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OYEZ, OYEZ: AN INSIDE LOOK AT *ROMER V. EVANS*

Judge Mary A. Celeste[†]

“I, Mary Celeste, do solemnly swear that I will support the Constitution and the Laws of the State of Colorado and the City and County of Denver and faithfully perform my duties of the Office of Judge for Denver County Court.” At age forty-nine, I had become a judge. I was slated to be a straight suburban housewife, but I was now instead the first out and open LGBT judge in Colorado and the Rocky Mountain Region. I went from being a housewife, to a single lesbian mother, to an attorney, to an LGBT activist, to an LGBT leader involved in the United States Supreme Court case, *Romer v. Evans*.¹ As a judge, I would leave behind my LGBT activism, but my experience with the *Romer* case would stay with me forever.

[†] Judge Mary A. Celeste currently sits on the Denver County Court bench where she was the presiding judge in 2009 and 2010. Judge Celeste was the first woman and out LGBT person to hold that position in the history of that court. She was also the first out LGBT judge in Colorado. She sat on the Colorado Advisory Committee for the United States Civil Rights Commission and is currently a NHTSA Judicial Outreach Liaison for Region 8. She has served as the president of the Colorado Women’s Bar Association Foundation; the president of the American Judges Association, where she was the first LGBT judge to hold that position; a board member and former education co-chair of the International Association of LGBT Judges; and an adjunct professor at the Sturm College of Law. She served as a board member of the LGBT Community Center, the Colorado Bar Association’s Board of Governors, the Colorado Women’s Bar Association Board of Governors, and the LGBT Victory Fund, where she also served as the Political Committee Chair. She is the cofounder of the Colorado Legal Initiatives Project, the nonprofit organization that spearheaded Colorado’s campaign against Amendment 2, which resulted in the United States Supreme Court case of *Romer v. Evans*; the Colorado LGBT Bar Association; and the Colorado LGBT Chamber of Commerce. She is a pre-eminent national speaker on the topics of drugged driving, and marijuana and the law. This article is a modification of a chapter in her forthcoming book entitled MY LIFE IN LAVENDER. Kellie Lee Gibbs has contributed to this piece.

1. 517 U.S. 620 (1996).

Amendment 2 was a Colorado statewide initiative to amend the state constitution in an attempt to eradicate all existing citywide protections for LGBTs across the state. It was brought by a religious right organization called Colorado for Family Values (CFV) on the heels of their loss at the voting booths in Denver. CFV wanted to overturn a Denver LGBT protective ordinance. In essence, Amendment 2 stated that every entity in the state was barred from enacting, adopting, or enforcing any laws that protected LGBTs. LGBTs would be barred from bringing any claims of discrimination. The language of the amendment was fairly simple, but its potential impact was enormous. In full, it read:

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.²

In *Romer*, Amendment 2 was challenged all the way to the United States Supreme Court.

The holding in that case became one of the most important LGBT Supreme Court cases and would lay the legal foundation for overturning the nation's sodomy laws and pave the way for the legalization of LGBT marriages. *Romer* also established the equal protection argument against the newly developing "religious freedom laws,"³ which, if passed, would allow individuals or

2. *Evans v. Romer*, 882 P.2d 1335, 1338–39 (Colo. 1994).

3. *See, e.g.*, S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014) ("State Action shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."); H.R. 427, 62d Leg., 2d Reg. Sess. (Idaho 2014) ("Free exercise of religion is a fundamental right that applies in this state, even if laws, rules or other governmental actions are facially neutral."); H.R. 2453, 85th Leg., Reg. Sess. (Kan. 2014) ("[N]o individual or religious entity shall be required . . . to . . . provide any services, accommodations, advantages, facilities, goods, or privileges . . . related to the celebration of[] any marriage, domestic partnership, civil union or similar arrangement; . . . solemnize any marriage,

businesses to turn away LGBT clients as long as they cite religious objections to homosexuality.⁴

The case began in 1992 and ended in 1996. It wound its way from the state court, which halted the implementation of Amendment 2 by granting an injunction; to the Colorado Supreme Court, which affirmed the lower court decision; to its final destination at the United States Supreme Court.⁵ In 1991, five years before *Romer* reached the Supreme Court, I, along with other LGBT activists, formed the Colorado Legal Initiatives Project (CLIP) to prepare a legal challenge in the event that Amendment 2 became law.⁶ We selected the plaintiffs and the attorneys for the potential case far in advance of election night. Although the pundits and the polling seemed to indicate that this initiative would fail, I felt too nervous to idly stand by and watch. In consultation with the anti-Amendment 2 campaign manager, Judy Harrington, and many members of the newly formed Mayor Webb's LGBT Committee, we were ready to stop the implementation of Amendment 2 dead in its tracks.

We agreed that the legal challenge would be homegrown. I personally solicited former Colorado Supreme Court Justice Jean Dubofsky as our lead counsel—what a coup! National organizations such as Lambda Legal and the ACLU, local and national, would come aboard swiftly, but the case belonged to Coloradoans. We were “ground zero” along with Oregon, which was facing a similar discriminatory initiative. The political environment for LGBTs in Colorado during these five years was very difficult. CFV had been collecting money from all over the nation and disseminating hateful pamphlets about the LGBT “lifestyle.”

domestic partnership, civil union or similar arrangement; or treat any . . . as valid.”). A corollary religious argument was demonstrated in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760–62 (2014), which addressed the Religious Freedom Restoration Act as opposed to a First Amendment religious freedom argument.

4. See, e.g., Kan. H.R. 2453.

5. *Evans v. Romer*, No. 92-CV-7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996).

6. CLIP was formed for the sole purpose of preparing a legal challenge to Amendment 2. The organization selected the attorneys and plaintiffs, and funded the expenses for the suit. CLIP also served to coordinate all of the local and national organizations that participated in the action, including Lambda Legal, ACLU Gay Rights Project, and Colorado's ACLU. Currently, CLIP serves as the legal arm of the Colorado LGBT Community Center.

CFV was also cloning and exporting the initiative to other states for use in their next election cycles. Some LGBTs countered by calling for a boycott of Colorado, which caught fire quickly. Colorado was deemed the “hate state,” and organizations and celebrities alike honored the boycott. The boycott affected Colorado tourism and, needless to say, caught the attention of the business community. Many people came forward with remedies and substitutions, none of which gained any momentum. The media was laden with television pundits and commentators, and the newspapers had stories and editorials commenting on the legalities and illegalities of Amendment 2. All eyes were focused on Colorado. When we finally got to the United States Supreme Court, based upon my work and involvement, I was able to secure a ringside seat at the oral arguments.

As I waited outside the Court, crowds of people from Colorado and all over the country lined up to witness the case. I read to myself the main inscription on the front architrave high above the main doors: “Equal Justice Under Law.” Would we find that here today? Into the courtroom we moved, and I was seated immediately behind our lead attorneys. Suddenly a hush fell across the courtroom and entering from behind a flowing red curtain was a poised and proper man in long coattails. Directing people to their seats, the bailiff looked as though he belonged in England. Maybe the Justices would arrive in white powdered wigs. I smiled nervously to myself. Jean Dubofsky, Jeanne Winer,⁷ and Rick Hills,⁸ our team, entered and sat at their table. Colorado Solicitor General Tim Tymkovich and Colorado Attorney General Gale Norton sat at the opposing table directly in front of me. The way I saw it, the warriors had arrived and were prepared for battle. The power of truth would be revealed this morning—all that was left to do was express it convincingly.

I watched the tall bailiff gracefully maneuver about the large chamber. It was his job to ensure that the court session proceeded smoothly and timely. He held his back erect and his shoulders square, with his styled strands of hair pulled up and over a balding head. Clearing his throat slightly, the bailiff stood tall as he opened his mouth, “Oyez! Oyez!” He called out the simple words that snapped the entire room to order. After the room calmed, he

7. Jeanne Winer is a lesbian attorney from Boulder, Colorado.

8. Rick Hills was Jean Dubofsky’s assistant.

called the first case. An expectant quiet rippled through the court. Smoothly clicking his feet to one side, the bailiff announced the nine Court Justices. Entering almost simultaneously, they rounded the heavy curtains that hung behind their massive chairs and sat down: Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Ruth Bader Ginsburg, John Paul Stevens, Anthony M. Kennedy, Clarence Thomas, Antonin Scalia, Stephen G. Breyer, and David H. Souter.

The way they flowed from behind the curtain openings reminded me of the Johnny Carson Show: *Heere's* the United States Supreme Court! I shook off the nervous parody. Standing up respectfully straight, I released a quiet sigh. In all honesty, I had expected to feel daunted by the presence of the Justices but realized instead how very human they were. As I glanced from face to face, my heart began racing—*would they understand?* I shifted uncomfortably in my seat. Would they grasp the true content of our arguments? Would they get it? Would they see how discriminatory Colorado's Amendment 2 was? They were certainly smart enough, but would their political leanings influence them in the wrong direction?

