SIX

The Law and Politics of Antigay Initiatives

Lesbian, gay, and bisexual people have had their civil rights put to a popular vote more than any other group of citizens. As Gamble (1997, 257) has shown, nearly 60 percent of the initiatives and popular referenda that appeared on statewide ballots in the years between 1959 and 1993 focused on the civil rights of lgb people. As a rule, these ballot measures were attempts to repeal newly enacted laws that prohibited discrimination on the basis of sexual orientation.[1] Some ballot measures also sought to prohibit jurisdictions from passing any gay rights laws in the future.

The most famous example of an antigay rights ballot measure is, of course, Colorado's Amendment 2. In 1992, Colorado voters approved the following amendment to their state constitution.

> 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.

Table 11 itemizes the major ballot measures designed to stem the progress of gay rights.[2] As it indicates, antigay ballot measures have not always been successful. The same year that Coloradoans approved Amendment 2—the measure at the heart of *Romer v. Evans*—voters in Oregon rejected a similar measure known as Measure 9. And in 1994, although antigay rights activists attempted to place initiatives on the ballot in ten states, only two of the proposed initiatives actually made it to a

TABLE 11. Breakdown of Antigay Initiatives and Referenda

Year	Location[a]	Type[b]	Outcome	For (%)	Case Name (if applicable)
1974	Boulder, CO	R	passed	83	
1977	Dade Cty, FL	R	passed	69	
1978	CALIFORNIA	I	failed	42	
	Wichita, KS	R	passed	83	
	St. Paul, MN	R	passed	63	
	Eugene, OR	R	passed	64	
	Seattle, WA	R	failed	37	
1980	Santa Clara Cty, CA	R	passed	70	
	San Jose, CA	R	passed	75	
1982	Austin, TX		failed	37	
1984	Duluth, MN		passed	76	
1985	Houston, TX		passed	82	
	Kings Cty, WA	R	dnq[c]		
1986	Davis, CA		failed	42	
1988	St. Paul, MN		failed	44	
	OREGON	R	passed[d]	57	
1989	Irvine, CA	R	passed		
	Athens, OH		passed	53	
	Tacoma, WA	R	passed		
1990	MASSACHUSETTS	R	blocked		*Collins v. Commonwealth*[e]
	Wooster, OH		passed	63	
	Seattle, WA	R	failed	45	
1991	Concord, CA	I	passed	50.2[f]	
1991	Riverside, CA	I	blocked		*Citizens for Responsible Behavior*
	San Francisco, CA	R	failed	40	
	Denver, CO		failed	45	
	St. Paul, MN	R	failed	46	
1992	ARIZONA	I	dnq		
	COLORADO	I	passed[g]	53	
	FLORIDA	I	dnq		
	Tampa, FL	R	passed[h]	59	
	Portland, ME	R	failed	43	
	OREGON	I	failed	43	
	Corvallis, OR	I	failed	34	
	Springfield, OR	I	passed	56	
1993	Anchorage, AK	R	blocked		*Faipeas v. Anchorage*
	Tampa, FL	R	passed[h]	56	
	Lewiston, ME	R	passed	68	
	Cincinnati, OH	I	passed[i]	62	
	Canby, OR	I	passed	56	
	Cornelius, OR	I	passed	62	
	Creswell, OR	I	passed	58	
	Douglas Cty, OR	I	passed	72	
	Estacada, OR	I	passed	54	
	Jackson Cty, OR	I	passed	59	
	Junction City, OR	I	passed[j]	50.1	
	Josephine Cty, OR	I	passed	64	
	Keizer, OR	I	passed	53	
	Klamath Cty, OR	I	passed	64	
	Lebanon, OR	I	passed	65	

TABLE 11. ***Continued***

Year	Location[a]	Type[b]	Outcome	For (%)	Case Name (if applicable)
	Linn Cty, OR	I	passed	68	
	Medford, OR	I	passed	58	
	Molalla, OR	I	passed	55	
	Oregon City, OR	I	passed	53	
	Sweet Home, OR	I	passed	69	
1994	ARIZONA	I	dnq		
	FLORIDA	I	blocked		*In re Advisory Opinion to the Attorney General*
	Alachua Cty, FL	I	passed[k]	57	
	IDAHO	I	failed	49.9	
	MAINE	I	dnq		
	MICHIGAN	I	dnq		
	MISSOURI	I	dnq		
	Springfield, MO	R	passed	71	
	NEVADA	I	dnq		
	OHIO	I	withdrawn		
	OREGON	I	blocked		
	OREGON	I	failed	44	
	Albany, OR	I	passed	59	
	Cottage Grove, OR	I	passed	57	
	Grants Pass, OR	I	passed	60	
	Gresham, OR	I	failed[l]	50.5	
	Junction City, OR	I	passed[j]	57	
	Lake Cty, OR	I	passed	58	
	Marion Cty, OR	I	passed	61	
	Oakridge, OR	I	passed	51	
	Roseburg, OR	I	passed	65	
	Turner, OR	I	passed	79	
	Venetta, OR	I	passed	55	
	Austin, TX	R	passed	62	
	WASHINGTON	I (2)	dnq		
1995	West Palm Beach, FL	R	fail	44	
1995	MAINE	I	failed	47	
	WASHINGTON	I (2)	dnq		
1996	Broward Cty., FL	R	dnq		
	IDAHO	I	dnq		
	MAINE	R	passed		
	Lansing, MI	R	passed	52	

[a]Names in capital letters signify statewide ballot measures. Local measures are identified by city/ county name.

[b]R = referendum; I = initiative.

[c]DNQ = did not qualify for the ballot.

[d]The measure was subsequently overturned in *Merrick v. Bd. of Higher Ed.*

[e]Full case citations are contained in the chapter text and in the table of cases.

[f]The initiative was subsequently overturned in *Bay Area Network of Gay & Lesbian Educators v. City of Concord.*

[g]The initiative was subsequently overturned in *Romer.*

[h]The 1992 referendum was voided; it passed again in 1993.

[i]The initiative was appealed but ultimately upheld in *Equality.*

[j]The 1993 initiative was thrown out by a court because of voting irregularities; it passed again in 1994.

[k]The initiative was subsequently overturned in *Morris v. Hill.*

[l]Gresham City Charter requires supermajority to pass ballot initiative.

vote, and they failed, albeit by small margins. Nevertheless, citizen lawmaking on issues concerning gay rights has generally produced results counter to the interests of lgb people. Of the fifty-seven ballot measures ultimately submitted to a popular vote, forty-five passed, for a success rate of 77 percent.[3]

The generally strong ability of antigay rights activists to roll back gay rights through citizen lawmaking suggests that they possess an advantage over gay rights activists in the electoral arena. Gay rights activists have sought to mitigate this disadvantage in several ways, most notably through the legal system. By turning to the courts, gay rights activists have been able to stave off numerous antigay measures by convincing judges that the measures are legally defective. For example, Lambda challenged the legality of antigay ballot measures in California, Colorado, Florida, Ohio, and Oregon, successfully derailing almost all of them.[4]

Romer v. Evans ranks as the most consequential of the legal challenges to antigay ballot measures. Nine days after Colorado voters passed Amendment 2 at the ballot box, Lambda, the ACLU, and the newly formed Colorado Legal Initiatives Project (CLIP) asked Colorado's district court to enjoin Amendment 2 from taking effect.

It took *Romer* three and a half years to work its way up to the U.S. Supreme Court. During that time, it went to trial twice, once to determine whether Amendment 2 would be enjoined before it took effect (yes) and once to determine whether it served a compelling governmental interest (no). In each instance, the state appealed the unfavorable outcome to the Colorado Supreme Court. Both times, the state high court upheld the lower court decision. By the time *Romer* finally reached the U.S. Supreme Court, four different courts had reacted unfavorably to the constitutionality of Amendment 2.

