



Romer v. Evans

by Gregory A. Johnson

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In the landmark case of *Romer v. Evans* (1996), the United States Supreme Court invalidated Colorado's "Amendment 2," a constitutional amendment enacted by popular vote that prohibited municipalities and state agencies from granting lesbians and gay men "protected status," and denied them the right to bring any "claim of discrimination." The Court concluded that Amendment 2 "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."

Romer marks the first time in its history that the Court recognized lesbians and gay men as worthy and deserving of equal rights. The decision helped stem the tide of anti-gay initiatives that were spreading across the West in the late 1980s and early 1990s. The case is also important because it laid the groundwork for other important gay rights decisions.

Supreme Court Precedent Prior to *Romer*

Prior to *Romer*, the Supreme Court's record on lesbian and gay civil rights was nothing short of abysmal. In their groundbreaking 2001 book on the history of all gay rights cases before the Court, Joyce Murdoch and Deb Price list over 40 cases dating back to the 1960s in which the Court either ruled against a gay rights claim, or refused to hear the appeal of a lower court decision that had done so.

These include a case affirming the deportation of a gay immigrant based on an Immigration and Naturalization Service policy defining homosexuals as "psychopathic" (*Boutillier v. Immigration and Naturalization Service* [1967]), and an opinion from Justice Rehnquist in which he seemed to compare the right of homosexuals to assemble and advocate for legal reform to that of "those suffering from measles [who seek] a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles" (*Ratchford v. Gay Lib* [1978]). Most notoriously, in *Bowers v. Hardwick* (1986), the Court upheld Georgia's sodomy statute, calling Michael Hardwick's claim that his private sexual conduct was protected by the Constitution "at best, facetious."

Such was the state of the law when the Court agreed to hear *Romer*. Gay rights advocates had one more reason to worry: The Court reverses about 70 percent of the cases it agrees to hear, and in *Romer* the lower court had ruled in favor of the gay claimants. As Murdoch and Price observe, the Court's decision to hear the case therefore "sent a shiver down the spine of every gay-rights attorney in America."

The Case

To almost everyone's surprise, the Court affirmed the lower court decision by a comfortable 6-3 margin, in an opinion written by Justice Kennedy. The State of Colorado argued Amendment 2 did nothing more than deny lesbians and gay men "special rights." The Court found "nothing special in the protections Amendment 2 withholds," and instead said it imposed a "special disability" on lesbians and gay men.

The Court read through the rhetoric of "special rights" and concluded that Amendment 2 was actually

motivated by nothing more than "a bare desire to harm a politically unpopular group." In ringing terms it declared that no state may "deem a class of persons a stranger to its laws."

Justice Scalia wrote a stinging dissent (joined by Chief Justice Rehnquist and Justice Thomas) in which he accused the Court of "tak[ing] sides in the culture wars." Justice Scalia characterized Amendment 2 as an "entirely reasonable provision which . . . merely denies [gays and lesbians] preferential treatment." Pointing to the "centuries-old" condemnation of homosexuality, he concluded that Colorado was "*entitled* to be hostile toward homosexual conduct" (his emphasis).

In reaching this conclusion, Justice Scalia adopted a number of classic stereotypes about the lesbian and gay community. He said "those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and . . . possess political power much greater than their numbers, both locally and statewide." Justice Scalia proffered that the goal of the lesbian and gay civil rights movement is to "devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality."

The Impact of *Romer*

Romer was a great victory for lesbian and gay civil rights. At the time of the case, anti-gay initiatives similar to Amendment 2 had passed in Oregon and were also being contested in other states, such as Idaho. If *Romer* had been decided in favor of Colorado, these initiatives would no doubt have proliferated. The Court's strong condemnation of Amendment 2 cut short the dangerous trend of reversing local gay rights laws through statewide initiative.

Gay rights advocates rejoiced at the ruling, and rightly so, but at least initially *Romer* had limited impact beyond anti-gay initiatives. The case was first used against the military's "don't ask, don't tell" policy, but this failed miserably in the lower courts, and *Romer* did not change a thing for gay men and lesbians in the military (see, for example, *Able v. United States* [1996]).

Romer has been called a "great enigma" because the Court did not lay out any clear-cut test for analyzing claims of sexual orientation discrimination. Some thought the decision might be limited to its facts. Others, such as Nan D. Hunter, however, argued that *Romer* stood for much more, and at the very least it seriously undermined *Bowers*. The Court proved them right when it reversed *Bowers* and struck down all sodomy laws in *Lawrence v. Texas* (2003). The Court said the "foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* [a right to privacy case on abortion] and *Romer*."

The Massachusetts Supreme Judicial Court next relied on *Romer* in its historic same-sex marriage decision (*Goodridge v. Dep't of Health* [2003]). Quoting *Romer*, the court concluded, "Like Amendment 2 to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly 'identifies persons by a single trait and then denies them protection across the board.'"

The sentiment of *Romer* is clearly supportive of lesbian and gay civil rights, even if the test the Court used to reach its decision is somewhat ill defined. Courts have picked up on that sentiment and now use *Romer* to require equal treatment in realms far removed from the facts of the case.

Conclusion

What accounts for the Supreme Court's dramatic shift in attitude toward lesbians and gay men? Linda Greenhouse of the New York Times has suggested "it could be that webs of personal association and experience have led the justices to see old problems in new ways." The world around them has changed. She says the Court "has become a gay-friendly workplace where employees feel sufficiently comfortable in their open identity to bring their partners to court functions."

Some of the justices now meet frequently with judges in Europe and elsewhere, and these meetings have also influenced their view of gay civil rights. In particular, according to Greenhouse, "[e]xtensive foreign travel has made both Justice Kennedy and Justice O'Connor more alert to how their peers on other constitutional courts see similar issues." European courts have issued many positive gay rights rulings, and one of them was relied on by Justice Kennedy in *Lawrence*.

Greenhouse sees the Court's evolution as "a reminder that even in late middle age, people are open to new ideas." Yet she concedes, "not everyone responds to change in the same way." Referring to *Lawrence* and other cases, she observes: "It was as if [Justice Scalia] and Justice Kennedy, born within four months of each other 67 years ago, both Roman Catholic, both Harvard Law School graduates, both elevated to the court within 15 months by President Ronald Reagan, were speaking from parallel universes."

Indeed they are, and fortunately it is Justice Kennedy's position on lesbian and gay civil rights that currently holds sway at the Court. He deserves much of the credit for the Court's seismic shift on this issue, and it all began with *Romer*. Andrew M. Jacobs rightly calls the victory in *Romer* "the culmination of . . . twenty five years of gay rights advocacy, as well as a milepost on a longer journey."

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