My colleagues and I had spent the weekend trying to figure out which way each Justice would go, what types of questions they would ask, and whether or not the arguments they *needed* to hear would actually be allowed. Did they get the fact that gays and lesbians are a marginalized group of people? It was common knowledge that the Justices, with the help of their legal clerks, had read and reviewed all of the numerous amicus briefs and legal transcripts from the preceding trials. The legal clerks were chosen from the *crème de la crème* of America's brightest young legal minds. Few people fully realize how their behind-the-scenes opinions help shape the legal outcome of each Supreme Court case. It is the role of the clerks to research each appeal, examine the stacks of submitted briefs and court records on the case, and assist the Justices with the drafts and final opinions. The opinions of the clerks carry tremendous weight in deciding how and what information reaches the Justices. It is this knowledge that the Justices carry with them into chambers during their discussions with each other and into the courtroom.

Everyone understood that Justice O'Connor was the swing vote.⁹ She was the one that Jean needed to legally persuade. If she could convince her, we would get enough votes. Then there were Justices Ginsburg, Stevens, and Breyer who were to the "left," and, of course, Chief Justice Rehnquist and Justices Scalia and Thomas to the "right." Their votes were relatively predictable. Justice Kennedy was considered a liberal but we could not place him on either side of the issue. Throughout Amendment 2's evolution, it had been clear to me that the initiative was legally irrational. The sole purpose of Amendment 2 was to overturn LGBT protective ordinances and preclude LGBTs from bringing any claims of discrimination. If you replaced LGBT with any other group of people, it easily clarified how irrational and discriminatory the measure really was. But staring at the imposing line of Justices before me, I remembered that the issue might not be so "cut and dried" for others.

Nine clerks entered and pushed the Justices' high-backed leather chairs forward as they were simultaneously seated. As expected, a few brief matters were called and decisions given. Then, the Amendment 2 case was called. *Showtime!* I stared into the back of Jean's head for a response. There was none. In fact, Jean was not flinching; her head was poised and her back straight. What was going through her mind, I wondered. It had taken far longer than first imagined to get here. She hung in like a trooper, her style and class bringing solidarity and confidence to everyone involved. Jean would be granted just under a half hour to present our case. As the respondent, she would go second. Timothy Tymkovich, from the Colorado Attorney General's Office, would go first and would probably reserve a portion of his allotted time for rebuttal. Whenever attorneys go before an appeals panel, they hope to deliver their statements uninterrupted. If the argument is not clear, or the Justices want to make points, they may, and usually do, interject with questions. Valuable—*invaluable*—time is wasted.

Tymkovich rose to speak. Squaring his shoulders, he turned to face Chief Justice Rehnquist. "Mr. Chief Justice and may it please the Court—this case involves a challenge to the authority of a state to allocate certain law-making power among its state and local

9. See generally Abigail Perkiss, *A Look Back at Justice Sandra Day O'Connor's Court Legacy*, YAHOO! (July 2, 2013, 8:30 AM), <http://news.yahoo.com/look-back-justice-sandra-day-o-connor-court-094809112.html> (recognizing Justice O'Connor as an important swing voter on the Court at the time *Romer* was argued).

governments. Colorado's Amendment 2 reserves to the State the decision of whether to extend *special protections* under state law on the basis of homosexual or bisexual *conduct or orientation*.¹⁰

As the manipulative words "special protections" fell from his lips, many of the court Justices seemed to become visibly agitated. Good, I thought. Even though the Equal Protection Ordinance Coalition (EPOC), the statewide campaign organization fighting against Amendment 2, could not effectively confront CFV's "special rights" campaign slogan, maybe the legal arguments could confront it. It looked as though at least some of the Justices were not going to be as naïve as some Colorado citizens. And how were the Justices going to deal with the question of *conduct* versus *orientation*?

I knew that the case would move quickly. I also knew that many laypeople in the audience would have difficulty understanding the legal language being used. Where spectators might have difficulty with wording, the body language was quite clear. The Court, like the nation, was divided. Tymkovich went on to cite two previous Supreme Court decisions. The first, *James v. Valtierra*,¹¹ focused on low-income housing. The second, *Hunter v. Erickson*,¹² focused on the issue of race.

Like the *Romer* case, the *Hunter* and *James* cases included equal protection challenges to a referendum or initiative. In *Hunter*, black residents challenged an amendment to a city charter that prevented the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of voters in Akron, Ohio.¹³ Like Amendment 2's attempt to overturn existing protections, the Akron city charter amendment sought to overturn an existing city protection on the basis of race, color, religion, national origin, or

10. Oral Argument at 0:28, *Romer v. Evans*, 517 U.S. 620 (No. 94-1039), available at http://www.oyez.org/cases/1990-1999/1995/1995_94_1039. To interfere with the author's narrative as little as possible while remaining faithful to the source material, citations to the audio recording of the oral transcript are provided at the end of unbroken sections of dialogue from the arguments. The *William Mitchell Law Review* has taken reasonable steps to verify the accuracy of the quoted material, but all emphasis within, and interpretation of, the speakers' delivery of dialogue provided in this article conveys the author's personal experience of the live events.

11. 402 U.S. 137 (1971).

12. 393 U.S. 385 (1969).

13. *See id.* at 385.

ancestry.¹⁴ The Supreme Court found that this constituted an equal protection violation because the amendment to the charter not only suspended the operation of the existing ordinance forbidding housing discrimination, but also made an explicit racial classification treating racial housing matters differently from other housing matters.¹⁵

The *James* decision, although relying on the *Hunter* case, did not find an equal protection violation.¹⁶ Following the California voters' approval of a referendum that sought to bring public housing decisions under the state's referendum policy, the defendants, who were persons eligible for low-cost public housing, challenged Article XXXIV of the California constitution.¹⁷ The article stated that no low-rent housing projects were to be developed, constructed, or acquired by any state public body without the approval of a majority of those voting at a community election.¹⁸ The Supreme Court distinguished *Hunter* and *James*, stating, "Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on 'distinctions based on race.'"¹⁹ "The Article require[d] referendum approval for any low-rent public housing project, not only for projects [that would] be occupied by a racial minority."²⁰ It was clear that our side wanted the Court to analyze the case under *Hunter* and the State wanted the Court to analyze it under *James*.

Before Tymkovich could expound on these cases, Justice Kennedy stopped Tymkovich's testimony dead in its tracks. His salt-and-pepper hair gave his appearance an air of certainty and experience. "Usually when we have an equal protection question we measure the objective of the legislature against the class that is adopted . . . Here, the classification seems to be adopted for its *own* sake," Justice Kennedy continued, sounding appalled. "I've *never* seen a case like this. Is there any precedent that you can cite to the Court where we've upheld a law such as this?"²¹

14. *Id.* at 386–87.

15. *Id.* at 393.

16. *James*, 402 U.S. at 143.

17. *See Hunter*, 393 U.S. at 385.

18. *Id.* at 387.

19. *James*, 402 U.S. at 141 (quoting *Hunter*, 393 U.S. at 391).

20. *Id.*

21. Oral Argument at 1:41, *Romer v. Evans*, 517 U.S. 620 (No. 94-1039), available at http://www.oyez.org/cases/1990-1999/1995/1995_94_1039.

Tymkovich tried desperately to establish a link between Amendment 2 and *James*.²² “In *James v. Valtierra* the Court . . . fundamentally looked at whether *Hunter v. Erickson* should extend beyond the specific racial context in which it was decided—”

Justice Kennedy interrupted immediately. After elaborating on the specific legislative purpose of the classification in *James*, Kennedy asserted, “Here, the classification is just adopted for its own sake, with reference to all purposes of the law, so *James* doesn’t work. . . . Here, the classification is adopted to ‘fence out,’ in the Colorado Supreme Court’s words, the class for all purposes, and I’ve *never* seen a statute like that.”²³

Unconsciously, I brought my right hand up to my temple and began running my fingers through my hair. Justice Kennedy’s vote, along with Justice O’Connor’s and Justice Souter’s, could not be easily predicted. Although it gave an early indication of where he stood on the amendment, it was obvious that he had just blown a big hole in the State’s case. “Your Honor,” Tymkovich countered, “the objective here was to resolve an issue of whether or not to extend special protections to homosexuals and bisexuals, so the issue resolved here—”

“Well, Mr. Tymkovich!” Justice O’Connor interrupted, “the language of the Amendment, I guess, has never been actually interpreted by the Colorado courts!”

“The Colorado—” Tymkovich began before being cut off again.

“Has it been construed or interpreted as yet, in your view?”²⁴ Justice O’Connor continued.

Tymkovich admitted that yes, the Colorado courts made an interpretation based on its “face value.” The apparent meaning of Amendment 2’s wording overpowered local laws and state provisions. In other words, any ordinances in effect in Denver, Aspen, Boulder or any other city (as well as statutes passed by the state legislature) offering protection from discrimination to gays and lesbians were null and void.

“I mean,” Justice O’Connor proceeded, “the literal language would indicate that, for example, a public library could refuse to

22. *James*, 402 U.S. at 145 (Marshall, J., dissenting).

