example, one of the witnesses testified that under similar circumstances in another state, with respect to a similar city ordinance, she had not wanted to have any roommates who were attracted to her or who might have any sort of interest toward her that was anything except platonic. She didn't want a male roommate; she didn't want a lesbian roommate. She was, in fact, prosecuted for violating the city ordinance which precluded discrimination in housing on the basis of sexual orientation.<sup>20</sup>

THE COURT: There's no exception for a situation where you would have to have someone in your own room?

MR. GERHARDT: None at all.

THE COURT: Maybe that's a flaw in there, in the state ordinance. Ordinarily there are exceptions to discrimination—

MR. GERHARDT: Well, I think that's a—

THE COURT: —for places where there are just a few units.

MR. GERHARDT: Your Honor, the point is that these laws may not have been wise to begin with. The people of a state can make mistake in enacting a law like Amendment 2, for perhaps it's not the wisest thing the people of Colorado ever did. It also may not have been wise to have the antidiscrimination laws in the first place,

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<sup>20</sup> Brief for Petitioners at 15, *Romer v. Evans*, cert. granted, 115 S. Ct. 1092 (1995) (No. 94-1039).

because they simply created frictions and fractures that the people of the state can try to remedy in this manner.

THE COURT: Was that a typical example? How have these ordinances been used, and how have they been invoked regularly? I'm concerned about the removal of them just so the people won't have some recourse. Can you tell us a little bit about what the record reflects?

MR. GERHARDT: With respect to the removal, Your Honor, I think it's important to stress that Amendment 2 places these groups in the same position they would have been in if the ordinances had never been enacted in the first place. I think it's an important point to make because if there's no constitutional compulsion for these ordinances—

THE COURT: But it doesn't place them in the same position because they can no longer propose such an enactment. They no longer have the power to go to a city council and begin such a legislative process. That's quite a difference.

THE COURT: Except for the amendment process, which is a very high hurdle.

MR. GERHARDT: They retain the same opportunity that other people have through the referendum process, which is the process one goes through to gain constitutional protections.

THE COURT: Just not legislative protection. They're treated differently from all other Coloradans with respect to the ability to seek protection from their local government.

MR. GERHARDT: Your Honor, there are only two limitations on any state legislative restriction. One is whether the legislative restriction burdens a racial minority,<sup>21</sup> the

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<sup>21</sup> See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that administrative discrimination against Chinese was suspect).

other is whether it violates a fundamental right.<sup>22</sup> Neither of these is involved in this case. As a consequence, this Court has to review the constitutionality of this referendum with enormous latitude under the rational basis test.

THE COURT: So you are denying there's any pollution of political power here.

MR. GERHARDT: None whatsoever.

THE COURT: Counsel, this court rejected that exact same argument with respect to the ordinance issued. That was *Hunter v. Erickson*,<sup>23</sup> from which the Colorado Supreme Court reminds us—

MR. GERHARDT: We think *Hunter* is a very different case, Your Honor, for a couple of reasons. I think it's clear that *Hunter* involved a suspect class.<sup>24</sup> The emphasis on the fact that a suspect class was being burdened was of great importance to the Court. In addition, I think it's important to recognize that in *Hunter*, the city referenda that was enacted in a sense created two political hurdles for blacks to go through with respect to fair housing.<sup>25</sup> And the Court in reviewing the referendum, made the decision that putting additional hurdles in the way of a racial minority, for whom the Fourteenth Amendment was, in fact, primarily designed to protect, triggered strict scrutiny.<sup>26</sup>

THE COURT: Haven't we gotten far beyond the notion that the Fourteenth Amendment was only designed to protect

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<sup>22</sup> See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding unconstitutional annual poll tax imposed as prerequisite to exercising right to vote).

<sup>23</sup> 393 U.S. 385 (1969). In *Hunter*, the Court struck down an amendment to the city charter of Akron, Ohio that required majority approval of any city housing ordinance passed to combat discrimination on the basis of "race, color, religion, national origin or ancestry." *Id.* at 387 (quoting Akron City Charter § 137).

<sup>24</sup> *Id.* at 391.

<sup>25</sup> *Id.* at 389-90. "By adding § 137 to its charter the City of Akron . . . not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect." *Id.*

<sup>26</sup> *Id.* at 391-92.

black people? Doesn't the Fourteenth Amendment extend far beyond that in the current state of our law?

