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## Democracy, Kulturkampf, and the Apartheid of the Closet

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# Democracy, Kulturkampf, and the Apartheid of the Closet

William N. Eskridge, Jr.\*

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In the generation after World War II (1945-69), homosexual intimacy was a serious crime in Colorado and other states, as was any kind of “lewdness” or homosexual solicitation; people suspected of being homosexual were routinely dismissed from federal, state, and private employment.<sup>1</sup> In the generation after Stonewall (1969-97), Colorado’s legislature repealed the state’s consensual sodomy law, and the governor by executive order prohibited state employment discrimination on the basis of sexual orientation. The cities of Aspen, Boulder, and Denver enacted ordinances prohibiting private sexual orientation discrimination in housing, employment, education, public accommodations, and health and welfare services.<sup>2</sup> In 1992, the voters of Colorado adopted the following amendment to the 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 re-

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1. See generally William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* chs. 1-3 (forthcoming 1998).

2. See *Romer v. Evans*, 116 S. Ct. 1620, 1634, 134 L. Ed.2d 855 (1996) (Scalia, J., dissenting) (citing statutes).

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.<sup>3</sup>

The United States Supreme Court struck down Amendment 2 in *Romer v. Evans*<sup>4</sup> based on its conflict with the Equal Protection Clause.<sup>5</sup> Writing for himself and two other justices, Justice Scalia dissented, starting with the premise that “[t]he Court has mistaken a Kulturkampf for a fit of spite,”<sup>6</sup> and arguing at length that the Court’s opinion was inconsistent with both precedent and the ordinary operation of the democratic process.

Justice Scalia was using the term “Kulturkampf” out of context. Kulturkampf, a German word for “culture war” or “struggle,” was a nineteenth century campaign by Bismarck’s German Empire to domesticate the Roman Catholic Church in public culture.<sup>7</sup> The most noted national Kulturkampf in the United States was the nineteenth century campaign by the federal government to force conformity on the Church of Jesus Christ of the Latter Day Saints (“LDS Church”), a campaign that included statutes criminalizing cohabitation outside of marriage, depriving cohabiting or polygamous Mormons of the rights to vote and to serve on juries, stripping the same rights from anyone advocating polygamy, and confiscating the property of the LDS.<sup>8</sup> The Supreme Court upheld the anti-Mormon Kulturkampf in most respects. The anti-Mormon decision *Davis v. Beason*<sup>9</sup> was one of two precedents invoked by Justice Scalia to support the constitutionality of Amendment 2.<sup>10</sup> The other precedent cited was *Bowers v. Hardwick*.<sup>11</sup>

Justice Scalia’s charge was that *Romer* is inconsistent with both the rule of law and the system of democracy. In this Comment, I join Professor Schacter and other scholars in responding to Justice Scalia’s charge.<sup>12</sup> *Romer* subserves, rather than undermines, the rule

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3. 116 S. Ct. at 1623.

4. 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

5. *Id.* at 1629. See Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 *Stan. L. Rev.* 45 (1996).

6. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

7. Helmut Walser Smith, *German Nationalism and Religious Conflict: Culture, Ideology, Politics, 1870-1914* at 19-20 (Princeton U., 1995).

8. Richard S. Van Wagoner, *Mormon Polygamy: A History* 115-22 (Signature Books, 2d ed., 1989).

9. 133 U.S. 333 (1890).

10. *Romer*, 116 S. Ct. at 1635 (Scalia, J., dissenting).

11. 478 U.S. 186 (1986).

12. See, for example, Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 *Mich. L. Rev.* 203 (1996); Daniel Farber and Suzanna Sherry, *The Pariah Principle*, 13 *Const.*

of law in America's representative democracy. I make three kinds of arguments. The first argument challenges Justice Scalia's invocation of "majority-rules" democracy as the basis for legitimate state decisionmaking. According to the Framers' design, which guaranteed "republican" governance at both the state and federal levels, majoritarianism is not the litmus test for government legitimacy. Indeed, the Framers expected law to be shaped by courts as well as by popular majorities. The second argument combines gaylegal history with a theory of courts: A key role for the judiciary is to resist Kulturkampf, and to help the political system repudiate the legacy of Kulturkampf. A third argument is representation-reinforcing:<sup>13</sup> By invalidating local rules protecting openly gay people against job discrimination, the Colorado initiative impaired the ability of lesbian, gay, and bisexual citizens to exercise their political rights. Conversely, by resisting those antidiscrimination rules, the Court was in a small way helping to restore conditions needed for the effective operation of a majority-rules democratic process.