23. Oral Argument at 2:49, *Romer*, 517 U.S. 620 (No. 94-1039).

24. *Id.* at 3:10.

allow books to be borrowed by homosexuals and there would be no relief from that, apparently.”²⁵

The questions they were asking were a key indication, at least to me, that the Justices did understand and accept some of the arguments we had filed with the Court. Most importantly, they confirmed with each question that there might be something indeed *wrong* with Amendment 2. Hold it, I thought, do not get too hopeful now. Worried that I might be reading too much into the line of questioning, I turned to my left to look at the Denver City Attorney Darleen Ebert’s response to the exchange. Nodding her head with each word, she looked at me and silently confirmed what I was thinking. *YES!*

“And as Justice Kennedy pointed out,” Justice Ginsburg said, “*James v. Valtierra* dealt with one issue, low-cost housing. There were dozens of other ways in which to *improve* the status of the poor, to fight against the blight of poverty. But here, it’s everything . . . thou shalt not have access to the ordinary legislative process for anything that will improve the condition of this particular group . . . and I would like to know whether in *all* of U.S. history there has been any legislation like this that earmarks groups and says, you will not be able to appeal to your state legislature to improve your status.”²⁶

I paused it all. Briefly closing my eyes, I slowly inhaled a few deep breaths. The entire event felt like a dream. For over four *years* I had “lived” this moment, playing the scene over and over again. Measuring my breath, I again looked up.

“Mr. Tymkovich,” Justice Scalia said firmly, peering over the bench, “what about laws prohibiting bigamy, or prohibiting homosexuality or homosexual conduct? Incidentally, *how* do you interpret the bisexual orientation language, homosexual, lesbian, or bisexual orientation? Does that require any conduct, or is it just the disposition?”²⁷

Here we go, I thought, scrutinizing Justice Scalia’s stern face. The conservative Justice was attempting to throw Tymkovich a lifeline. By aiming the Court’s attention to a person’s *conduct*, Justice Scalia was giving the attorney an opportunity to distinguish between orientation and conduct. If he was successful, the *Bowers*²⁸

25. *Id.* at 3:54.

26. *Id.* at 6:05.

27. *Id.* at 6:48.

28. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

case might apply. Other than cases addressing gay people in the military, *Bowers*, decided ten years prior, was the most impactful case to be heard by the United States Supreme Court on gay and lesbian rights. Unfortunately, it upheld Georgia's discriminatory anti-sodomy law.²⁹ It also made a distinction between homosexual conduct and orientation.³⁰

We decided early on to stay away from the *Bowers* case; it would make our efforts to overturn Amendment 2 far too broad. The *Bowers* case was a disturbing ruling and would be used often to focus on behavior of LGBTs as opposed to sexual orientation as a classification. Many activists across the country, including me, wanted it overturned. However, our attorneys were concerned that if we sought to do that with this case, we may bite off more than we could chew. Although some of the national organizations were pushing in that direction, we wanted to narrow the focus to Colorado's Amendment 2 facts only. Long ago I had learned to build a movement on small successes, and biting off too big a piece could cause confusion. The probable concern of the Court was that someone could challenge a state sodomy law using the Amendment 2 decision and other creative legal arguments to seek to overturn the *Bowers* case. Many years later, *Bowers* would be overturned by *Lawrence v. Texas*,³¹ but at the time, it was a thorny case decision on our issues.

"I want to know," Justice Scalia interrupted, "what you mean by . . . what is meant by . . . if all orientation means is someone who engages in homosexual, lesbian, or bisexual acts, then you have plenty of precedent in response to your question, namely state laws that absolutely criminalize such activity . . . bigamy, homosexuality—" ³²Justice Scalia was determined to aid Tymkovich. He quickly tried to get his message across.

"That's right! The—" Tymkovich was instantly cut off.

"Colorado has no law that prohibits consensual homosexual conduct," Justice Ginsburg interrupted.³³ She was making a point that Colorado did not have a sodomy law, which distinguished this case from *Bowers*.

29. *Id.* at 196.

30. *See id.*

31. *Lawrence*, 539 U.S. 558 (2003).

32. Oral Argument at 7:29, *Romer*, 517 U.S. 620 (No. 94-1039).

33. *Id.* at 7:41.

“No. Colorado repealed its sodomy law in 1972, but to answer—”³⁴ Tymkovich rushed—he had been passed the ball by Justice Scalia and was now frantically trying to score.

“*Well?*”

“Justice Scalia’s question, it is unclear whether conduct defines the class. Many courts have so held in looking at the issue of a classification involving—”

“You have *no* position on it? *You have no position on it?!*” Justice Scalia demanded.

“Yes!” Tymkovich said. Catching onto the lifeline thrust by Justice Scalia, the attorney quickly added, “We believe that conduct *is* the best indicator of—”

“Well, is it the sole indicator?” Justice Souter commanded. “Are you representing to this Court that Colorado’s position is that the class defining characteristic is conduct as opposed to preference or proclivity or whatnot?”

“No, Your Honor . . . There was an attempt by the respondents to prove a suspect class.”³⁵

Looking back and forth from Jean to Tymkovich, my heart swelled with pride. I was sure it was because Jean’s presentation of the case would be more fluid. Her selection as the lead counsel demonstrated the importance of selecting the right people for such a monumental job. How people dress, talk, act and present themselves *does* make an impression. Personalities, however subtle, affect the outcome. As a practicing attorney and judge, I have witnessed this notion first hand with jurors.

Sitting behind the attorneys’ tables gave me a perspective of the proceedings I rarely saw anymore. Again, I pondered how “human” each player was—and hopefully how humane. Joined in the mind of each Justice were the values, morals, legal responsibility—heck, even childhood impressions—helping to formulate each decision. To deny this fact would be to deny human nature.

Tymkovich was blinking his eyes as he spoke. I held back the anger that welled up over the years. *No*. I would not succumb to the bitterness of hate; it had never served me or my causes well. But it was difficult—no, it was nearly impossible—to squash the animosity that I felt towards the proponents and supporters of the

34. *Id.* at 7:45.

35. *Id.* at 8:16.

discriminatory amendment. I caught myself. This is the same animosity held against LGBTs. From that moment forward, I would no longer indulge myself with any animosity.

Tymkovich denied that there was any “arbitrary or irrational” discrimination involved in the language of Amendment 2. “No, Your Honor. We don’t think—”

“It’s not a slippery slope argument.” Justice Souter said. “You’re not saying we go from . . . if an equal protection challenge wins here, a due process challenge necessarily wins too. You’re not saying that.”

“There’s been no due process challenge in this case—” Tymkovich said.

“But,” Justice Souter interrupted, “that’s not what you’re *arguing*.”

“—and there is—” Tymkovich tried to finish.

“But, that’s not what you’re arguing, is that—”

“That’s correct,” Tymkovich said hurriedly. “There is a slippery”³⁶

I shook my head as I remembered the time I sat across from Tymkovich to argue the merits of Amendment 2 and gay rights on television. The debate was hosted by Clifford May, a political commentator and associate editor of the *Rocky Mountain News* in Denver. Years later, May went on to become the communications director to the Republican National Committee. At the time, however, he hosted a talk radio program on the dominant station in the region and also produced and moderated an interview program on KRMA-TV, a PBS station. It was called the “Roundtable” and Tymkovich and I sat across from one another at that table with May in the middle. I recalled how confident I felt as I told the TV host that the Justices would overturn Amendment 2, just as they understood that “separate” was not “equal” in *Brown v. Board of Education*.³⁷ All these years later, while watching him argue before the Supreme Court, I remembered why I felt so assured at the time of our debate—he was simply wrong. Tymkovich and I would cross career paths again many years after the *Romer* case, when, in 2003, he was appointed to the federal bench by President Bush. I had been appointed to a Denver County court judgeship three years earlier by Mayor Webb.

36. *Id.* at 11:44.

37. 347 U.S. 483, 495 (1954).

It was clear that some of the Justices understood. But would a sufficient number of them agree to keep Amendment 2 overturned? As was customary, Justice Clarence Thomas had not spoken a single word. His mind is made up, I thought.

“Mr. Tymkovich,” Justice Ginsburg began adamantly, “I was trying to think of something comparable to this, and what occurred to me is that this political means of going to the local level first is familiar in American politics.”³⁸ The Justice was comparing the anti-discrimination ordinances protecting gays and lesbians in the cities of Denver, Aspen, and Boulder to the same type of city ordinances that assisted in protecting women for voting purposes.³⁹

Justice Ginsburg went on, “In fact, it was the way that the suffragists worked. When they were unable to achieve the vote statewide, they did it on a cities-first approach, and I take it from what you are arguing that if there had been a referendum that said no local ordinance can give women the vote, that *that* would have been constitutional.”

“No, Your Honor. I think that . . . that—”

“*What’s* the difference?!” she exclaimed.