MR. GERHARDT: It obviously depends on the context, Your Honor, and in this context, I think it's important to recognize that the Court rejected extending *Hunter* in *James v. Valtierra*.<sup>27</sup> *James* involved a class of poor people who were subjected to almost exactly the same burden as the racial minority was in *Hunter*, except the Court refused to apply *Hunter* to that context, and instead upheld the state amendment.<sup>28</sup> I think *James* is an opinion that's awfully important to this case.

THE COURT: But you're not arguing that the Equal Protection Clause in the Fourteenth Amendment only applies to race, are you?

MR. GERHARDT: Not at all, but I think—

THE COURT: What's the distinction between your case and the way this Court has applied the Equal Protection Clause to gender?

MR. GERHARDT: Well, I think one critical thing to keep in mind is that where the people of a state are exercising their sovereign authority to redefine allocation of power within the state, the process is normally accorded great deference by this Court. There have only been two exceptions thus far in history to state enactments on that issue, and they had to do with a racial minority and fundamental rights. With respect to women who haven't been implicated in any of those other cases, in other contexts, this Court obviously, for the most part, has used intermediate scrutiny.<sup>29</sup>

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<sup>27</sup> 402 U.S. 137 (1971). In *James*, the plaintiffs challenged a California constitutional provision that required a majority vote of electors in local governments to approve of low-rent housing projects. *Id.* at 139-40. Plaintiffs unsuccessfully argued that *Hunter* precluded enforcement of the California provision. *Id.* at 141.

<sup>28</sup> *Id.* at 143.

<sup>29</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (noting that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); see also *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding male-only draft registration); *Michael M. v. Superior Court*, 450 U.S. 464

THE COURT:

Mr. Gerhardt, do you think it would be okay for Colorado officials to discriminate against gays in an affirmative way? In other words, suppose I'm a mayor in a small town in Colorado. This amendment takes effect, and I say I'm going to put out a statement that as of Monday, I want all the gays and lesbians fired who work in our city government at any level. I want them fired because I think I've learned about this amendment, and these people don't have any right to equal treatment, so I don't care whether they're good or bad employees—I want them fired. Is that okay?

MR. GERHARDT:

That decision, Your Honor, would still have to be subjected to Fourteenth Amendment analysis, and under that decision, which we think ought to be subjected to the rational basis test, it's conceivable that such a policy might not be found to be satisfactory. In other words, it may be that the Court would have a difficult time conceiving of a reasonable basis for that kind of decision.<sup>30</sup>

THE COURT:

All right. Well, let's say I don't like gays. I've read about this amendment, and I've seen the discussion, and people say they're not good people. I'm free to discriminate now, so why not?

MR. GERHARDT:

Well, I think, Your Honor, there are a couple different things involved here. One is if animus or prejudice is the reason for a law, legal action, or governmental action, as in *Cleburne*, this Court will strike it down.<sup>31</sup> If, however, there is a rational basis for the law that is legitimate and related to the achievement of the government's legitimate objective, then this Court will uphold it.<sup>32</sup> In the circumstances you are postulating, it sounds to me like prejudice is the sole reason for the mayor's action.

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(1981) (upholding statutory rape law under which only men could be held liable).

<sup>30</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). In *Cleburne*, the Court was unable to find any rational basis for a city requirement that a group home for the mentally retarded obtain a special use permit. *Id.*

<sup>31</sup> See, e.g., *id.* at 450.

<sup>32</sup> *Id.* at 440.

THE COURT: Wasn't prejudice the main reason here? Wasn't it homophobia?

MR. GERHARDT: Not at all, Your Honor. It seems to me that if the state has the discretion to grant special benefits in the first instance, it ought to be able to retain the authority to withdraw them if it so chooses. Your Honor, I don't know of any constitutional provision that says a state is estopped from ever withdrawing an experiment, once it's put it into motion, if it decides for whatever reason that it doesn't think the experiment is in the best interests of the people of Colorado.

THE COURT: What's your response to the argument that's in a line of cases starting with *Reynolds v. Sims*?<sup>33</sup> This Court has said that once you dilute the power of a popular group to influence the political process, you have violated the Equal Protection Clause.<sup>34</sup>

MR. GERHARDT: Well, *Reynolds v. Sims* and the cases that you are referring to obviously again deal primarily with the voting rights of blacks. I would point out that there's no dilution of a vote here, nor is there a racial minority.

THE COURT: Not a dilution of a vote, the dilution of political power to influence the political process?