The Supreme Court responded in the same fashion. By a 6–3 majority, the Court struck down Amendment 2, ruling that it was "born of animosity" toward lgb people and denied their right to equal protection under the U.S. Constitution. Amendment 2, it said, "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws" (635).

In this chapter, I examine the divergence of the electoral and legal outcomes of antigay initiatives. My analysis is centered on the political and legal progress of Amendment 2 but also touches on the many other initiatives designed to retard the progress of the gay rights movement. My core argument is that the differences in the electoral and legal outcomes of anti-

gay initiatives are largely attributable to differences between the *political* and *legal* structures of opportunity within which pro- and antigay rights activists operated. These differences include the mechanics of the decision-making process, the decision makers themselves, the alliance and conflict system, and the frames available to pro- and antigay rights activists. I begin by sketching out the various forms of antigay ballot measures.

The Form and Scope of Antigay Ballot Measures

Antigay ballot measures take two basic forms. Popular referenda seek to repeal existing laws. In the context of gay rights, popular referenda virtually always address laws that have been enacted quite recently. Before the late 1980s, all but one gay rights law (Wisconsin) was the product of local decision making, and so repeal efforts were also locally based. But as the scope of gay rights laws increased, so did the scope of antigay repeal efforts. For instance, early in 1988 Oregon's governor implemented an executive order protecting state employees from discrimination based on sexual orientation. Antigay activists mobilized in opposition to the executive order and by the end of the year had succeeded in engineering its repeal through a popular referendum called Measure 8.

Initiatives seek to make new law, although they may also attempt to repeal existing law. Like referenda, ballot initiatives generally arise in the immediate aftermath of perceived gains by the gay rights movement. Although statewide initiatives have received the lion's share of publicity, table 11 shows that the large majority of antigay initiatives have taken place at the city or county level. There are three primary types of antigay initiatives. Adams (1994) refers to them as *specifically targeted, overtly hostile,* and *stealth* initiatives.

Specifically targeted initiatives seek to remove power from governmental decision makers to prohibit discrimination based on sexual orientation. Colorado's Amendment 2 was a specifically targeted initiative. It prohibited state and local governments in Colorado from enacting, enforcing, or adopting any law that prohibited discrimination based on "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships" or gave lgb people any claim to "minority status, quota preferences, [or] protected status" based on their sexual orientation. The phrasing of Amendment 2 was subsequently copied by antigay activists in several other locales, including Cincinnati (1993), Arizona (1994), and Missouri (1994).

Overtly hostile initiatives also seek to limit governmental ability to remedy discrimination based on sexual orientation. In addition, they seek to ensure that public agencies officially condemn homosexuality. Oregon's Measure 9, voted on the same day as Amendment 2, is the paradigmatic example of an overtly hostile initiative. The proposed constitutional amendment provided that

> All governments in Oregon may not use their monies or properties to promote, encourage, or facilitate homosexuality, pedophilia, sadism, or masochism. All levels of government, including public educational systems, must assist in setting a standard for Oregon's youth which recognizes that these "behaviors" are "abnormal, wrong, unnatural, and perverse," and that they are to be discouraged and avoided. State may not recognize this conduct under sexual orientation or sexual preference levels, or through quotas, minority status, affirmative action, or similar concepts.

Other overtly hostile initiatives have been less explicit than Oregon's Measure 9 but are nevertheless designed to ensure governmental condemnation of homosexuality. An initiative on Idaho's 1994 ballot forbade all public school employees from sanctioning homosexuality as a "healthy, approved, or acceptable behavior" (Proposition One), language mirrored by a proposed Washington initiative that same year (Initiative 608).

Stealth initiatives take the opposite tack from overtly hostile proposals. They never explicitly mention homosexuality or sexual orientation, instead proposing to limit the scope of civil rights laws to certain specified classifications, usually including race, sex, ethnicity, religion, national origin, age, disability, and marital status. These initiatives appear neutral on their face but are nonetheless designed to repeal existing gay rights laws and prevent the passage of future ones. The letter accompanying a 1994 petition to place a stealth initiative on Florida's ballot offers a clear illustration of the initiative's underlying purpose: "This petition is designed to stop homosexual activists and other special interest groups from improper inclusion in discrimination laws. . . . Therefore, this amendment would prevent homosexuality and other lifestyles from gaining special protection in discrimination laws" (quoted in Adams 1994, 590).

The three different kinds of antigay initiatives reflect shifting assessments among antigay activists of the best approach to fighting the so-called homosexual agenda. For example, antigay activists in Idaho origi-

nally proposed an overtly hostile initiative that was similar to Oregon's Measure 9 in tone. An opinion by Idaho's attorney general that the initiative was unconstitutional combined with the electoral defeat of Oregon's Measure 9 and the simultaneous success of Colorado's Amendment 2 convinced them to amend their measure to soften (but not eliminate) the overt hostility toward lgb people. Likewise, the legal problems faced by Amendment 2 and its clone Cincinnati's Issue 3 (passed in 1993) prompted antigay activists to try stealth initiatives as an alternative to specifically targeted proposals.[5]

Despite variations in the scope and content of antigay initiatives and referenda, they share a number of structural features in common. At the most basic level, they are attempts by opponents of gay rights to expand the scope of conflict from the legislative and/or executive branches to the larger voting public, seeking thereby to appeal to a set of decision makers potentially more aligned against the concept of gay rights.[6] We turn now to the mechanics of citizen lawmaking, examining both the citizen lawmaking process and the ways in which gay rights advocates such as Lambda have been able to turn to the courts to keep antigay measures off the ballot.

The Mechanics of Citizen Lawmaking

Although the great majority of antigay ballot measures arise in response to recently enacted gay rights laws, most gay rights laws have not given rise to antigay ballot measures. A major reason for this involves the mechanics of citizen lawmaking. Fewer than half of the states in the nation allow voters to initiate ballot measures to check the state legislative process.[7] In the years between 1975 and 1992, statewide gay rights policies were enacted in sixteen states, either through legislative action or executive order.[8] Only five of those states—California, Massachusetts, Ohio, Oregon, and Washington—permit popularly initiated ballot measures. In each state but California, the enactment of gay rights policies was closely followed by popularly generated attempts at repeal.[9] In other words, in almost all the states where people could use the citizen lawmaking process to counter legislative actions to protect gay rights, they attempted to do so.

The requirements for putting proposed measures onto the ballot vary from state to state and locality to locality, but at a minimum qualifying a proposed referendum or initiative requires the signatures of a certain percentage of the voting population. These percentages vary. In order to

qualify for the ballot in Colorado, a proposed initiative must garner the signatures of at least 5 percent of the voters who cast ballots for the secretary of state in the last election. In order to qualify in Arizona, however, a proposed constitutional initiative must be signed by at least 15 percent of the voters who cast ballots in the last gubernatorial election. Some states require as well that the signatures be geographically disbursed. Nevada, for instance, requires that 10 percent of the eligible voters in three-quarters of the counties sign onto a proposed initiative to qualify it for the ballot. The more stringent the signature requirements the fewer the initiatives that qualify for the ballot.[10]

In addition to signature requirements, some states have textual requirements for proposed ballot initiatives. A common requirement is that the proposed measure be limited in scope to a single subject.[11] A second common requirement is that the proposed ballot measure contain a title or summary that explains the measure's substance.[12] Finally, some states and localities limit the substantive areas open to citizen lawmaking. In states such as Idaho, Maine, and Washington, voters may propose statutory laws but not constitutional amendments, while the reverse holds true in Florida, Illinois, and Mississippi. Likewise, many localities do not permit voters to utilize citizen lawmaking to amend charters but do allow popularly generated measures on statutory matters.