“—classification would be analyzed under this Court’s equal protection jurisprudence on a suspect—”⁴⁰ Tymkovich was taking on something bigger than he was, I thought, shaking my head slowly. Was he really going to argue with a female Supreme Court Justice about women’s rights?

“Well,” Justice Ginsburg said leaning forward on her elbows, “cast your mind back to the days *before* the Nineteenth Amendment.”⁴¹ The Nineteenth Amendment, ratified in 1920, gave women the right to vote.⁴² No state could deny any person his or her constitutional privilege to vote based on gender. Her argument made a laughingstock of the State’s case. Questions from the bench flew at Tymkovich so fast that he rarely was able to answer completely. Faltering through each attempted response, invariably a Justice would throw up his or her hand to make Tymkovich stop while he or she began arguing with the other Justices. The energy in the courtroom was electric, and my head continued to spin.

38. Oral Argument at 12:23, *Romer*, 517 U.S. 620 (No. 94-1039).

39. *Colorado’s Tourism Fighting Anti-Gay Boycott*, L.A. TIMES, Dec. 6, 1992, at MN-Main News, available at 1992 WLNR 4063875.

40. Oral Argument at 12:54, *Romer*, 517 U.S. 620 (No. 94-1039).

41. *Id.* at 12:57.

42. U.S. CONST. amend. XIX.

Justice Ginsburg was my hero. Her line of questioning demonstrated that she truly understood civil rights.⁴³

“No court has found homosexual orientation or conduct to be a suspect classification. Therefore, the traditional equal protection model should be applied in this case,”⁴⁴ Tymkovich stated. The attorney was honing in on a delicate spot. Conservative members of the bench felt that gays and lesbians should *not* be in the same class as race, gender, age, and other protected classes. Engaged, he too expanded on the issue of suspect classification. Then suddenly, the line of questioning shifted.

“When you talk about ‘special protections,’” Justice Scalia remarked pointedly, “this brings me to an earlier question about discrimination in libraries. How do you interpret the term, minority status quota preferences protected status?” he asked. “You mean—what does that mean?”⁴⁵

The question was another attempt to aid the attorney, allowing him a chance to denounce classifying homosexuals as a legally protected class.

“Protected status would be a particular affirmative positive piece of legislation that granted some type of protection—” Tymkovich said before being cut off.

“Special protection beyond what—” Justice Scalia interrupted.

“Beyond the Fourteenth Amendment baseline.”⁴⁶ Tymkovich had happily taken the bait. The Fourteenth Amendment, ratified in 1868, along with the First and Fourth Amendments, is the most

43. Little did I know that over a decade later I would get to personally introduce Justice Ginsburg at a judicial conference. With the help of a former federal woman judge who I knew through the Colorado Woman’s Bar Association, I was able to secure Justice Ginsburg as one of the keynote speakers along with a Justice from the Canadian Supreme Court. My reward for doing so was that I got to introduce her at the opening plenary session to all 550 judges in attendance. My tenure as chair of the American Judges Association’s Education Committee culminated in coordinating this conference. It was held in Vancouver, Canada and included the American Judges Association, the Canadian Provincial Judges Association, a few individual Provincial Judges Associations and, at the behest of LGBT Canadian Judge Gary Cohen and myself, the LGBT Judges Association. The only thing that I loved more than breaking new ground as a gay person was the cross-pollination of straight and gay organizations. This conference proved to be one of the highlights of my legal career.

44. Oral Argument at 13:39, *Romer*, 517 U.S. 620 (No. 94-1039).

45. *Id.* at 14:45.

46. *Id.* at 14:58.

called-upon constitutional provision in Supreme Court cases.⁴⁷ It forbids the enforcement or creation by any state of any law that infringes on the individual's rights under the U.S. Constitution.⁴⁸ It was intended to protect citizens against any state action that results in deprivation of life, liberty, or property without due process of law—or in denial of the equal protection of the laws.

“So,” Justice Scalia followed, “why wouldn’t that have been your answer to the library hypothetical that was produced earlier?! Any—no homosexual can be treated differently from other people. He simply cannot be given special protection by reason of that status.”

“That’s right!” Tymkovich agreed. “Amendment 2 is simply a Fourteenth Amendment—”⁴⁹ Justice Scalia had led the horse to water and Tymkovich was ready to drink.

Justice Stevens aborted the fleeting triumph. “May I ask how that works in the public accommodation area? If a hotel or restaurant—at common law you get some kind of an innkeeper’s duty to take everybody in. Could an innkeeper refuse accommodations to a homosexual who was not engaging in any homosexual conduct but had admitted that he had that type of tendency? Could an innkeeper under—in Colorado just say, ‘I’m sorry, we don’t rent rooms to people like you?’”⁵⁰ Ironically, this argument would serve to foreshadow a case decided almost twenty years later on the issue of whether businesses open to the public could deny services based upon their religious beliefs.⁵¹

“Amendment 2 would carve out any special protections in the public accommodation area that had been extended to homosexuals—” Tymkovich replied.

47. See Barry Horwitz, *A Fresh Look at A Stale Doctrine: How Public Policy and the Tenets of Piercing the Corporate Veil Dictate the Inapplicability of the Intracorporate Conspiracy Doctrine to the Civil Rights Arena*, 3 NW. J. L. & SOC. POL’Y 131, 134 n.35 (2008) (“[S]ection 1 [of the Fourteenth Amendment] is arguably the most important and most litigated law in the nation’s history.” (citing Sanford Levinson, *Why It’s Smart to Think About Constitutional Stupidities*, 17 GA. ST. U. L. REV. 359, 364 (2000))); Martin Kelly, *14th Amendment Summary*, ABOUT.COM, <http://americanhistory.about.com/od/usconstitution/a/14th-Amendment-Summary.htm> (last visited Oct. 13, 2014) (“Over time, numerous lawsuits have arisen that have referenced the 14th amendment.”).

48. U.S. CONST. amend. XIV, § 1.

49. Oral Argument at 15:17, *Romer*, 517 U.S. 620 (No. 94-1039).

50. *Id.* at 15:40.

51. See *supra*, note 3 and accompanying text.

“What would the rule be in Colorado? How do you understand the law there? Now, would a homosexual have a right to be served in a restaurant?” Justice Stevens insisted.

“A homosexual would not have any claim of discrimination or special liability theory in a private setting after Amendment 2,” Tymkovich admitted.

“Even in the public accommodation area,” Justice Stevens continued.⁵²

I, like others in the courtroom, was on the edge of my seat. The exchange demonstrated how gays and lesbians would be targeted for discrimination where other citizens were not.

“So we don’t know whether homosexuals have a right to be served or not,” Justice Stevens continued.

“That will be a question for the state courts interpreting Amendment 2,” Tymkovich said. “But, if they do have a right to be served, would that be an affirmative right, then, as in the distinction Justice Scalia was drawing, or would that be just being treated like everybody else?”

“I think,” Tymkovich responded, choosing his words carefully, “it would be treated just like any other characteristic or classification that has not gotten the special benefits of the civil rights law.”

“And being—having the right not to be refused a job or to rent on that ground is a special right,” Justice Stevens queried with eyebrows raised.

“Unless—” Tymkovich tried to interject.

“It’s not *being* just like everybody else,” the Justice finished.⁵³

That’s *right*, I responded gently nodding my head. I was totally invested in the case. There was not a day that had gone by over the years that I had not thought about this moment. As a tear trickled down my face, I quickly raised the back of my hand to brush it away. Suddenly, I stopped. So what, let them see it, I reasoned. This was a tear of struggle. These were our *civil rights* they were talking about. Shifting in my chair to a more upright position, I raised my head and searched the faces of the Justices.

Arguing about the supposed “rational basis” for Amendment 2, it appeared to me that the Justices were in disagreement about whether people outside of Aspen had a right to tell the citizens of

52. Oral Argument at 16:17, *Romer*, 517 U.S. 620 (No. 94-1039).

53. *Id.* at 17:04.

Aspen whether or not they could elect to have a nondiscriminatory provision. Could the State of Colorado tell one of its cities that it can no longer conform to its own laws?

“There’s a question about the desirability of each local jurisdiction dealing with this issue,” Tymkovich contested, “which I think raises some very fundamental and sensitive cultural, moral, political concerns for our state.”⁵⁴ His neck, I realized, was clearly on the line with such a statement.

Justice Souter continued to press Tymkovich on this issue until Justice Scalia suddenly exploded, “MR. TYMKOVICH! If this is an ordinary equal protection challenge and there’s no heightened scrutiny, isn’t it an adequate answer to Justice Souter’s question to say that this is the *only* area in which we’ve had a problem? If localities started passing special laws giving favored treatment to people with blue eyes, we might have a statewide referendum on that as well. Isn’t one step at a time a normal response to equal protection?”

“That’s exactly what happened here,” Tymkovich struggled to edge in, “and the court—”

“Well, what *is* the problem?”⁵⁵ Justice Souter said admonishingly. Suddenly throwing a court brief across the bench, the Justice seemed incensed. “I mean, what is the problem that you supposedly have been having?!”