MR. GERHARDT: Your Honor, states override local decisionmaking all the time. It's commonplace that either through legislation or referendum, local decisionmaking ordinanc-

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<sup>33</sup> 377 U.S. 533 (1964). *Reynolds* was the Court's first articulation of the "one person, one vote" principle. For later cases developing this principle, see *Kirkpatrick v. Presler*, 394 U.S. 526 (1969) (requiring states to make "good-faith effort to achieve precise mathematical equality"); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964) (holding that apportionment schemes violating "one person, one vote" principle are not made constitutional by approval by majority of voters).

<sup>34</sup>

[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. . . . [A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."

*Reynolds*, 377 U.S. at 568.

es get overridden all the time. And if the people who lose in that kind of process are allowed to bring any kind of constitutional claim, simply because they lost, state government comes to a grinding halt.

THE COURT: Counselor, you are short on time. I'm going to give you a question that you can answer yes or no.

MR. GERHARDT: Yes, Your Honor.

THE COURT: As I understand it, 53% of the citizens in Colorado voted for this amendment.<sup>35</sup> Let me give you a hypothetical: Let's say that 95% of the Americans who live outside of Colorado think this is just terrible public policy. Does that affect the rational basis standard one iota?

MR. GERHARDT: I think it does, Your Honor, except it strengthens the people's argument in this case. The reason I think it does is because it demonstrates the political power of the group that we have at issue here. I might point out, for example, that this same group, these groups we have been talking about, persuaded Congress to place sexual orientation on the list of hate crimes within the federal hate crimes statute.<sup>36</sup> So, for example, with respect to the earlier question about assault, such assault might be actionable under the federal statute. In addition, I think the political victories that were achieved reflect the fact that the groups we're talking about are not politically powerless. This all goes to whether we have a discreet and insular minority.<sup>37</sup>

THE COURT: Wait a minute. Neither are women, neither are people over 40, neither are the disabled, and we protect them.

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<sup>35</sup> See *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995).

<sup>36</sup> Hate Crimes Statistics Act of 1990, 28 U.S.C. § 534 note (Supp. V 1993).

<sup>37</sup> See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) ("Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

- MR. GERHARDT: We protect some of them specially, Your Honor, but there are left-handed people, there are red haired people, there are tall people, there are short people, there are overweight people—all those people, by the way, have characteristics that are far more visible than the characteristics of these groups, which would qualify the former as discreet and insular groups within a narrow reading of those terms—but we don't give any of those groups special protections.
- THE COURT: Are you saying this group is not protected because it doesn't have an immutable characteristic?
- MR. GERHARDT: This group is not given special status because we would argue it is not a discreet minority, and because it's within the state's discretion to withdraw special benefits that might have been conferred on it as such.
- THE COURT: Let's come to rational basis. What is your best argument for a legislative, for a governmental purpose here?
- MR. GERHARDT: I think the best argument for a legitimate governmental purpose is that the state of Colorado can choose to allocate its resources in whatever manner it sees fit. Billions of dollars have been spent on cases that have arisen under the laws that were overridden and superseded by the referendum. The state of the Colorado can't fund every special interest group, or every special group's interest.
- THE COURT: And so you take out the less deserving?
- MR. GERHARDT: We take out—it has nothing to do with being less deserving, Your Honor.
- THE COURT: That's opinion.
- MR. GERHARDT: It has to do with drawing the line, and the people of the State of Colorado can reach a judgement that they are now going to limit the class of special groups.
- THE COURT: On what basis?

MR. GERHARDT: I see my time is up, Your Honor.

THE COURT: You may answer the question.

MR. GERHARDT: They may do so, Your Honor, on the basis of—

THE COURT: On what basis do you ignore centuries of discrimination against homosexuals and say they are less deserving?

MR. GERHARDT: Well, Your Honor, there are a couple of points here. One is that I think the groups we're talking about in this case have won enormous political victories. That doesn't suggest to me that these groups have the same degree of political powerlessness as any of the groups this Court has ever recognized as being entitled to strict scrutiny. That's the first thing. Second, I don't think these groups have the same kind of characteristics as those other groups—immutable, visible traits which set people apart—and that makes enforcement of discrimination laws that are based on the abuse of those characteristics much easier.

THE COURT: Is that the same as saying a homosexual can just change their behavior?

MR. GERHARDT: It has nothing to do with behavior, Your Honor.

THE COURT: You talk about immutable characteristics.