The mechanics of citizen lawmaking offer several opportunities for gay rights activists and other interested parties to prevent proposed antigay measures from qualifying for the ballot. For example, Lambda and the ACLU raised both constitutional and procedural arguments in their successful effort to prevent one of the nation's earliest antigay initiatives from coming to a vote. In 1991, a California group called Riverside Citizens for Responsible Behavior developed a ballot initiative designed to repeal two protective ordinances recently enacted by the Riverside City Council and to remove all power to remedy discrimination based on sexual orientation from the legislative body. The "Citizens' Ordinance Pertaining to Homosexuality and AIDS" specifically sought to forbid the Riverside City Council from enacting any law or policy that

(a) defines homosexuality, bisexuality, sexual orientation, sexual preference, affectional preference, or gay or lesbian conduct as a fundamental human right;
(b) classifies homosexuality or AIDS as the basis for determining an unlawful discriminatory practice and/or establishes a penalty or civil remedy for such practice;

(c) provides preferential treatment or affirmative action for any person on the basis of sexual orientation or AIDS; or
(d) "promotes, encourages, endorses, legitimizes or justifies homosexuality.

The proposed ordinance also forbade the city of Riverside from spending any city monies, either directly or indirectly, to fund any individual, activity, or organization that promoted, encouraged, endorsed, legitimized, or justified homosexual conduct.

Although the "Citizens' Ordinance" received a sufficient number of signatures to be placed on the ballot, the city council refused to do so, believing it to be unconstitutional. Riverside Citizens for Responsible Behavior subsequently filed suit in the Superior Court of Riverside County, seeking to have the city council ordered to place the initiative on the ballot. The city of Riverside, represented by Lambda and the ACLU, in turn asked the court to declare that the city's decision was proper.

After consideration of the issues involved, the superior court agreed with the Riverside City Council, finding that the proposed ballot measure was both procedurally and constitutionally impermissible. Procedurally, the city of Riverside's charter did not permit the electorate to enact a measure as broad as the "Citizens' Ordinance." Constitutionally, the proposed measure ran afoul of the Fourteenth Amendment, said the court, because it was "designed to permit and encourage private discrimination against homosexuals and persons with AIDS" (*Citizens for Responsible Behavior v. Riverside City Council*, 1991). Riverside Citizens for Responsible Behavior promptly appealed the lower court ruling to the California Court of Appeals, which refused to grant them relief, thus blocking the attempt by antigay rights activists to use citizen lawmaking to stem the progress of gay rights.

Lambda has also used procedural arguments to derail a number of other ballot measures. In a 1994 case, Lambda invoked subject-matter requirements in a successful bid to block a proposed constitutional amendment from appearing on Florida's ballot. The language of the stealth initiative stated, in relevant part, that

> The state, political subdivisions of the state, municipalities or any other governmental entity shall not enact or adopt any law regarding discrimination against persons which creates, establishes, or recognizes any right, privilege or protection for any person based on any characteristic, trait, status or condition other than race,

> color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. (Proposed Initiative § 1(b))

"All laws inconsistent with this amendment," the measure continued, would be repealed.

Among the objections raised by Lambda was that the proposed measure violated Florida's single-subject requirement because it enumerated ten different classes of people who would be protected under civil rights laws and thus really raised ten different questions. The Florida Supreme Court agreed and knocked the antigay initiative off the ballot.[13]

Although procedural challenges have prevented several antigay ballot measures from coming to a vote, they have not been uniformly successful. For example, the ACLU failed in its attempt to derail Idaho's antigay initiative through a preelection challenge. In *ACLU v. Echohawk* (1993), the ACLU claimed that Idaho's Proposition One was unconstitutionally vague because it failed to define ambiguous terms such as *homosexual behavior* and employed terms such as *minority status* and *special rights* that had no specific legal meaning. The Idaho Supreme Court rejected the ACLU's contention without itself specifically defining the terms at issue. The measure was subsequently brought to a vote and defeated by a razor-thin margin.[14]

The Politics of Antigay Initiatives

Campaigns to stem the progress of gay rights through citizen lawmaking have shared a number of features. All have been responses to (perceived) gains by the gay rights movement. All have been driven largely by religious conservatives with ties to the New Right. All have been conducted largely via sound bite, and all have employed two major frames: morality and "special rights." In the following pages, I use the campaign over Amendment 2 to illustrate the ways in which the mechanics of the political process, the availability of resource networks, the configuration of decision makers vis-à-vis gay rights, and the existing cultural stock all combined to facilitate the passage of antigay ballot measures.

The Origin of Amendment 2

The immediate impetus of Amendment 2 was the Colorado Springs Human Rights Ordinance. In the spring of 1991, the Human Rights Com-

mission of Colorado Springs held hearings on a proposed human rights ordinance that would prohibit discrimination based on a person's "race and color, their religion and creed, their national origin and ethnicity, their age, marital status, their sexual orientation, or their disabled condition" in employment, public accommodations, sales and services, and the transfer or financing of property.[15] This proposed ordinance followed on the heels of a similar ordinance passed in Denver in 1990 as well as a proposed statewide human rights bill that would, among other things, add sexual orientation to a list of grounds upon which "ethnic intimidation" was prohibited.

The Colorado Springs proposal engendered immediate and vociferous opposition. Colorado Springs was home to a large number of fundamentalist Christian organizations, including Focus on the Family, the country's largest Christian radio ministry. Members of these organizations spearheaded the assault on the proposed ordinance, and the city council ultimately defeated it by an 8–1 vote.[16]

An unintended consequence of the proposed Human Rights Ordinance is that it sparked a coordinated effort to repeal gay rights laws across the state. The majority of the key players in the push for Amendment 2 came from Colorado Springs and had lobbied against the proposed ordinance. In the spring of 1991, Tony Marco, one of the local activists who was working against the ordinance, contacted David Noebel. Noebel was the head of Summit Ministries, a anticommunist organization with ties to the Christian Crusade; he had written a book in 1977 titled the *Homosexual Revolution,* in which he linked tolerance of homosexuality with pedophilia, atheism, totalitarianism, and nihilism. Noebel in turn contacted Kevin Tebedo, the son of state senator Maryanne Tebedo. Noebel recounted the meeting that led to the notion of Amendment 2 in a 1993 article.

> So the three of us got together—Tony Marco, Kevin Tebedo and myself. . . . And we said, no further. This is not going any further. I mean it was so obvious what was going on. [The homosexuals] were going to pick us apart, piece by piece. They were just going to go city by city, county by county. And there was only one way to stop it, and that was to do something statewide, at least. (Quoted in Harkavy 1993, 28)

Colorado for Family Values (CFV) was formed to do just that. The people involved in its formation comprised a who's who list of conservative Christian activists. Aside from Marco, Noebel, and Tebedo, the

group included Bill McCartney, coach of the University of Colorado's football team and founder of Promise Keepers; Barbara Sheldon of the Traditional Family Values Coalition; Randy Hicks of Focus on the Family; Jayne Schindler of Eagle Forum; and Senator Bill Armstrong.[17] Will Perkins, a man whose television commercials for used cars made him widely known in Colorado Springs, became the voice of CFV during the Amendment 2 campaign.

CFV's links to national New Right organizations gave it access to resources gathered from earlier anti–gay rights efforts. The text of Amendment 2 was drafted by the National Legal Foundation (a conservative litigation organization founded by Pat Robertson) and drew heavily on the principles articulated in the Riverside "Citizens' Ordinance." The campaign to promote Amendment 2 likewise drew heavily on a handbook published by an attorney for Concerned Women for America entitled *How to Defeat Gay Rights Legislation*. CFV's connection to conservative Christian churches and New Right organizations also gave it access to populations of Colorado citizens likely to support Amendment 2.