Tymkovich said, “[L]aws that raise particular and sensitive liberty concerns.”

Justice Scalia joined in another attempt to rescue the floundering attorney. “State—state subdivisions giving preferences which the majority of the people in the state did not think were desirable for social reasons, isn’t *that* the problem that was seen?”⁵⁶ Justice Scalia offered. There it was, the majority rules argument, I thought. Let’s put my rights up for vote!

“That’s right,”⁵⁷ Tymkovich said, relieved.

“Isn’t your answer, this is the only area where the people apparently saw a problem, which is enough for equal protection?” Justice Scalia continued.

“It is,” the attorney said, “and this is an area where there have been piecemeal additions of special protections. We’ve had—”

54. *Id.* at 20:50.

55. *Id.* at 22:06.

56. *Id.* at 22:30.

57. *Id.* at 22:31.

“What is the special preference at stake here? What is the special preference that a homosexual gets?”⁵⁸ questioned Justice Stevens. Each trying to be heard, the Justices’ raised voices layered over each other. I was breathless.

“[W]ith this Amendment on the books, a restaurant owner can say, ‘Sorry, I don’t want to serve gay people,’ and what about—take a scarce resource. Think of a public hospital that has a kidney dialysis machine, and the hospital says, ‘We have to limit this, and one group that we’re going to keep out, we’re not going to have any gay, any lesbian person use this—use this facility.’ Now there would be, under this Amendment, what recourse?!”⁵⁹ asked Justice Ginsburg.

“[T]hat’s the rule that the *public* hospital sets. Under this Amendment, that’s okay, right?!”

Tymkovich stated, “[W]e don’t know how the court is going to construe other potentially applicable state laws.”

“How—I do have one question on that point which I’d like to ask,” Justice Breyer said. “The statute says, ‘no agency shall adopt or enforce any policy whereby homosexual conduct, or whatever, orientation, shall be the basis of any claim of discrimination.’⁶⁰ So if a police department says, ‘There’s been a lot of gay bashing. It’s our policy. Stop it.’ If the head librarian says, ‘You’re making gays sit—you’re being mean to them and not letting them in. Stop it.’ If the health department says the same thing, if the insurance commissioner says the same thing, doesn’t this word policy cover that, and if it doesn’t cover it, what is it about?”

“The government agencies that you’ve indicated could enact a general non-bias policy or require—” Tymkovich said.⁶¹ “It prohibits any type of special protection or a liability claim that somebody might have under that policy,” he replied firmly.

“It seems to me,” Justice Kennedy said, “that your answer is inconsistent to what the Supreme Court of Colorado said. It said health insurance discrimination regulations are void.”

“The health—” the attorney began.

“That’s . . . based on sexual orientation.” Justice Kennedy interrupted.

58. *Id.* at 22:56.

59. *Id.* at 23:46.

60. COLO. CONST. art. II, § 30b (West, Westlaw through Nov. 2013 amendments).

61. Oral Argument at 25:14, *Romer*, 517 U.S. 620 (No. 94-1039).

“The health—that regulation did carve out what would be construed as special protection,” Tymkovich replied.

“*That’s* inconsistent with the answer you gave to Justice Breyer!”

“I don’t think so, Your Honor,” Tymkovich said, “because I thought he was talking about a law of general application—”

“No! Look, suppose Boulder, Colorado says, ‘It is our policy in Boulder not to discriminate against gays.’ They call it Boulder Regulation 14.2. Is that forbidden by this?” Justice Breyer asked.

“Yes,” Tymkovich finally conceded, “It would be to the extent—”

“All right,” Justice Breyer interrupted. “Now, suppose the police department does exactly the same thing. Is that forbidden by this?”

“The police department would be governed by a rule of general applica—” the attorney continued.

“So, the police department—”

“They would not be able to—” Tymkovich rushed.

“I don’t understand. So is the city of Colorado,” Justice Breyer said, mixing his words. “They’re all governed by, they can’t discriminate arbitrarily. My point is, suppose that the police department says exactly the same thing. You say that’s not forbidden.”

“That’s correct,” the attorney said, sounding exhausted.

“Okay.”

“Your Honor?” Tymkovich said. “May I reserve the balance of my time for rebuttal?”

“Yes,” Chief Justice Rehnquist said calmly. “Thank you, Mr. Tymkovich. Ms. Dubofsky, we’ll hear from you.”⁶²

Jean rose gracefully; her courtroom demeanor was spirited and alive, and her delivery was clear and concise. Due to her impeccable legal experience as an attorney and former justice of the Colorado Supreme Court, she had pedigree and seemed to be respected.

“Mr. Chief Justice, and may it please the Court. Let me begin with how Amendment 2 should be construed and then discuss how our legal theories relate to its unique combination of breadth and selectivity,” she began. “Amendment 2 is vertically broad in that it prohibits all levels of government in the State of Colorado from *ever*

62. *Id.* at 27:34.

providing *any* opportunity for one to seek protection from discrimination on the basis of gay orientation.”⁶³

Not only did Jean carefully choose which words to emphasize, she opened her testimony using the word “gay.” Tymkovich refused to use the word at all, choosing instead to say “homosexual.” Even the Justices used the word “gay” in their line of questioning.⁶⁴

“Well,” Chief Justice Rehnquist began, “when you say ‘all levels of government in Colorado,’ Ms. Dubofsky, you don’t include the people by referendum, I take it, or the people by initiative.”

“No, we do not.”

“And I have one more very specific question,” Justice Kennedy said. “What about the courts? Can the courts interpret a statute that prohibits unreasonable denial of public accommodations to include gays by a specific judgment that deals with the rights of gay people?”

“The state,” Jean said, referring to the Colorado Supreme Court decision, “has conceded that Amendment 2 is unconstitutional to the degree it would prohibit such a claim based upon federal law since 1983.”

“No, no, no. I meant state courts interpreting state public accommodation laws,” the Justice boomed.

“Our theory,” Jean replied, unwavering, “is that Amendment 2 on its face prohibits a state court from recognizing such a claim, but that particular interpretation of the amendment is not necessary for this Court to find that Amendment 2 is unconstitutional.”

“Thank you, and that particular interpretation has not been given by the supreme court of Colorado,” Justice Kennedy stated.⁶⁵ It was an attempt, I figured, to discredit Jean’s firm stance concerning what the Colorado court intended by its decision to overturn Amendment 2. The United States Supreme Court had the

63. *Id.* at 28:13.

64. The GLBT community generally refers to itself as the “gay” community rather than “homosexual” community. The word “homosexual” sounds either too clinical or religiously-forbidden since it includes “sex” as part of the identity. CFV capitalized on the word homosexual during the campaign by placing it in its campaign materials to focus in on the “sexual” behaviour of gays. They distributed a video to voters that depicted gay men participating in the gay parade while nude. To make “sex” the centrepiece of the gay lifestyle, it moved the argument from orientation to behaviour. Duke Law Sch., *Romer v. Evans*, YOUTUBE (July 28, 2014), <http://www.youtube.com/watch?v=HZEZ7PMQbQE>.

65. Oral Argument at 29:14, *Romer*, 517 U.S. 620 (No. 94-1039).

prerogative to remand the case back to the Colorado Supreme Court for interpretation of the Amendment: a decision that would belabor our case. It was a potential outcome that none of us wanted.

“That’s right,” the attorney said. “The Colorado Supreme Court interpreted the amendment, and it said it was doing this as a *minimum*, because that was *all* that was necessary in order to find the amendment unconstitutional.

“It interpreted the amendment to mean that state and local governments are barred from promulgating and enforcing rules that declare discrimination against gay people by both government and private actors to be arbitrary, so that would include Justice Breyer’s general policy suggestion with respect to the police department,” Jean added.

“[C]ounsel for the other side said, ‘No . . . it *doesn’t* forbid *any* of these agencies from having such a rule,’” Justice Breyer stated.

“The Colorado Supreme Court interpretation of this amendment is authoritative for purposes of this argument, I believe,” Jean replied, “and the Colorado Supreme Court—”

“*Where* does it say that in the Colorado Supreme Court’s opinion?!” Justice Scalia retorted.⁶⁶

Everyone in the packed room suddenly took a deep breath. If Jean could not recall exactly which passage addressed the issue of the Amendment’s unconstitutionality, our team would instantly lose credibility. It also raised the possibility of having Amendment 2 remanded back to Colorado’s trial court for interpretation.

Glancing down at her legal pad, Jean’s index finger instantly came to rest. “It says that,” Jean said, looking directly at the Justice, “on page B-3, D-24—”

The courtroom was abuzz. Chief Justice Rehnquist interrupted, “of the white appendix, or the—”⁶⁷

“Yes,” Jean interjected before he could finish, “in the white appendix. B-3, D-24, and D-25.”

“D as in does?”

“D as in David, or does, yes.” Jean said, her voice warm and her manner controlled, “and the way in which the Colorado Supreme Court says that is by giving examples of the types of provisions that

66. *Id.* at 30:17.