MR. GERHARDT: No, I'm talking about how the Court has traditionally found minorities to be discreet and insular, and it would be our argument that we're dealing with neither characteristic in this case. And that the people of Colorado can make a decision that they want to allocate their scarce economic resources in other directions, perhaps directions that are aimed, in their judgment, to bringing the people of Colorado closer together, rather than dividing them apart into special groups.

THE COURT: And to make a uniform rule.

MR. GERHARDT: And to make a uniform, neutral rule.

THE COURT: If you wanted a uniform rule, why does this amendment rule out state antidiscrimination laws which are uniform?

MR. GERHARDT: Your Honor, again I would remind the Court that this amendment, this referendum seeks simply to remove special status that other laws—local laws—and some state agency decisions granted. In doing so, it returns and places the groups in this case still within the protections of the Fourteenth Amendment. As far as the private sector is concerned, these people may still influence federal law, and they have done so, as well as the private associations with which we all must live.

THE COURT: Thank you, Mr. Gerhardt. Mr. Maclin?

ORAL ARGUMENT OF  
PROFESSOR TRACEY MACLIN  
ON BEHALF OF RESPONDENTS

MR. MACLIN: May it please the Court, my name is Tracey Maclin, counsel for the Respondents. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>38</sup> The Respondents submit that the command of the Equal Protection Clause is violated when the state makes some persons ineligible for the protection of the laws for an entire category of mistreatment. In this case, Colorado, through Amendment 2, has declared that a group of persons is ineligible from protection against discrimination, however wrongful or unnecessary that discrimination may be.

If, for example, Colorado had declared that some groups within the state, say law professors or hot dog vendors, were ineligible from protection of the law—for example, from physical assault or robbery—and again, not only for today, but for all existing laws, I have no doubt that this Court would de-

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<sup>38</sup> U.S. CONST. amend XIV, § 1.

clare that a per se violation of the Equal Protection Clause. This same principle applies to Amendment 2, which mandates that gays and lesbians—citizens of Colorado—be denied the same protection of the laws that every other citizen of Colorado is entitled to receive. This is not a case about whether there may be adequate justification to deny gays, lesbians, or any other group, less favorable treatment, or to have them receive less favorable treatment in particular circumstances, and by what standard that law should be judged. Rather, the central issue is whether the Fourteenth Amendment allows the State to exclude a group of persons from the protection of its laws on the basis of a personal characteristic, that may not be the basis of any protection—any protection—pursuant to state law, from any form of discrimination, again however invidious or unwarranted that discrimination may be.

THE COURT:

But counsel, is it accurate to say that Amendment 2 operates to withdraw from gay people the same protection that everybody else gets? For instance, I don't think there's anything in Colorado law that would protect law professors as a class if somebody didn't want to rent to a law professor—

MR. MACLIN:

No, but if Colorado said that law professors were not entitled to the protection of Colorado law—for example, from physical assault or from robbery—and only law professors shall not receive the protections of Colorado law, I doubt if that would be an open and shut case to say that's a violation of the Equal Protection Clause. Even though law professors are not a suspect class, and even though there is no fundamental right involved there. What this statute does say is that gays and lesbians are not entitled to any protection under current law, or even future law, when it comes to discrimination at any level of state government.

THE COURT:

I don't think it says that. It protects them against assault just as it does law professors.

MR. MACLIN:

Well, it does not protect them against discrimination. If I may read the last portion of the amendment, it

says, "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."<sup>39</sup> That is the core of Respondents' argument. This amendment says that gays and lesbians shall not be entitled to make any claim or be entitled to receive any relief where they are claiming that they are being discriminated against on the basis of their sexual orientation. For example, if Colorado law were to say that you should not be denied housing on an arbitrary basis, and if a gay or lesbian person was denied housing because of their sexual orientation, they would not be entitled to any relief—even if a judge were to find that this was an arbitrary decision based on their sexual orientation—because this is a claim of discrimination on the basis of their sexual orientation.

THE COURT: What do you say to Mr. Gerhardt's main argument, though, that these sorts of protections, as he calls them, should have never been enacted in the first place? As if it were saying that left-handers get something special.

MR. MACLIN: With all due respect, Your Honor, this is not about special treatment. If it's about anything, it's about selective denial. This amendment makes gays and lesbians worse off than other individuals. This is not about selective treatment.

THE COURT: And there's no way that we need to accord gays and lesbians any kind of special treatment at all?