Amendment 2 and the Mechanics of Citizen Lawmaking

As noted previously, Colorado has relatively lax signature requirements for placing a proposed measure on the ballot. CFV easily garnered enough signatures to qualify Amendment 2 for the ballot. Although Lambda was well aware of Amendment 2's existence, its hands were tied. In Colorado, courts do not have the power to pass on the constitutionality of a proposed initiative until and unless it is passed into law. The state does not have a single-subject requirement for popularly initiated ballot measures, nor does it limit the permissible subjects for ballot measures. Amendment 2 was thus less viable for a preelection challenge than ballot proposals in other jurisdictions.

Framing Amendment 2, Part I: The Politics of Morality

Haider-Markel and Meier have noted that the politics surrounding antigay initiatives resembles the kinds of "morality politics" surrounding issues such as abortion. Morality politics, in their terms, tend to be "partisan, seek non-incremental solutions, [and] focus on deeply-held values" (1996, 334). Oregon's antigay initiative campaign is a paradigmatic example of this invocation of morality politics: virtually all of the campaign rhetoric produced by the Oregon Citizen's Alliance (OCA), the rough

counterpart to CFV, emphasized the "deceitful, grasping, and immoral nature of homosexuals" (Douglass 1997, 26).

For example, a key tool of the OCA was a video it produced called "No Special Rights." The video purported to expose the underlying agenda of the gay rights movement. The bulk of it was simply spliced-together footage of a handful of gay pride parades, with an emphasis on drag queens, scantily clothed men, leather-clad women, and displays of sexual conduct such as kissing. A few interviews with purported "participants" were interspersed; they focused on sadomasochistic and pedophilic practices. In short, the video attempted to equate homosexuality with moral deviance and to engender a visceral reaction in its viewers.

The framing of Amendment 2 by CFV likewise incorporated the rhetoric of morality. In the final days of the campaign, CFV distributed literature highlighting what it referred to as "astonishing, fully-documented reports of the actual goals of homosexual extremists," as well as "graphic, disgusting facts" that "will shock and repel."[18] In particular, CFV worked to paint homosexuals as pedophiles. A tabloid distributed by CFV contained the following bulletin.[19]

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

CFV also argued that legalized same-sex marriage was the ultimate goal of the gay rights movement, a goal that would harm children in still other ways: "Homosexual 'marriages' will only erode traditional family structures, sap resources from legitimate, traditional families (by increasing disease-driven insurance rates, etc.) and cause measureless misery to helpless children, who would be the most wretched victims of such 'marriages.'"[20]

In addition, CFV also painted homosexuals as endangering the public's health. Lesbians and gay men, CFV claimed, were society's "most persistent and change-resistant communicators of sexually transmitted diseases." Their ability to transmit "a host of highly communicable, even incurable, diseases" was augmented in "occupations like health care,

child care and food care." Homosexuals were such prolific breeders of disease, CFV argued, that caring for them would tax available resources to the breaking point. Its campaign literature claimed that, "by the mid-1990's, it will be difficult for sick persons to get hospital beds because of overcrowding by AIDS-infected homosexuals."[21]

In making these homosexual danger claims, CFV was seeking to motivate the significant minority of Colorado voters with deep-seated objections to homosexuality to go to the polls on election day. As noted in chapter 4, about three-fourths of Americans surveyed in 1991 by the General Social Survey agreed that "homosexuality is always wrong." It is interesting to note that a similarly worded question asked of Coloradoans in 1992 suggested that Coloradoans were somewhat *more* tolerant of homosexuality than was the nation as a whole. During the campaign over Amendment 2, the *Denver Post* commissioned a polling firm to survey attitudes about homosexuality. Among other things, respondents were asked to respond to the statement "Homosexuality is morally wrong." Forty-six percent agreed with the premise of the statement, while 40 percent disagreed; the remaining 14 percent either said they were neutral or did not know (Gerstmann 1999, 99–100). Despite the seemingly greater tolerance of Coloradoans about the moral legitimacy of homosexuality, however, a plurality still believed that homosexuality was immoral. This population offered potentially fertile ground for CFV's homosexual threat claims.

Framing Amendment 2, Part II: Special Rights

Although CFV invoked the politics of morality, its primary rhetorical strategy was the invocation of "special rights." In its campaign to enact Amendment 2 CFV consistently argued that the initiative was not designed to deprive homosexuals of equal rights but simply to ensure that homosexuals were unable to get special rights based on their "life-style choice." CFV framed homosexuals as different from "legitimate" minorities. The baseline comparison group it invoked was African Americans. Lgb people, it argued, were not sufficiently "like" African Americans to warrant protections under civil rights laws.

Campaign materials disseminated by CFV were designed to highlight the differences between the two groups. In one widely distributed tabloid, CFV asked voters to compare the hardships faced by homosexuals to those faced by African Americans. Only the latter group, it argued, had been barred from voting and denied access by law to drinking foun-

tains, bathrooms, businesses, and restaurants. The clear implication was that African Americans merited legal protections in a way that lgb people did not.

Schacter (1994) refers to this framing as the "discourse of equivalents." The crux of this discourse of equivalents is the notion that some groups in society receive rights that are unavailable to others and, hence, are "special." In another widely disseminated tabloid, CFV laid out the criteria for deciding which groups should receive "special rights."

> Amendment 2 upholds common sense civil rights laws and Supreme Court decisions, which say that people who want protected class status have to show they need it in three fair, logical ways:
>
> 1. A group wanting true minority rights must show that it's discriminated against to the point that its members cannot earn average income, get an adequate education, or enjoy a fulfilling cultural life.
> 2. The group must be clearly identifiable by unchangeable physical characteristics like skin color, gender, handicap, etc. (not behavior).
> 3. The group must clearly show that it is politically powerless.

Homosexuals, CFV claimed, met none of these criteria. For one thing, homosexuality was a "life-style choice" rather than an unchangeable physical characteristic. Moreover, homosexuals were advantaged rather than disadvantaged. According to one of CFV's principal spokesmen, homosexuals were "affluent, well-educated, sexually deviant political power brokers" who "sport[ed] average annual household incomes over $55,000" (Perkins 1992). Their undue political power, in fact, was the reason why a citizen-initiated amendment to Colorado's constitution was needed. As Tony Marco testified at Amendment 2's trial, the amendment was necessary because other voters "simply could not compete with gay militants' ability to lobby, to influence legislation, [and] to promulgate its views through print and other media."

> It was obvious that the aggression of gay militants through the legislature was not going to cease. . . . The legislature is very vulnerable to all kinds of lobbying and other activity without citizens'

> direct representation on that activity—lobbying for which I discovered gay militants were very, very well equipped and were very well experienced. And so the only way to insure that this kind of activity would stop would be through passage of [a] constitutional amendment. (Quoted in Keen and Goldberg 1998, 109)

Without Amendment 2, CFV argued, heterosexuals would fall yet another rung further down the economic ladder as homosexuals got "their" jobs through "quota preferences"; they would also lose the "right to live out their beliefs" to the extent those beliefs diverged from homosexual orthodoxy (see Perkins 1992).

In depicting Amendment 2 as a necessary corrective to the disproportionate influence of lgb people on the legislative process, CFV was seeking to tap into public antipathy toward *civil rights laws* as much as public antipathy toward lgb people.[22] This approach fell on fertile ground. Several surveys conducted early in 1993 found that a significant percentage of people who opposed discrimination based on sexual orientation also opposed the extension of existing civil rights laws to include lgb people.

A Gallup poll undertaken in April 1993 found that 80 percent of respondents surveyed believed that "homosexuals should . . . have equal rights in terms of job opportunities" but also found that only 52 percent favored "extending civil rights laws to include homosexuals." A *New York Times* poll undertaken a month later found that 78 percent of respondents favored equal rights for homosexuals in terms of job opportunities but only 42 percent supported the enactment of civil rights protections for lgb people (Schmalz 1993). A *U.S. News and World Report* poll undertaken in June 1993 similarly found that 65 percent of respondents opposed discrimination against gay men and lesbians but only 50 percent supported the enactment of civil rights protections for lgb people (Shapiro, Cook, and Krackov 1993).