67. *Id.* at 30:22.

would be repealed by the amendment, or precluded from enactment in the future.”

“B-3?” Justice Scalia mumbled. “What does it say on B-3 that says that?”⁶⁸

Jean was restraining any sign of frustration. The Justice was clearly wasting valuable time, but to give any indication of annoyance would be detrimental. Tymkovich had stuttered and stammered his way through responses to questions, at times at a loss for critical information. It was better, I knew, to be slow in one’s response—at least until the controlled and proper reply was clear.

“Is it B—” Justice Breyer began.

“It—B-3—you said B as in—” Justice Scalia asked, befittingly.

“B as in boy,” Jean said resolutely.

“It seems to me it says the effect, the ultimate effect is to *prohibit* any government entity from adopting similar or more protective statutes, regulations, or orders in the future.”

“Yes,” Jean replied calmly, “and it refers back to the first sentence. It says, the immediate objective of Amendment 2 is at a minimum to repeal existing statutes, regulations, ordinances, and policies. Then on pages—”

“Wait,” Justice Scalia said raising his palm toward Jean, “that barred discrimination based on sexual orientation. I assume that that means special provisions giving special protection—”

“Well—” Jean began.

“—as opposed to a general law that says you have to, not just accept homosexuals, but all citizens have to be accommodated at hotels.”

“That’s correct,” Jean confirmed. After a brief pause, she continued, “There are general laws that say—”

“As opposed to a special law that says a private homeowner who wants to rent a room—you know, the mom and a family that wants to do bed and breakfast cannot discriminate” Justice Scalia interjected, eyeing to clarify his disapproval. “Although it has no obligation to take the public at large, it can decide to take only Irishmen if it wants, but it cannot discriminate on the basis of homosexuality. I thought that’s the kind of thought the court is referring to here.”

“The Colorado Supreme Court is referring to?” Jean repeated.

68. *Id.* at 30:59.

“Yes.”

“No, I don’t think so,” Jean continued. “I think it’s referring to the general ordinances that were preempted by Amendment 2”

“You mean no general laws can be applied to homosexuals now?!” Justice Scalia asked. “They can be *bashed*, they can be *murdered*, they—all sorts of things! Is *that* what it means?!”⁶⁹

Jean was not about to be suckered into such a line of questioning. Taking a breath and shifting to her left foot, she leaned forward and said, “We think it can mean that, but we don’t think the Colorado Supreme Court found it necessary to go that far in its interpretation—” She continued, “*and* we’re not *arguing* that it needs to be interpreted that broadly in order to find Amendment 2 *unconstitutional*,” Jean said matter-of-factly.⁷⁰

“I think,” she began slowly, “we’re having trouble . . . with semantics. One of the difficulties is the use of the words ‘special protection’ in this case. I don’t think there is such a thing as ‘special rights’ or ‘special protections.’ I think there’s a right which everyone has to be free from arbitrary discrimination!”⁷¹

As the Justices proceeded to argue and define arbitrary discrimination at various levels of government, I tried to sort through the arguments. The Justices needed to be kept on track with regard to the devastation Amendment 2 would wreak on gay and lesbian civil rights. Jean was doing a heck of a job maintaining the panel’s focus on Amendment 2’s inherent evils.

The courtroom was mesmerized as Jean drove home her points with refined articulation and nonverbal movements. She moved her hands as she spoke, turning her head to look at each Justice to accentuate her points. Assertive, yes, but Jean drew the line at direct confrontation. She wanted and needed to hold the interest of the nine Justices long enough to make her main point—the Colorado Supreme Court found Amendment 2 unconstitutional, and they should as well. Returning swift and clear answers, Jean kept the conversation moving.

“Let me put it to you this way,” Justice Kennedy said to Jean, “suppose there’s a Colorado ordinance, or city ordinance which said you cannot bar people from public accommodations for any

69. *Id.* at 32:45.

70. *Id.* at 32:59.

71. *Id.* at 33:27.

arbitrary or unreasonable reason. . . . After this amendment, could a court in Colorado find that it was unreasonable or arbitrary to bar a person from public accommodations by reason of sexual orientation?”

“I think a court could find that, yes,” Jean said.⁷² “If that criteria in the particular case is because the person who was denied that benefit is a gay person, then I think under Amendment 2 the court would not be able to provide relief. . . . Amendment 2, if interpreted at its *broadest*, would *authorize* that type of discrimination.”⁷³

Reporters’ pens were flying as they took notes and tried to keep up with every word. The noise level in the courtroom was at a low hum with spectators shuffling in their seats, clearing their throats, and rattling paper.

The Justices branched off to argue amongst themselves, through Jean, about whether *any* part of Amendment 2, if applied, was constitutional.

“We’re saying,” Jean repeated, “that the *minimal* interpretation that the Colorado Supreme Court gave to this in *all* of its applications is invalid. Because there may be other types of applications of this amendment, we don’t have to deal with those in this particular facial challenge because they’re basically *irrelevant*.”⁷⁴

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

“Could they also provide that no such ordinance shall be adopted in the future?”⁷⁵ he added.

“That’s where it gets more difficult. That’s where our political participation argument comes to play, that by disabling a government from responding to a need for a particular benefit, the type of protection that—it depends upon the circumstances,” Jean said.

“Well,” Justice Kennedy began, “it would seem a little odd that there could be an ordinance enacted, then repealed by the

72. *Id.* at 36:28.

73. *Id.* at 37:43.

74. *Id.* at 40:38.

75. *Id.* at 44:00.

referendum, then the ordinance is enacted again, then repealed—it just goes back and forth!”⁷⁶

Justice Kennedy had addressed the same issue that Judy Harrington, the anti-Amendment 2 campaign manager, and I had discussed with respect to whether a repeal effort against Amendment 2 would have been more effective than the constitutional challenge. Would we have been playing legislative and electoral ping-pong if we sought a repeal?

“There are other problems with dealing with civil rights protections and generally, but let’s say they passed Amendment 2 but it didn’t target gay people. It simply said that no one can obtain any protection from discrimination, arbitrary discrimination for any reason. That would not present the problem that Amendment 2 presents. Amendment 2 is *very selective*. It targets only *one* group of people, and that’s where it encounters equal protection difficulties,” Jean explained. “The State may be able to rearrange its process in any number of ways. It just can’t do it in a way that prevents *one particular* group.”⁷⁷

Justice Scalia was not buying it. Returning to his earlier line of questioning, the Justice wanted a full definition of “who” exactly Amendment 2 did target. “How do *you* read the statute when it refers to sexual orientation, homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships?” Justice Scalia asked. “Suppose a person who, let’s say, has a tendency to homosexual conduct, but has never engaged in homosexual conduct, is that person—would an ordinance that relates to that person be covered by this?”

“Yes,” Jean replied firmly. “The Colorado Supreme Court did interpret this initiative in this regard. It said that homosexual conduct was subsumed within homosexual orientation, and—”

“Well, I’m sure it is, but what else? I mean, that’s the problem. What *else*?”

“I don’t understand what you mean by ‘what else,’” Jean boldly countered.

“*Beyond* homosexual conduct.”⁷⁸

Jean and Justice Scalia continued to dispute the meaning of “homosexual conduct” and where it fit into Amendment 2. Jean

76. *Id.* at 44:52.

77. *Id.* at 45:52.

78. *Id.* at 46:48.

finally told the Court that homosexual “conduct” and “orientation” were not mutually exclusive.⁷⁹ Her point was to reinforce her earlier statement: Amendment 2 was extremely broad in its attack on the civil and political rights of its citizens.

Suddenly, the audience’s concentration was broken. Conservative Justice Scalia directed a curt question about whether Jean’s intention was to overturn *Bowers*. My colleagues and I had feared such a reference.⁸⁰

In the very last row of the courtroom, supporters from Colorado were conducting their own exchanges. Some of the men had their heads bent praying; most of the women were transfixed by the electrifying exchange unfolding before them. Others were crying. The delegation grasped each other’s hands creating a silent network. Please, let this be the decade that they say “yes” to civil rights for gays and lesbians. It has to be *now*.

“Ms. Dubofsky, do you contend that—are you asking us to overrule *Bowers v. Hardwick*?!” Justice Scalia stormed.

“No, I am *not*,” Jean replied.

“Well, there we said that you could make homosexual conduct criminal. Why can a state not take a step short of that and say, ‘We’re not going to make it criminal, but on the other hand, we certainly don’t want to encourage it, and therefore we will neither have a state law giving it special protection,’” the Justice drilled, “nor will we allow any municipalities to give it special protection. It seems to me the legitimacy of the one follows from the legitimacy of the other; if you can criminalize it, surely you can take that latter step, can’t you?!”