MR. MACLIN: Absolutely not. Absolutely not. This amendment makes them worse off because, for example, it doesn't say that heterosexuals shall not be denied claims of discrimination or even special treatment. Heterosexuals are free to go out and make claims of discrimination, indeed they're free to go out and ask for special treatment. It's only gay and lesbian individuals who cannot make these claims, and that makes them worse off. Every other citizen of Colorado is

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<sup>39</sup> COLO. CONST. art. II, § 30b (enforcement stayed pending appeal).

free to bring a claim on the basis of, for example, of their marital status.

THE COURT: How would a heterosexual bring such a claim?

MR. MACLIN: For example, if they claim that they were arbitrarily denied housing by a landlord based on their marital status, a judge would be free to say that Colorado law protects against discrimination on the basis of marital status. In some instances, it protects against discrimination on the basis of that you are a smoker. Those individuals are free to come in and argue to a judge that this is an arbitrary discrimination. However, if a gay or lesbian person were denied housing on the basis of their sexual orientation, the judge would not be free to find that this is an arbitrary discrimination. A gay or lesbian person would be precluded from bringing the same claim or a similar claim at every level of state government.

THE COURT: Along with a lot of other groups—smokers, non-smokers.

MR. MACLIN: No, that's not true. That's not true, Your Honor.

THE COURT: Where do they get their protection?

MR. MACLIN: They're free to come in and make a claim on the basis of an arbitrary denial, and if a judge were to find that that's arbitrary on the basis of the fact that they're left-handed, red-headed, or overweight, they're free to receive protection of Colorado's law. It's only gays and lesbians that are denied a remedy. So this is not a case about special treatment. My colleague says, "Well, the state is simply trying to be even-handed." The state is not even-handed here, it's only gays and lesbians—

- THE COURT: Didn't the statute that we upheld in *Bowers*<sup>40</sup> treat gays with less than equal treatment? Didn't that accord them less than an equal status?
- MR. MACLIN: Well, we're not arguing that gays and lesbians are entitled to suspect classification. I would be very happy if this court were to overrule *Bowers*, but you don't have to overrule *Bowers* to affirm the lower court decision.
- THE COURT: But if we upheld a statute that criminalized conduct engaged in by the class at issue here, surely we can uphold a statute that simply strikes a middle ground.
- MR. MACLIN: I disagree with that, Your Honor. As I said, this is not a case about a situation where Colorado has decided that there's adequate justification to single out gays and lesbians for less favorable treatment. Colorado is saying that under all circumstances, no matter how rational or irrational—under all circumstances—gays and lesbians are never going to be allowed to bring a claim of discrimination. All circumstances! It would be one thing if they were to say that in a particular situation, gays and lesbians are not entitled to the same protection that other individuals or groups receive. For example, if the State were to say: "Well, we think that gays and lesbians should not be allowed to adopt children because of particular circumstances." Here Colorado is saying that under each and every instance, no matter how arbitrary or how warranted, you cannot bring a claim of discrimination if you are gay or lesbian.
- THE COURT: Your opponent was trying to avoid making the claim based on a moral sense but in fact that is what lies

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<sup>40</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Supreme Court found constitutional a Georgia statute that criminalized sodomy. *Id.* at 189. Although neutral on its face, the majority phrased the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 198. The majority answered that inquiry in the negative. *Id.*

behind this amendment. Why are states denied the ability to use this type of legislation to enforce the moral sense that certain lifestyles are inappropriate?

MR. MACLIN: The state is free to make moral judgments and have those judgments enforced into law. However—

THE COURT: Why should the Court second-guess those judgments?

MR. MACLIN: This is not about second-guessing moral judgments. This is about a per se denial of the Equal Protection Clause. The state may decide that law professors, for example, are not morally fit because they train lawyers, but if Colorado were to say that law professors shall not be entitled to the protection of laws in—again I use the example of a case of assault—I have no doubt that it would be an open and shut—

THE COURT: That's a false comparison. Colorado has not said that homosexuals can be assaulted in the street.

MR. MACLIN: No, but they have said that homosexuals cannot bring any claim of discrimination. That's their language of Amendment 2, "claim of discrimination."<sup>41</sup>

THE COURT: That's not true. If a homosexual happens to be a racial minority, he can bring a claim. You're saying—

MR. MACLIN: If it's a racial minority, but if the person is simply gay or lesbian, they cannot have that status be the basis of any claim of discrimination, and that is, with all due respect to Justice Epstein, what the law demands. It mandates that. My colleague said, "Well, they lost in the political process." Sure gays and lesbians retain the right to vote, but state law here mandates that they shall never succeed when they bring a claim of discrimination. This is not evenhandedness on the part of the State.