Gerstmann's interviews with several key figures in the political struggle over Amendment 2 indicate that the "special rights" framing was a major component in Amendment 2's electoral success. Both proponents and opponents of the measure felt that the general public distinguished between discrimination and civil rights laws, disavowing the former but finding the latter untenable as a solution. As Jean Dubofsky, the lead attorney for the plaintiffs in *Romer v. Evans,* explained:

> The "no special rights" slogan was very clever, particularly given a time when at least white males don't like affirmative action. The

> Amendment 2 people spent a lot of time talking about [how] you don't want gays and lesbians getting in front of you in line for jobs or scholarship or college. Of course, that wasn't what Amendment 2 was about overall, but that's the way it was sold. . . . People I talked with voted for it because they felt gays and lesbians should not get affirmative action. (Quoted in Gerstmann 1999, 103–4)

The efficacy of CFV's "special rights" framing was highlighted by one of the polls commissioned by the *Denver Post* before the 1992 election. Respondents were asked to respond to the following statement: "When homosexuals talk about gay rights, what they really mean is that they want special rights." Nearly three out of every five respondents noted agreement with the statement.

Amendment 2 and the Campaign Process

Opponents of Amendment 2 were well aware of the cultural resonance of the "special rights" framing employed by CFV. The form of modern campaigns, however, hobbled their efforts to reframe the central question at issue. Three major tools of modern campaigning are pamphleteering, direct mail, and media advertising. Each of these tools engages in "sound bite" politics, where the quick and repeated invocation of political symbols plays a major role.[23] Opponents of Amendment 2 found themselves on the rhetorical defensive with respect to "special rights" from the outset, because they could not find an equally resonant sound bite with which to counter CFV's framing. As one of the antiamendment activists Gerstmann interviewed observed, "there is no one good phrase or slogan to counter 'special rights.' It takes fifteen minutes of real discussion to undo the damage that phrase does" (1999, 105).

These fifteen minutes were not generally available to Amendment 2's opponents during the political battle over the ballot measure. They *did* become available to Amendment 2's opponents in the legal battle that followed the passage of the amendment. We turn to that legal battle now.

The Litigation of Amendment 2

Nine days after Colorado voters passed Amendment 2 at the ballot box, opponents of the amendment filed a constitutional challenge in federal district court. The complaint was filed in the name of Richard Evans (an

openly gay man who worked for Denver's mayor and who served on the Mayor's Gay and Lesbian Advisory Committee), five other openly lgb people, a heterosexual man with AIDS, and the cities of Boulder, Aspen, and Denver—each of which had gay rights ordinances that would be nullified if Amendment 2 went into effect.[24]

Filing a legal challenge was not a spur-of-the-moment decision. CLIP had organized some six months earlier to explore legal strategies in the event that Amendment 2 passed. The moving force behind CLIP was Richard Evans, the man who would end up becoming the lead plaintiff in *Romer*. He solicited Jean Dubofsky, a former justice on the Colorado Supreme Court, to be the lead attorney in the challenge—if a challenge was needed. Lambda, the ACLU's Lesbian and Gay Rights Project, and the Colorado ACLU filled out the preelection team. (For ease of presentation, I shall often refer to this legal team simply as the Lambda team, but this shorthand should not be read to imply that Lambda was more important than Dubofsky or the ACLU in determining the path of litigation.)

In the days before the elections, the "fallback" legal team considered a wide range of possible legal claims. The complaint they eventually filed in Colorado's district court included everything but the kitchen sink. Among other things, it alleged that Amendment 2 violated the federal Constitution's guarantees of equal protection, freedom of association and expression, freedom from establishment of an official religion, due process, and the right to petition government for a redress of grievances, as well as the supremacy clause. The complaint also alleged that Amendment 2 violated Colorado's constitution by unlawfully restricting citizens' home-rule authority, violating state limits on voter initiatives, and overstepping the limitations on state constitutional amendments.[25]

It is intriguing that the pro- and antiframing of Amendment 2's scope and purpose altered very little when the forum shifted from the ballot box to the courts. In both forums, the proponents of Amendment 2 argued that it would simply prevent lgb people from seeking special protections based on their sexual "orientation, conduct, practices, or relationships." Proponents of the amendment also argued in both forums that the ballot measure would enable the state of Colorado to focus its resources on those groups that truly required extra assistance, to protect the familial and religious rights of those with deep-seated and profound beliefs about the immorality of homosexuality, to protect the traditional family, and to promote the psychological and physical well-being of children. Proponents of Amendment 2 also consistently depicted homosexuality and bisexuality as a "life-style choice," which apparently conferred

some benefits (more money, more education) and some disadvantages (more diseases, less emotional stability, shorter life expectancy). They emphasized the distinctions between sexual orientation and race. They told horror stories of what might happen if Amendment 2 were not enacted.

Opponents of Amendment 2 likewise framed its scope and purpose quite similarly in both the political and the legal campaign. They told horror stories of what would happen if Amendment 2 *were* enacted. They argued that the phrase *special rights* was a red herring, that Amendment 2 would actually deprive lgb people of the kinds of rights and protections that most people took for granted. In both places, they depicted Amendment 2 as motivated by animus toward lgb people. In both places they emphasized that homosexuality was more than simply a "life-style choice." They emphasized the similarity between sexual orientation and race.

Why then did Amendment 2 prevail in the court of public opinion but fail in the court of law? I argue in the following pages that the divergence in the electoral and legal outcomes of Amendment 2 is largely a product of the differences in the political and legal structures of opportunity surrounding Colorado's antigay initiative. When Amendment 2 moved from a political question to a legal question, several key factors shifted, including the configuration of decision makers, the decision-making process, and the resonance of legal and cultural frames.

The Configuration of Elites

The most obvious difference between the political and legal battles over Amendment 2 was the locus of decision making. In the political campaign, the Colorado electorate had the duty and power to decide Amendment 2's fate. In the legal campaign, that responsibility fell to judges. Thirteen judges heard arguments about the constitutionality of Amendment 2 during the course of its litigation: one district court judge, the three justices of the Colorado Supreme Court, and the nine members of the U.S. Supreme Court. Of those thirteen jurists, nine agreed that the amendment was fatally flawed: the district court judge, two of the justices on the Colorado Supreme Court, and six of the justices on the U.S. Supreme Court.

Justice Scalia's blistering dissent from the U.S. Supreme Court's opinion in *Romer* proposed an explanation for why the majority of the jurists deciding *Romer* differed from the majority of Colorado's electorate. As

he saw it, striking down Amendment 2 was an act "not of judicial judgment, but of political will" (*Romer,* 653).

> When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and the values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evidenced to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is Republican; because he is an adulterer; . . . or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. This law school view of what "prejudices" must be stamped out may be contrasted with the more plebian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws. (652–53)

The question of whether judges make decisions based on law, politics, or some combination of the two is a major one, and one I shall turn to presently. For the moment, the point I wish to make is that, whether the jurists deciding Amendment 2's fate engaged in legal analysis or advanced their elite political agenda, they utilized a different decision-making calculus than did the majority of Colorado's voters in the 1992 election. When Amendment 2 shifted from the ballot box to the courtroom, a major aspect of opportunity structure also shifted.

As it stands, and with all due respect to Justice Scalia, it seems difficult to attribute the Supreme Court's decision in *Romer* solely to the political values of six of its members. Comparing the *Romer* justices to their *Bowers* brethren is useful here.

As discussed in chapter 5, six of the nine seats on the Court changed hand in the ten years between *Bowers* and *Romer.* At first glance, the large turnover in the Court's membership adds fuel to Scalia's contention that *Romer* was the product of individual values rather than "objective" legal analysis. Scholars have demonstrated that major doctrinal changes

are often preceded by membership changes on the Court.[26] However, comparing the ideological positions of the *Bowers* justices to their *Romer* replacements suggests that, on the whole, the ideological tenor of the Court remained reasonably stable in the decade between the two cases.