79. See, e.g., Janet Lever & David E. Kanouse, *Sexual Orientation and Proscribed Sexual Behaviors*, in *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 15, 33 (Gregory M. Herek et al. eds., 1996) (“Although current military policy equates homosexual status (i.e., homosexual identity) with homosexual conduct (i.e., sexual behaviors), data indicate that they are not the same.”). Homosexual “conduct” was a more difficult argument to defend against. The underlying presumption is that conduct is not a mutable characteristic and therefore does not deserve any heightened scrutiny under equal protection arguments. *Id.* at 22–23. “Status,” on the other hand, denotes something more inherent and removes the sexual conduct as the focus. *Id.*

80. Our intention was not to get lost in the weeds in an attempt to overturn *Bowers*. We wanted to keep it narrowly focused on Colorado’s Amendment 2. In retrospect, given how *Lawrence v. Texas* shook out six years later, this seems to have been the right call. Arguably, in 1996, the country was not yet ready for that change.

I sank into the back of my chair. Emotionally, I was exhausted. My eyes bounced back and forth from the verbal attack on Jean to the LGBT community members in the audience and back to the Supremes. I wished that the whole thing would vanish or that I could just disappear.

In response to the last arrow shot, Jean responded, “What you’ve done is deprived people, based on their homosexual orientation, of a whole opportunity to seek protection from discrimination, which is a *very* different thing.”

“So, do you do it when you throw them in jail for a felony?!”⁸¹ Justice Scalia exclaimed.

What a degrading question, I thought, my mind briefly jogging back to a media story about Rush Limbaugh’s third wedding being officiated by Justice Clarence Thomas.⁸² What does sodomy have to do with whether someone is allowed to eat in a restaurant, check out a book, receive medical care, or secure employment? Back then we did not even conceive that people would refuse to bake wedding cakes or take photos for a gay wedding. In the 1990s, the constitutional right to marry was in its fledgling stages.

At that same time, Hawaii, the first state to pass gay marriage legislation—which would later be reversed—had LGBT tourists travelling there to get married.⁸³ The relationship between the Amendment 2 case and the Hawaii same-sex marriage case, I knew, was an important one. Pending in the Hawaii state courts was the first major same-sex marriage case.⁸⁴ The case began in 1991, a year prior to the passage of Amendment 2. Three same-sex couples were denied marriage licenses after exchanging vows. Challenging the refusal in Hawaii’s lower courts, the couples, represented by attorneys from Lambda Legal, were again denied. They appealed the decision to Hawaii’s Supreme Court in May 1993. There the couples found hope, as did gays and lesbians across the country.

81. Oral Argument at 53:12, *Romer*, 517 U.S. 620 (No. 94-1039).

82. Glenn Greenwald, *Congrats to Rush Limbaugh on His Fourth Traditional Marriage*, SALON (June 6, 2010, 6:07 AM), http://www.salon.com/2010/06/06/marriage_18/.

83. *See Hawaiian Judge Upholds Same-Sex Marriages*, CNN (Dec. 3, 1996, 5:50 PM), <http://www.cnn.com/US/9612/03/same.sex.marriage/>.

84. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *see also 1993: The Hawaii Case of Baehr v. Lewin*, FINDLAW, <http://family.findlaw.com/marriage/1993-the-hawaii-case-of-baehr-v-lewin.html> (last visited Oct. 14, 2014) (summarizing the holding of *Baehr*).

The state high court ruled that the denial of marriage licenses to same-sex couples appeared to violate Hawaii's constitutional guarantee of equal protection.⁸⁵

The couples argued that by allowing same-sex marriage, the state would benefit, children of gays and lesbians would benefit, and Hawaii would suffer no adverse effects. The lower court decision was appealed again and the case went back to the Hawaii Supreme Court in 1996, around the time that the *Romer* case went to the United States Supreme Court. Same-sex marriage was in the same hotbed of legal uncertainty as was Amendment 2. Once gays and lesbians could legally marry in Hawaii, couples would eventually travel to other states and challenge any anti-gay marriage laws in effect. The Hawaiian government took three years, at the taxpayers' expense, to justify sex discrimination in marriage. Attorneys for the government tried to show that same-sex marriages would adversely affect children; children should grow up in conventional families, and the State had an interest in promoting traditional families. The Defense of Marriage Act (DOMA)⁸⁶ was passed in 1996, the same year as the *Romer* decision.

I focused my attention back on the oral argument. Jean was still responding to Justice Scalia's comparison of Amendment 2 and *Bowers*.

"If homosexuals were put into the language of Amendment 2 only in terms of, those people who engage in homosexual conduct shall not be entitled to ever seek protection under the civil rights laws, we would say *that* is unconstitutional," Jean exclaimed. "That's a very *different* thing from saying that you can criminalize homosexual sodomy!" she added.

"Then how do you answer Justice Kennedy's further question, well, isn't the State entitled to end a ping-pong game? The locality passes it, the State repeals it. The locality passes it again, the State repeals it again," Justice Ginsburg interjected.

"The constitutional bar, in effect, to ever adopting a protection of any sort, or an opportunity to seek protection from discrimination, is a very different type of barrier than a simple repealer and reenactment, because it means that if the group is

85. *Baehr*, 852 P.2d at 67.

86. Defense of Marriage Act, 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996).

going to ever obtain any protection, it has to amend the state constitution first.”⁸⁷ Jean said.

“Yes, but wouldn’t you say that it could end the ping-pong ball that way if it ends it with respect to all protection against private discrimination?” Justice Souter asked.

“That’s correct, it could,” Jean affirmed.

“That would not be an equal protection problem.”

“That’s right. That’s right,” Jean repeated.

“So you’re saying, if I understand you, you just can’t end the ping-pong ball for this particular group?”

“That’s correct,” Jean replied, “or any particular group.”

“Right. Right.”

“It doesn’t *matter* who the group is—”

“Yes. Yes,” Justice Souter tried to finish.

“—you just couldn’t do it this way,” Jean said looking into the Justices’ faces.

“But, you can end the game.”

“That’s correct,” Jean agreed.⁸⁸

“Thank you, Ms. Dubofsky,” Chief Justice Rehnquist said.

“Thank you,” Jean replied as she sat down.⁸⁹

Tymkovich rose to make his rebuttal. He had approximately one minute in which to do so and began by quickly bringing attention to the civil rights of the people of Colorado to pass and enact an initiative. “Your Honor, the Colorado Supreme Court rule basically holds that preemption is unconstitutional,” the attorney opened. Before he was done with his reasoning on that particular point he was again interrupted.

“Well, *excuse* me,” Justice Souter interjected, “I don’t see where it said preemption was unconstitutional, as distinct from saying, preemption for one identifiable group was unconstitutional.” Tymkovich was stepping in the wrong territory now, I thought.

“It’s preemption of this issue that affects a group, and in *James* the Court told us it’s permissible—”⁹⁰ Tymkovich’s explanation was cut off. There was the *James* case again.⁹¹ As a young attorney, I was once told that if the facts in a case are against you, you argue the

87. Oral Argument at 55:00, *Romer v. Evans*, 517 U.S. 620 (No. 94-1039), available at http://www.oyez.org/cases/1990-1999/1995/1995_94_1039.

88. *Id.* at 55:53.

89. *Id.* at 56:12.

90. *Id.* at 56:45.

91. See *James v. Valtierra*, 402 U.S. 137 (1971).

law and vice versa. This was certainly true during the last hour. Jean and the more liberal Justices discussed the factual implications of Amendment 2, while Tymkovich and Justice Scalia wanted to talk about the *James*⁹² and *Bowers*⁹³ cases.

“Well, it doesn’t—it doesn’t—” Justice Souter interrupted, “the ordinance speaks both in terms of issue, i.e., basis for claim, and group. I mean, it refers to both, doesn’t it? You can’t have one without the other, the way the ordinance is—”

“It’s an issue that affects a group, like in *James* and like in *Gregory v. Ashcroft*,”⁹⁴ Tymkovich continued to explain, “where we had an age restriction in the state.”

“Well, isn’t it in effect defined in terms of the group under traditional equal protection analysis, which looks to the *intent* of the enacting body?”

“Right,” Tymkovich said, “and then there would be the question—”

“Okay,” Justice Souter interrupted, holding up his hand.

“—of whether a rational basis supports that,” Tymkovich said, struggling to fit in a more detailed explanation.

“Thank you, Mr.—” Chief Justice Rehnquist began.

“In this case—” Tymkovich said over the Justice.

“*Thank* you, Mr. Tymkovich,” Chief Justice Rehnquist stated firmly. “The case is submitted.”⁹⁵

It was exactly 11:01 a.m.

More than four years of waiting ended in one hour of United States Supreme Court points and counterpoints. As in most cases, the Justices utilized the attorneys as conduits to convey their own positions to each other. I took one last look at the imported marble encrusted with symbolic sculpture decorating the courtroom. Now the entire country would have to wait to see who among the nine Justices had been persuaded.