THE COURT: Just to clarify what you think this amendment takes

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<sup>41</sup> COLO. CONST. art. II, § 30b (1994) (enforcement stayed pending appeal).

away from gays, what do you think a gay person in the state of Alaska—where maybe there are no laws one way or another regarding sexual status or sexual preference—what can a gay person in Alaska do that Amendment 2 says a gay person in Colorado can't?

MR. MACLIN:

Again, I use the example of housing. If Alaska, for example, prohibits arbitrary housing discrimination, that individual is free to come in and to say, "The landlord has denied me housing because of my sexual orientation." The judge might find it arbitrary under Alaska law to deny someone housing because of sexual orientation. If that same case were brought in Colorado, you can't provide protection. And again, it applies to all branches of the state government. It says "shall enact, adopt or enforce any statute, regulation, ordinance or policy,"<sup>42</sup> so it's preventing state judges from coming up with laws and policies that protect gay and lesbian individuals—

THE COURT:

Does it really reach that far? Before the amendment was passed, Colorado Springs had no law protecting homosexuals. No system of allowing them to make claims of discrimination. How are they any worse off now under Amendment 2?

MR. MACLIN:

Maybe not under Colorado Springs law, if Colorado Springs law is as you stated, but in some places where they—For example, housing is the one example that I know applies statewide. Housing discrimination cannot be arbitrary.<sup>43</sup> A gay or lesbian individual cannot come to court and make a claim of having been denied housing because of sexual orientation. Even if the judge were to find that the denial is, as a matter of Colorado law, an arbitrary denial of housing. The gay or lesbian cannot do that now under Amendment 2. So that's how they are made worse off. Every other individual in Colorado, whether it be law professors, hot dog vendors, or left-handed people, can come in and make the argument, and if the judge were to agree with them, they

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<sup>42</sup> *Id.*

<sup>43</sup> COLO. REV. STAT. § 24-34-502 (1994).

are entitled to relief.

THE COURT: How about other groups like smokers or alcoholics. Suppose some heavy smoker is in a work place and gets fired because all his fellow employees don't like the smoke. He brings a claim of discrimination, wins a million dollars, and the people of Colorado get angry and say we're going to put on ballot a new amendment that says no one can bring any claim of discrimination, preference or minority status based on smoking. You can't bring any claim from now on, in any court, based on the fact that you are a smoker or heavy smoker. That's just not going to be heard as far as claims of discrimination. Is that unconstitutional?

MR. MACLIN: Well, Colorado protects smokers.

THE COURT: No, but let's say they change their views. Yes, you're right, they do have a smoker's bill of rights in Colorado.<sup>44</sup> Suppose a lot of people get angry about it and say, "I don't want that. I don't think smokers deserve a special preference." So they add this new amendment to the constitution. Is it unconstitutional because smokers have been—

MR. MACLIN: Well, if they were to say because states remain free to restructure the political process.

THE COURT: Yes, that's true.

MR. MACLIN: What they are not free to do, however, is to have that restructuring done in an impartial way. True, this is not a situation where they have been denied the right to vote. Gays and lesbians retain the right to vote. What they don't have is the right to participate in the process in the sense that every other individual in Colorado has, because every other individual in Col-

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<sup>44</sup> See COLO. REV. STAT. § 24-34-402.5 (Supp. 1995). Although the statute does not specifically address smoking, it prohibits employment discrimination against "any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours," with certain limited exceptions. *Id.* § 24-34-402.5(1).

orado is free to bring the claim. Only gays and lesbians. Now if Colorado were to say that people who rent housing can never bring a claim of discrimination, I think it also would be a violation of the Equal Protection Clause.

THE COURT: Counsel, I don't want to cut you off, but I don't think you have answered Justice Savage's question about smokers, and I'd be very fascinated by your answer. Smokers repulse some members of the Colorado population, and they decide to bar smokers from seeking antidiscrimination legislation, or any other type of antidiscrimination—

MR. MACLIN: And if every other individual is entitled—

THE COURT: Right.

MR. MACLIN: —to bring a claim, if this is the way the question is posited, I would say that seems to be very similar to this situation.