Table 12 arrays the justices of both courts on a liberal-conservative scale ranging from 1 (most liberal justice) to 9 (most conservative justice). As in all winner-takes-all voting schemes, the voters in the middle matter more than the voters anchoring the edges of the ideological spectrum, because they are the ones who will swing the outcome of ideologically charged cases. In order to carry a case, the justices on either end of the ideological spectrum have to convince two of the three justices in the middle (positions 4–6) to vote with them. As table 12 shows, the swing justices on the *Romer* Court were roughly equivalent to the swing justices on the *Bowers* Court with respect to their likelihood to support the liberal position in civil liberties cases. If anything, they were slightly more amenable to conservative arguments than were the *Bowers* justices.

Of course, aggregate measures say nothing about the justices' attitudes about homosexuality. Yet just one year prior to *Romer,* the Court had unanimously upheld the right of the organizers of Boston's St. Patrick's Day Parade to prevent a group from marching under a banner identifying themselves as openly gay (*Hurley v. Irish-American Gay, Les-*

TABLE 12. Comparative Ranking of Justices in *Bowers* and *Romer*

Rank[a]	*Bowers* Justices	Civil Liberties (%)[b]	*Romer* Justices	Civil Liberties (%)[c]
1	Marshall[d]	80	Breyer	63
2	Brennan	79	Stevens	62
3	Stevens	58	Ginsburg	61
4	White	44	Souter	48
5	Blackmun	43	Kennedy	35
6	Powell	35	O'Connor	34
7	O'Connor	28	Scalia	30
8	Burger	28	Thomas	28
9	Rehnquist	19	Rehnquist	23

[a]1 = most liberal justice; 9 = most conservative justice.

[b]Percentages represent justices' support for the liberal position in civil liberties cases from their arrival on the Supreme Court through 1985. Source for data is Segal and Spaeth 1989.

[c]Percentages represent justices' support for the liberal position in civil liberties cases from their arrival on the Supreme Court through 1995. Source for data is Epstein and Knight 1998.

[d]Underlined names are justices who cast "gay-friendly" votes, that is, justices who voted in the minority in *Bowers* and the majority in *Romer*.

bian, and Bisexual Group, 1995). The parade was a private event with an expressive message, the Court ruled, and the government could not compel the organizers to include GLIB. Were the justices in the *Romer* majority as reflexively pro-gay as Scalia's dissent implied, one suspects they would have supported GLIB's position rather than opposing it.

In sum, it seems unwarranted to reduce the decision-making process in *Romer* solely to the application of elite political preferences. In the aggregate, the *Romer* justices were at least as conservative as their predecessors in *Bowers*. In the specific context of gay rights, the Court had unanimously rejected GLIB's claim just one year prior to *Romer*. It seems more reasonable to posit that the jurists hearing *Romer* were influenced, at least to some extent, by the legal frames undergirding the case.

The Availability of Legal Frames

Although the original complaint filed by the Lambda team listed every conceivable theory under which Amendment 2 might be found wanting, during the course of the actual litigation, the team focused the bulk of its energy on two claims arising from the Equal Protection Clause. First, it claimed that Amendment 2 infringed on the fundamental right to participate equally in the political process. The crux of its argument was that a measure that restricted any identifiable group's ability to bring about change through ordinary political processes warranted strict scrutiny. To support this claim, it relied primarily on a 1969 case called *Hunter v. Erickson.*

In *Hunter,* the Supreme Court struck down an Akron, Ohio, law that prohibited the city council from passing any "fair housing laws" without the approval of the electorate, after finding that the measure was intended to prevent racial minorities from seeking protection against housing discrimination. The Court ruled that Akron could "no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group smaller representation than another of comparable size."

In addition to *Hunter,* the legal team attacking Amendment 2 also cited cases dealing with restrictions on the exercise of the franchise, cases concerning reapportionment, and cases concerning the rights of minority parties.[27] The link between these cases was the common concern that animated them, namely, the "special judicial duty to ensure to all persons regardless of their social identity equal access to the day-to-day political process."[28]

The virtue of this equal-participation argument is that it allowed the

Lambda team to sidestep the discourse of equivalents that had worked so effectively in the political context. It did not matter whether lgb people were sufficiently "like" African Americans to warrant heightened protection by the courts. What mattered was whether Amendment 2 prevented lgb people from exercising a fundamental right.

A particularly interesting feature of this fundamental rights argument is that Lambda and its colleagues did not themselves think it was their strongest legal argument. In fact, they thought they were most likely to prevail on the merits by showing that Amendment 2 was motivated by an impermissible purpose (animus) and lacked any rational relationship to legitimate governmental ends (Gerstmann 1999; Keen and Goldberg 1998). But in order to win a preliminary injunction, they needed to convince the court that Amendment 2 would do "irreparable harm" to lgb people were it allowed to take effect, and they were concerned that a showing of animus would not be enough. So they cast about for a suitable fundamental rights argument.

Of the fundamental rights possibilities around them, "equal participation" seemed the strongest. However, it was not without its weaknesses. Chief among them was a case called *James v. Valtierra* (1971), decided only two years after *Hunter*. In *James,* the Supreme Court upheld a California referendum that prohibited state and local governments from creating low-income housing projects without the approval of the electorate. The plaintiffs in *James* had argued that the measure violated the rights of poor people in much the same way as the initiative in *Hunter* violated the rights of racial minorities. The Supreme Court, however, declined to accept this analogy. They noted that, unlike in *Hunter,* the law at issue in *James* did not rest on racial classifications. If *Hunter* were extended beyond suspect classes, the Court reasoned, it would mean that "a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group" (*James,* 142).

Not surprisingly is the fact that the state of Colorado relied on *James* to argue that the fundamental right asserted by Lambda and its colleagues did not exist. The debate over whether people had a fundamental right to participate equally in the political process dogged every step of *Romer*'s litigation. In the end, the U.S. Supreme Court declined to answer the question, basing its ruling solely on the *second* claim raised by Lambda and its colleagues, namely, that Amendment 2 was unconstitutional because it did not meet the minimum requirement that a law be rationally related to a legitimate governmental interest.

Nonetheless, advancing the fundamental rights claim served several purposes. First, it shifted the debate from whether lgb people should receive "special rights" such as "quota preferences" to whether it was constitutional for a majority to fence lgb people out of the political system by preventing them, and them alone, from seeking to improve their lot through the legislative process. This reformulation of the scope and purpose of Amendment 2 convinced both the district and supreme courts of Colorado that Amendment 2 would do "irreparable harm" to lgb people were it allowed to take effect. The preliminary injunctions issued by these courts in turn altered dramatically the balance of power between pro– and anti–Amendment 2 forces by requiring that Amendment 2 be subject to *strict scrutiny* in the trial on the merits.

Judicial review of cases implicating the right to equal protection proceed along one of three different tiers (see *Frontiero v. Richardson,* 1973). Most laws need only be *rationally* related to a *permissible* governmental objective (rational-basis review). Laws that infringe on fundamental rights or make suspect classifications, however, are subject to strict scrutiny; in order to pass constitutional muster, such laws must be *narrowly drawn* to advance *compelling* governmental interests. Laws that make quasi-suspect classifications are subject to intermediate scrutiny; they must be *substantially related* to *important* governmental interests. In practical effect, the determination that Amendment 2 would be subject to strict scrutiny in the trial on its merits ended the lower court phase of *Romer,* because legislation rarely ever meets the compelling interest standard.