Once the Court was adjourned, spectators and journalists rushed to spread word of the oral arguments to the rest of the world. As the Colorado delegation exited the courthouse and descended the long white stairs, we were bombarded by international, national, and local press. Having set up their

92. *Id.*

93. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

94. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

95. Oral Argument at 57:21, *Romer*, 517 U.S. 620 (No. 94-1039).

technical equipment promptly after ticketed guests entered the courthouse, the journalists anxiously awaited word of the hearing. Recording devices of every size and shape littered the center of the courtyard. Microphones with various station logos extended into our faces as numerous TV cameras strained to catch a glimpse of attorneys and plaintiffs together.

Stepping ahead to issue the first comments to reporters, Suzanne Goldberg from Lambda Legal and Matt Coles, an attorney from the ACLU, both attempted to legally interpret and impart what had occurred inside. After waiting patiently, Jean and I addressed the journalists who were still hungry for a sensational comment for their news stories.

Descriptive renditions of the precedent-setting legal arguments were only beginning to reverberate across the nation. We knew that this first meeting with reporters was critical as to how America would understand what had occurred inside. It was one thing to tell the media our viewpoints regarding how the oral arguments unfolded; it was quite another to voice the collective opinion of the Justices and “foretell” their pending decision.

Our activities had climaxed into a political zenith that neither Jean nor I had previously experienced. It was a moment of shared bitter sweetness enriching our already extensive legal histories. One half hour to dramatically influence those who judge the nation’s injustice. Relieved that the oral arguments had progressed as they had, all of us knew the contentment was temporary. Our fight to overturn Amendment 2 now rested in the hands of nine very human Americans.

“I am famished!” Jean said, turning to Katherine, her assistant. She had just finished taking questions from reporters, and the dense crowd outside was slowly breaking up.

“Me too, Jean.”

“Yeah, let’s go get some lunch,” I said.

“Let’s all go have lunch together at the Monocle,” Jean offered.

Heading down the street on foot, I strained to see between government buildings to the neighborhoods beyond. Inside the courtroom, I had never lost sight of what the case was truly about: ordinary people living ordinary lives.

Our nation’s capital—where deals are cut and scandals are our way of life. A place where America’s brightest and most powerful politicians gather to argue for change for all citizens. Where

lobbyists and activists bang heads and shout their causes, shoulder to shoulder with radicals, liberals, and conservatives. In many ways, I had changed over those four years being involved in the anti-Amendment 2 fight. I recalled the early days of my activism. Flush in the center of a radical 1960s activist organization, marching against the Vietnam War on behalf of my brother who was on the front lines, my commitment then closely mirrored my dedication of today. Richer, fuller idealism now came to me in ways I could never have foreseen. I had matured and my skills were more diplomatic and refined. *By whatever means*. Malcolm X's words recalled images of the Black Panthers, many of whom were still imprisoned for their political beliefs. Others melted into the mainstream, their hair now gray and their children grown. The once angry activists were now applying their political talents to meetings with corporate managers in high-rise offices.

After our small group of attorneys, activists, and plaintiffs had arrived and been seated for lunch, we shared our viewpoints and feelings. We laughed and cried together; the ad hoc luncheon gave everyone a chance to unwind and release the emotions of the tense hour they had silently spent in the courtroom. Light-hearted jokes blended with serious discussion about the implications of the morning's presentation. Everyone seemed to avoid talking about what the final decision would be and when it would be given.

"That's Justice Powell," Jean called out to us.

"Who?" Frank Brown, CLIP director, asked.

"What's everybody talking about?"

"Who?" someone repeated.

"Former Supreme Court Justice Powell," Jean explained, pointing casually across the room. Sitting with what appeared to be two colleagues was an elderly man dressed in a dark suit and tie. "He's one of the Supreme Court Justices who sat on the bench when the 1986 *Bowers v. Hardwick*⁹⁶ case was decided."

"You mean Georgia's sodomy case?!" another asked.

"That's the one," I said, shaking my head. "He voted *for* it."

"I heard somewhere that he made an about-face on that vote," Jean interjected. "Powell said that if he had to do it all over again, he would have voted *against* Bowers. You know it's never too late for someone to change . . ."

96. 478 U.S. 186 (1986).

Justice Powell was appointed by President Eisenhower in 1956, and was considered a liberal when he sat on the High Court bench. In October of 1990, three years after his retirement, Powell told a group of New York University law students, “I think I probably made a mistake in that one.”⁹⁷ Besides *Bowers*, the only other change he would have liked to have made was to add the Equal Rights Amendment to the Constitution.⁹⁸

The politics surrounding the *Bowers* case were filled with irony. The case was brought by the Georgia Attorney General’s Office. The attorney representing Georgia was Michael Bowers. In 1997, the skeletons in Michael Bowers’ closet would begin to surface. That year, as a leading gubernatorial candidate for Georgia, Bowers admitted to an adulterous ten-year affair.⁹⁹ Resigning his position as the state’s attorney general on June 1, 1997, Bowers, a married father of three children, broke his *own* promise to uphold the law.¹⁰⁰ Never clearly disclosing when the affair ended, his news-making tryst again brought attention to Georgia law. Adultery, like sodomy, was illegal in the southern state. *Bowers* would ultimately be overturned by *Lawrence v. Texas*¹⁰¹ in 2003, which cited the *Romer* case.¹⁰²

For now, the other attorneys, activists, supporters, and I were content with the day we had just endured. Life suddenly looked a little different, a little more hopeful. The continued fight for civil rights for gays and lesbians could now wait—at least until the following day.

Before departing Washington, D.C., I visited the Gay and Lesbian Victory Fund. Upon entering their offices, Kathleen Debold, the political director of the organization, pulled me quickly into her office.

97. Gay & Lesbian Archives of the Pac. Nw., *Bowers v. Hardwick*, SODOMY L., <http://www.glapn.org/sodomylaws/bowers/bowers.htm> (last updated Apr. 18, 2007).

98. See Edward Lazarus, *The Ghost of Justice Powell: How His Cautious Conservatism Still Haunts the Supreme Court*, FINDLAW (July 10, 2003), <http://writ.news.findlaw.com/lazarus/20030710.html>.

99. Kevin Sack, *Georgia Candidate for Governor Admits Adultery and Resigns Commission in Guard*, N.Y. TIMES, June 6, 1997, at A, available at 1997 WLNR 4879916.

100. *Id.*

101. 539 U.S. 558 (2003).

102. *Id.* at 560.

“Mary,” Kathleen whispered. “You understand we are going to lose this thing. The Justices are not going to decide in our favor.”

“Who told you that?!” I asked.

“That’s the word here in Washington, D.C., Mary,” Kathleen responded. The LGBT law professors and national organizations apparently all thought that we had a loser case.

“Well, the word is *wrong*,” I said matter-of-factly. “We *are* going to win and we’re going to do so on the rational basis argument. I am confident that the Justices will decide in our favor. In fact, I’m sure the vote will be 6–3 in our favor! We have a just cause here, Kathleen!”

The Supreme Court opinion on the *Romer* case was indeed 6–3 on a rational basis theory. Amen. I participated in a rally with over 4000 in attendance on the steps of the Colorado State Capitol Building on the day of the Supreme Court decision. I said, “How does it feel to know that the Constitution is alive and well and living in Colorado?” While I was speaking to the audience, a filmmaker captured me and this comment was used in the documentary film, *After Stonewall*.¹⁰³ I then said, “It ain’t over till the fat lady sings,” and proceeded to sing “God Bless America.” The crowd roared with laughter.

The language and dicta authored by Justice Kennedy would be argued and quoted in many LGBT cases over the next fifteen years. He wrote: “[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”¹⁰⁴ This language was cited in the oral arguments and briefs for the 2013 United States Supreme Court cases on DOMA¹⁰⁵ and California Proposition 8,¹⁰⁶ as well as in the new round of marriage cases before the federal appeals courts.

Once the marriage issue is totally resolved, I believe that the *Romer* language will be used in cases concerning religious freedom. Business owners may have a harder time espousing a religious

103. AFTER STONEWALL (First Run Features 1999). This film was the second in a two-part series that depicted and documented the Gay Rights Movement in the U.S., from its inception, to the *Romer* case and beyond, to the beginnings of the gay marriage movement. *Id.* Part I included the Mattachine Society and the Daughters of Bilitis, and Part II included the Stonewall Riots and *Romer. Id.*

104. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

105. *See United States v. Windsor*, 133 S. Ct. 2675 (2013).

106. *See Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

belief argument to deny LGBTs a public accommodation when it stands in stark contrast to people who take those positions solely because of their “animosity toward a class of persons.”

The Supreme Court interpreted the Constitution to forbid laws that reflect “animus” against gay and lesbian Americans, and last year’s decision in *United States v. Windsor* reaffirmed this anti-animus principle.¹⁰⁷ Given the motives of those who support the expansion of religious exemptions, it is not difficult to construct an argument that the new laws would deny equal protection under the law. The *Romer* case, in my opinion, will go down in the annals of LGBT history as the LGBT *Brown v. Board of Education*.¹⁰⁸ I am grateful to have been involved in the case.

107. *Windsor*, 133 S. Ct. at 2693.

108. 347 U.S. 483 (1954).