THE COURT: Isn't that what constitutions are about? Doesn't our Constitution's First Amendment say "Congress shall make no law"?<sup>45</sup> Constitutions appropriately fence off areas of legislation that the makers of the constitution, the populace, have deemed to be inappropriate. Here in this hypothetical, it's inappropriate in Colorado to protect so-called smokers' rights.

MR. MACLIN: But the Federal Constitution says—and, of course we know, trumps any state constitution—the Federal Constitution says "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>46</sup> What Colorado has done to gay and lesbian individuals is to deny them the equal protection of the law that every other citizen in Colorado is entitled to receive, and that is why that this is a violation of the equal protection clause.

THE COURT: Why is it irrational? Why is it irrational?

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<sup>45</sup> U.S. CONST. amend I.

<sup>46</sup> U.S. CONST. amend XIV.

- MR. MACLIN: Because only gays, and no one else, are singled out in this way.
- THE COURT: It's punitive but does that mean it's irrational?
- MR. MACLIN: No, it doesn't mean it's irrational, but the problem is that it can't be explained in terms of a rational basis. Colorado has not explained why gays and lesbians, and only gays and lesbians, have been singled out in this way.
- THE COURT: Do you not think, not to change the focus here, but you don't seem to be defending the decision below on the grounds on which the Colorado Supreme Court reached it.<sup>47</sup> Do you have a fundamental right argument? Do you have an argument against *Hunter v. Erickson*?<sup>48</sup>
- MR. MACLIN: Yes, absolutely. Absolutely and that is that the citizens here are entitled—well, strike that. The State of Colorado is entitled to restructure its political process, but as the court said in *Hunter*—we disagree with the petitioners that *Hunter* is solely about race. *Hunter* is about restructuring the political process in a discriminatory way, and as Justice Harlan made clear in his separate opinion in *Hunter*, the state is free to do so but it cannot do so in a way that denies the opportunity to participate in the process in an unequal manner.<sup>49</sup> The reason why we're concerned about that is not that we're not trying to mandate results, and it's not about the Supreme Court coming in and second-guessing what the legislature has done, or even what the electorate has done, rather it's making sure that everyone has the chance to participate in the process and the procedures of the law. And that is not the case in Colorado, because again, gays and lesbians, and only gays and lesbians, are removed and denied access to the protection of Colorado's laws.

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<sup>47</sup> See *supra* note 8 and accompanying text.

<sup>48</sup> *Hunter v. Erickson*, 393 U.S. 385 (1969).

<sup>49</sup> *Id.* at 393 (Harlan, J., concurring).

- THE COURT: How can you explain *James*, which was the case in which we refused to take this beyond the suspect class?
- MR. MACLIN: Right, in fact—
- THE COURT: When have we ever taken this beyond the suspect class?
- MR. MACLIN: The difference here—you're right—*James* was a case that rejected poverty as a suspect class. *James* also considered and rejected a claim that any measure which sets up a different process for adopting a legislation on a particular issue violates the Equal Protection Clause.<sup>50</sup> This is not about changing a process, this is about completely denying to gays and lesbians any chance to receive the protection of Colorado's laws that it gives to everybody else. You don't have to touch *James*, or *James* in no way prevents you from affirming the lower court. *James* said, "Yes, it doesn't violate equal protection for a local community, or for that matter, a state, to adopt a different process or procedure for a particular issue in that case public housing." This is not about a particular process. This is about completely denying all gays and lesbians any claim of discrimination, no matter how arbitrary, how unwarranted, how invidious that discrimination is.
- THE COURT: Counselor, Colorado has another constitutional amendment that forbids incumbent elected officials from exceeding a certain number of terms.<sup>51</sup> How is that one fencing out a category?
- MR. MACLIN: Because it doesn't say, for example, only Republicans or only Socialists shall be given two terms, or whatever number of terms it is. It says to all people who have been incumbents, you cannot repeat your term after a certain number of terms.
- THE COURT: Why is it necessary to add your qualifier?

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<sup>50</sup> U.S. CONST. amend. XIV.

<sup>51</sup> COLO. CONST. art. XVIII, §§ 9a, 11.