Despite the height of the legal hurdle facing it, the state of Colorado chose not to exit the litigation process. Instead, it advanced a set of interests that it alleged were compelling and argued that Amendment 2 was tailored as narrowly as possible to advance those interests. As the main litigator for the state has since admitted, the state was aware that several of its asserted purposes were not "compelling" under existing law (Tymkovich, Dailey, and Farley 1997, 299–300). Its strategy was really to establish the rational basis of Amendment 2, preparatory to requesting review by the U.S. Supreme Court. The state hoped that the U.S. Supreme Court would reject the fundamental rights analysis adopted by the Colorado Supreme Court and instead decide *Romer* via rational-basis analysis.

The Lambda team was well aware of Colorado's strategy. It was concerned that the state might be right—that the U.S. Supreme Court might be unwilling to accept that the right to participate equally in the political process constituted a fundamental right. As a result, although *Romer* was

judged under the strict scrutiny standard in both the district and supreme courts of Colorado, the goal of both sides was to win on rational-basis grounds. In a way, the Colorado judges hearing the case became incidental to the real audience: the nine justices on the U.S. Supreme Court.

Amendment 2 and the Legal Process

Opponents of Amendment 2 were disadvantaged in the political battle over the measure, because they were unable to find a sound bite with which to counter CFV's "special rights" framing. As one of the activists involved in the Amendment 2 campaign noted earlier, "It takes fifteen minutes of real discussion to undo the damage that phrase does." During the litigation of Amendment 2, opponents got those "fifteen minutes of real discussion," because the mechanisms of persuasion altered. Unlike the political campaign over Amendment 2, the legal struggle did not proceed via sound bite. It proceeded via legal brief. Opponents of the amendment were able to leverage the process of litigating to their advantage by articulating the myriad petty and profound harms that would accrue to lgb people were the amendment to take effect. Over the course of the litigation, the Lambda team and numerous friendly amici detailed a veritable laundry list of harms that would result to lgb people, often illustrating these harms with hypothetical and real-life examples of discrimination. Among other things, they argued, Amendment 2 would

- Fence lgb people out of the political system by preventing them, and them alone, from seeking to improve their lot through the legislative process;
- Prevent elected officials from responding to the concerns of their constituents;
- Prevent lgb people from turning to Colorado's courts for a redress of injuries relating in some fashion to their sexual orientation. "Suppose, for example, that a Colorado municipality passed an ordinance that required any gay person entering the town to register with the local police department. Or suppose that a community college with an otherwise open enrollment refused to allow lesbians to take any classes in its automotive mechanics department. Such treatment would almost certainly violate the Equal Protection Clause. . . . Nonetheless, on its face,

Amendment 2 would require the Colorado courts to dismiss lawsuits brought under [federal civil rights law] since the gravamen of each lawsuit would be a claim of discrimination' on the basis' of sexual orientation";[29]

- Open lgb people to arbitrary and capricious actions by judges. "Suppose, for example, that a lesbian plaintiff were to bring a garden-variety personal-injury lawsuit. At a bench trial, the judge rules against her on the grounds that because she is a lesbian her testimony is inherently incredible and he believes that lesbians 'deserve' whatever misfortunes come their way";[30]
- Open lgb people to arbitrary and capricious actions by police;
- Eliminate programs allowing voluntary protective custody in prisons around the state for lgb persons who preferred not to live with the jail's populations;
- Prevent county and school district programs designed to deter teen suicide from counseling students about sexual orientation;
- Prevent county and school district programs from training employees to recognize and respond to the harassment of lgb students;
- Interfere with collective bargaining agreements, even in private contexts, because unions would be unable to turn to administrative and judicial forums to enforce existing grievance and arbitration agreements;
- Prevent local and state HIV-prevention programs from discussing homosexuality; and
- Open lgb people to arbitrary and capricious actions by libraries and other public facilities.

The Lambda team also described all the existing statutes, regulations, ordinances, and policies that would be repealed should Amendment 2 take effect, among them

- Residents of Aspen, Boulder, and Denver would lose their protections from discrimination on the basis of sexual orientation in employment, housing, and accommodations;
- Governor Roy Romer's executive order protecting state employees from discrimination based on sexual orientation would be rescinded;
- Health insurance providers would no longer be prohibited from

using sexual orientation as a criterion for insurability or premiums;
- The canons of conduct for judges and lawyers forbidding them from discriminating based on sexual orientation in the performance of their professional duties would be rescinded; and
- Antidiscrimination policies at state universities would be rescinded.

Even more important than giving the *Romer* plaintiffs a forum to detail the dangers to lgb people posed by Amendment 2, the legal process also forced the state of Colorado to articulate the purposes advanced by Amendment 2. To survive strict scrutiny, the state needed to show that the scope of Amendment 2 was narrowly tailored so as to advance a compelling governmental interest in the least restrictive manner possible. Even under rational basis analysis (which the state hoped and the Lambda team feared the Supreme Court would apply in place of strict scrutiny), the state needed to show that Amendment 2 was rationally related to a legitimate governmental purpose. Much of the power of CFV's framing during the political campaign had come from evoking the specter of the homosexual threat to "legitimate" minorities, to children, to heterosexuals, and to the rights of all those who believed homosexuality to be immoral. When these "homosexual threat" arguments were examined systematically, they collapsed.

For example, the state of Colorado argued that Amendment 2 served the compelling purpose of deterring discrimination, because it forced the state to focus its limited resources on those circumstances, such as racial and sexual discrimination, that most warranted attention. The Lambda team made several responses to this argument. It drew on the experiences of Wisconsin, the state with the oldest gay rights law, to debunk the notion that protecting lgb people from discrimination would hinder the enforcement of other civil rights laws; Wisconsin's records showed that the enactment of a statewide gay rights law did not reduce the state's ability to handle other civil rights claim and only marginally increased costs. Lambda and its litigation partners also detailed the many state and local laws prohibiting discrimination based on nonsuspect classifications, including marital status, veteran's status, and *any* legal off-duty conduct, including smoking. As the Lambda team phrased it: "Nothing in the state's proffered purpose explains why the preservation of state resources required that gay people be denied all protection from discrimination on

the basis of their sexual orientation, while everyone else—from smokers to heterosexuals to divorcees—may continue to be protected."[31] Moreover, Lambda emphasized, requiring government to *refrain* from invidious discrimination did not in and of itself consume *any* resources.

The state of Colorado also argued that Amendment 2 served the compelling purpose of protecting religious liberty, by ensuring that the government could not coerce, either explicitly or implicitly, a belief about the morality of homosexuality. Without Amendment 2, it noted, landlords with deep-seated religious objections to homosexuality might be compelled to compromise them under threat of governmental sanctions. Amendment 2 prevented governments from entering "the political marketplace by forcing private persons to subscribe to or advance particular political beliefs."[32] In response to this argument, the Lambda team argued that the "means" of Amendment 2 were such a poor fit to the "ends" of religious liberty that they failed even the most lenient standards of rational review. Amendment 2 targeted lgb people even when other people's individual freedoms were not at issue, such as in the context of health insurance. However, it left in place laws prohibiting discrimination on the basis of characteristics such as marital status and legal off-duty conduct that implicated religious freedom just as much as any law excluded by Amendment 2. To the extent that the purpose of Amendment 2 was to protect religious liberty, the rational approach would be to craft a religious exception to antidiscrimination ordinances.[33]

CFV's framing of the threat that lgb people posed to traditional families and children likewise collapsed when it was fully articulated. The state of Colorado contended that Amendment 2 served the compelling purposes of protecting children, traditional families, and the institution of (heterosexual) marriage. Without Amendment 2, the state argued, there would be nothing to prevent the state or a local government from endorsing, at least implicitly, the view that homosexuality and heterosexuality were morally equivalent. Such an implicit endorsement would undermine the traditional family in several ways. For one, it would interfere with the efforts of parents to teach their children moral values, because if "a child hears one thing from his parents and the exact opposite message from the government, parental authority will inevitably be undermined. While some may think it is desirable for children to find homosexuality acceptable, the Constitution 'excludes any general power of the State to standardize its children.' "[34]

Moreover, a state's implicit endorsement that homosexuality and heterosexuality are morally equivalent would also undermine the norm of heterosexual marriage, because "married heterosexuals might choose

to become homosexual." In addition, Amendment 2 fostered the state's compelling interest in protecting the morals of its children and steering them toward healthy individual and societal life-styles. Homosexuals had lesser life expectancies and suffered greater morbidity, the state argued. It also submitted evidence indicating that lgb teenagers accounted for 50 percent of suicide attempts although they constituted only a small percentage of the population. "Amendment 2 helps to avert unnecessary suffering for those who may be influenced relative to their sexual preference by not lending government's voice to the debate," concluded the state.[35]

Lambda and its colleagues made several responses to these contentions. They attacked the state's premise that forbidding discrimination on the basis of sexual orientation was the equivalent of endorsing homosexuality: "By the State's reasoning, when government forbids private employers from discriminating against Buddhists on the basis of their Buddhism, it endorses Buddhism and prevents parents from inculcating their children with non-Buddhist religious principles."[36]

They used a two-pronged approach to attack the state's contention that gay rights laws threatened families. First, they presented statistical evidence showing that the divorce rates in states that had instituted statewide gay rights laws had actually *declined* after the enactment of these laws. Second, they ridiculed the state's notion that heterosexuals might just wake up one morning and "choose" to become homosexuals if the state did not actively discourage such behavior.

Finally, they marshaled extensive sociological evidence showing that lgb people posed neither physical nor psychological harm to children. It was Amendment 2, they countered, that posed a threat to children. Scientific research on sexual orientation showed that it was fixed long before puberty and was highly resistant to change. Amendment 2 would only harm lgb youth by further legitimating discrimination against lgb people, preventing schools from counseling teenagers about their sexual orientation, and prohibiting HIV-prevention programs from discussing same-sex sexuality.

In sum, the requirements of the legal process both gave the Lambda team space to articulate the ways in which Amendment 2 threatened the civil rights of lgb people and forced the state to explicitly articulate the governmental purposes advanced by the ballot measure. When pushed into the open and examined dispassionately, the "homosexual threat" that had allegedly necessitated Amendment 2 dissolved. Some of it looked downright silly. Amendment 2's impact on the rights of lgb people, conversely, became much clearer.

The Difference between Legal and Cultural Frames

A final difference between the political and the legal battles over Amendment 2 concerned the meaning of key terms such as *special rights, minority status, protected class status,* and *quota preferences.* Although these terms *sounded* as though they were legal standards, they had no real legal meaning. They were the legal equivalent of psycho-babble (legal-babble, if you will).[37] The National Legal Foundation, which helped CFV draft Amendment 2, recognized the difference between the legal and cultural meanings of these terms. In a letter to Tony Marco dated June 13, 1991, the National Legal Foundation coached CFV about the strategies for framing Amendment 2. "[W]hile homosexuals do not get far by asking the electorate for special privileges, they do get a good deal of sympathy by asking to be 'treated just like everyone else'" (quoted in Keen and Goldberg 1998, 11). CFV, the letter advised, should frame the issue as one of special rights in the political campaign but should avoid it in the actual text.

> If language of denying special privileges to homosexuals is in the amendment, it could possibly allow homosexuals to argue that they are not asking for any special privileges, just those granted to everyone else. I believe that "No Special Privileges" is a good motto for the amendment's public campaign, but I fear the possible legal ramification if it is included in the amendment itself. (Quoted in Keen and Goldberg 1998, 11)

As a result of the disjoint between the cultural and legal meanings of terms such as *special rights,* they lost much of their persuasive power when they were invoked in the legal rather than the electoral context. For instance, part of the political debate over Amendment 2 was whether granting "protected class status" on the basis of sexual orientation would lead to affirmative action for homosexuals and bisexuals. Proponents of Amendment 2 argued that laws prohibiting discrimination on the basis of sexual orientation would inevitably lead to "quota preferences," which would disadvantage both "legitimate" minorities such as African Americans (who were socially disadvantaged for reasons beyond their control) and the larger heterosexual population (who would then be losing jobs not only to less qualified minorities but also to homosexuals).

This framing of Amendment 2 was quite successful in the political campaign over gay rights because of the popular conflation of laws pro-

hibiting discrimination and laws mandating affirmative action. Leanna Ware, the director of Wisconsin's Civil Rights Bureau, addressed this perception for the Lambda team during Amendment 2's trial. Employers, she explained, were often confused about whether Wisconsin's law prohibiting discrimination on the basis of sexual orientation required them to institute affirmative action policies for lgb people. The results of focus group research conducted during the Amendment 2 campaign echoed this sense.

> The public is wary of anything that hints of "affirmative action." [Opponents of Amendment 2] would be well advised, in discussing discrimination in the workplace or housing, to place emphasis on *retaining* one's job or one's residence after the employer or landlord learns that the person is homosexual. When the subject turns to *hiring* homosexuals or *accepting* them as tenants, the specter of quota arises in many people's minds. (Quoted in Gerstmann 1999, 105)

This logic chain was severed when the battle over Amendment 2 shifted to the courts. Legally, the institution of civil rights protections on the basis of a certain characteristic is not at all the same as requiring affirmative action based on that characteristic. Civil rights protections have been seen as a way to *stop* state-sanctioned disadvantaging of disfavored groups. Affirmative action has been seen as a way to *ameliorate* the effects of past discrimination. Although the two are not completely unrelated, they are not equivalent, and the one does not ineluctably lead to the other.

Conclusion

The structure of *legal* opportunities often operates in conjunction with the structure of *political* opportunities. However, the two are not interchangeable. In this chapter, I have utilized a case study of antigay initiatives to illustrate the ways in which legal opportunity structure and political opportunity structure differ. Specifically, I have argued that the differential ability of gay rights activists to stop antigay initiatives at the ballot box and in the courtroom is largely a function of differences in the structures of opportunity within which the activists operated. Several aspects of the political opportunity structure (the configuration of deci-

sion makers, the mechanics of the decision-making process, and the availability of cultural frames) regularly combined to disadvantage gay rights advocates vis-à-vis their opponents. In the legal system, the allocation of advantage and disadvantage reversed. The configuration of decision makers, the decision-making process, and the existing legal frames generally operated to advantage gay rights advocates vis-à-vis their opponents.

Although my examination has focused on how gay rights advocates have used the legal system to mitigate political defeats, I do not wish to leave the impression that turning to the courts always operates to the advantage of gay rights advocates. Do not forget *Bowers*.[38] Consider also the case of employment. The major gains of the gay rights movement in the employment context have come through the passage of gay rights laws and through collective bargaining, *not* through the courts. A major reason for this is that legal frames do not lend themselves to gay rights claims concerning employment *except* in those jurisdictions with gay rights laws on the books.[39]

I also do not wish to leave the impression that turning to the courts is an unproblematic endeavor for social movements. Scholars of legal mobilization have examined the ways in which legal arguments can both empower and disempower groups in their attempts to effect social change (e.g., Kairys 1982; McCann 1994; Smart 1989). Merry (1985, 60) notes that legal frames "provide symbols which can be manipulated by their members for strategic goals, but they also establish constraints on that manipulation."

In this chapter I have simply endeavored to show that legal and political opportunity do not always operate in tandem with respect to a given movement claim and that disadvantages in one system do not necessarily translate into disadvantages in the other. In some ways, this is not a novel claim. Scholars have commonly argued that groups litigate at least in part because they are disadvantaged in the political process (see Scheppele and Walker 1991).[40] What my examination of antigay initiatives adds to this body of scholarship is an articulation of several of the key factors conditioning the differential outcomes of political and legal activism on a particular issue. In the following chapter, I continue my exploration of the relationship between legal and political opportunity by examining the extent to which legal "wins" can effect actual social change.