- MR. MACLIN: Because Colorado treats all individuals who held office in an equal manner. In this case, Colorado has not treated gays and lesbians in an equal manner.
- THE COURT: How do you explain other constitutional amendments, other constitutional sections, that fence out people, such as the Establishment Clause,<sup>52</sup> which fences out the Catholic church from ever getting tax money for its parochial schools, or the right of privacy,<sup>53</sup> which prevents pro-lifers from ever getting to abortion bans.
- MR. MACLIN: Well, I'm not sure I see the analogy. I mean, the First Amendment—the Religion Clauses of the First Amendment—or the Establishment Clause, which is the first one to which you referred, sets out a principle. It doesn't say that only the Catholic church shall not be entitled to tax funds. If a statute were to say that only the Catholic Church is not entitled to tax funds, that would be an open and shut First Amendment violation.
- THE COURT: Churches generally, then.
- MR. MACLIN: That's the Establishment Clause. That's the principle on which the Federal Constitution was established. The Equal Protection Clause establishes another principle. The principles sometimes may seem to clash, but I don't see where the analogy necessarily requires this Court to overrule the lower court opinion or reverse the lower court.
- THE COURT: Here it's the same principle as in *Bowers v. Hardwick*.
- MR. MACLIN: No, it's not.
- THE COURT: On the condition of heterosexuality.

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<sup>52</sup> U.S. CONST. amend I ("Congress shall make no law respecting an establishment of religion . . .").

<sup>53</sup> See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

MR. MACLIN: Well, in *Bowers v. Hardwick*, the Court said it was okay to criminalize sodomy.<sup>54</sup> Now, as I said, this case does not require the Court to say that gays and lesbians are a suspect class, or even for that matter, that sodomy is a fundamental right. All this Court has to say in this case to affirm the lower court is that you shall not deny protection of the law, as demanded by the Equal Protection Clause. You cannot single out a group or an individual to deny protection of the laws. I see my time is up.

THE COURT: Thank you. Mr. Gerhardt?

ORAL ARGUMENT OF  
PROFESSOR MICHAEL GERHARDT  
ON BEHALF OF PETITIONER

MR. GERHARDT: Two brief points in rebuttal, Your Honor. The first is going straight to the arguments about fundamental rights. I think it's significant to note there was no alteration of the state political process in this case. In addition, the Respondents remain free to pursue the same political process today that was in existence at the time, and even before the referendum went into effect. In other words, there was no change in the political process that had anything to do with the Respondents at all. What happened in this case is somebody lost a referendum battle, and that same somebody had achieved political victories in a process that the state long ago had devised and had complete control of.

THE COURT: What do you say to the question that we brought up before—that the gay and lesbian community cannot push for another local ordinance in Denver or Boulder, or wherever such ordinances have been in place previously?

MR. GERHARDT: What I say to that, Your Honor, is that they never had a constitutional right to obtain such ordinances in the first place. In other words, Your Honor, there is

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<sup>54</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

no affirmative constitutional right that this group has to achieve a political victory, in this area.

THE COURT: Was there prohibition against it? I'm not saying necessarily there was a constitutional right, but was there a prohibition against it before this amendment?

MR. GERHARDT: Your Honor, prohibition against?

THE COURT: Against that sort of local ordinance.

MR. GERHARDT: There was no state prohibition, but states do this all the time. There are state-wide referenda all the time, and there's state legislation that supersedes whatever localities do. The critical point is that if Respondents can base a constitutional argument on a political loss, then state governments just simply cease to matter.

THE COURT: Would it make any difference to you if there was evidence that proponents of this amendment really had animus, really hated homosexuals?

MR. GERHARDT: Would it make a difference?

THE COURT: Yes.

MR. GERHARDT: I don't think so, Your Honor, because it has long been understood that this Court gives great deference to referenda because it is the one process in which the people speak. And it may well be true that some of those people did have animus, but as Chief Justice Marshall said in *Fletcher v. Peck*,<sup>55</sup> it may be that bad people passed some laws, but that's no reason to strike them down.<sup>56</sup> You look at the law to see if the law itself reflects, in so many words, and in so many ways the animus.

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<sup>55</sup> 10 U.S. (6 Cranch.) 87 (1810).

<sup>56</sup> *Id.* at 125 (observing that "a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law").

THE COURT: I think it would make a difference if we could discern animus in this amendment.

MR. GERHARDT: Well, it makes a difference in that—then I misspoke, Your Honor. I may have misunderstood your question. Animus may make a difference if that were all there were, but that's not by any means all there is in this case.

THE COURT: Thank you, Mr. Gerhardt.

MR. GERHARDT: Thank you.

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### DECISION

After thirty minutes of public deliberation, the Court ruled five to four to strike down Colorado Amendment 2. The participants were less confident that the United States Supreme Court would follow suit.