### I. DIRECT VERSUS REPRESENTATIVE DEMOCRACY

As Justice Scalia posed the case, the Court's opinion protecting lesbians, bisexuals, and gay men was a judicial intrusion into an area left by the Constitution to "normal democratic means, including the democratic adoption of provisions in state constitutions."<sup>14</sup> Later he contrasted Amendment 2's adoption by "this most democratic of procedures" (that is, a voter initiative), with what he disrespected as the Court's unprecedented and elitist opinion.<sup>15</sup> The Court declined to respond, but there is an obvious response from the text and original intent of the Constitution's Framers.

The Constitution's text and original design offer scant support for Justice Scalia's strong invocation of a "countermajoritarian diffi-

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Commentary 257 (1996); Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 *Vand. L. Rev.* 361 (1997); Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 *S. Ct. Rev.* 67.

13. See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U., 1980).

14. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

15. Compare with *id.* at 1634 (Scalia, J., dissenting) (characterizing a voter initiative as "most democratic"); *id.* at 1637 (Scalia, J., dissenting) (reflecting that law school elitism is at odds with "more plebeian attitudes" prevailing in legislatures and among the people).

culty.”<sup>16</sup> To begin with, democratic initiatives and referenda such as Colorado’s Amendment 2 are exceptional in our constitutional scheme: the federal government is a *representative* and not a *direct* democracy,<sup>17</sup> and Article IV guarantees the states a *republican* and not a *democratic* form of government. This design was carefully considered by the Framers and most famously defended in Madison’s Federalist No. 10. That paper rejected direct democracy as a basis for lawmaking, because it gave freer rein to “factions,” which Madison defined as citizens “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>18</sup> Madison worried that a factionalized polity “divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good.”<sup>19</sup>

Madison was pessimistic that the nation could avoid the problem by eliminating the causes of factions; the best a nation can do is to ameliorate their effects. This was the reason he favored a republic over a pure democracy: the latter gave factionalism free rein when passion and interest ruled a majority of the people, whereas the former provided a check on temporary passion or interest through the filter of the elected representatives. “Under such a regulation it may well happen that the public voice, pronounced by the *representatives* of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”<sup>20</sup> On the other hand, Madison conceded that corrupt or sinister representatives could themselves betray the public good and establish factional policy.<sup>21</sup> There were three checks against this latter possibility, two emphasized by Madison and one by Hamilton.

In Federalist No. 10, Madison argued that the large size of the American republic provided a check against local factions. It is less

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16. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Co., 1962); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990).

17. The original Constitution required the President and Senate to be indirectly elected, with only the House elected directly by the people. The Senate is now directly elected by reason of the Seventeenth Amendment, and the President by practice, but Madison’s core idea—that the federal government would be a republic and not a democracy—remains intact after 200 years.

18. Federalist No. 10 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 77, 78 (Mentor, 1961).

19. *Id.* at 79.

20. *Id.* at 82 (emphasis added).

21. *Id.*

likely that a parochial interest would be able to command national support at nearly the same level as at the local level, and America's diversity makes it unlikely that local passions will inflame the entire country. In Federalist No. 51, he argued that federalism (two-level government) and separation of powers at the national level protected against factional excesses and official corruption, so that the "private interest of every individual [officeholder] may be a sentinel over the public rights."<sup>22</sup> In Federalist No. 78, Hamilton argued that interpretation and review of laws by an independent judiciary would protect the polity against "unjust and partial laws."<sup>23</sup> As Hamilton put it,

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.<sup>24</sup>

In short, representative democracy was intended to be countermajoritarian, at least much of the time. Hence, Justice Scalia has no argument—as a matter of *our* constitutional tradition—that judges must presumptively go along with majority-based limits on minority rights. Judicial review was intended to be countermajoritarian and even elitist, if the Framers' intent and design are credited.

The foregoing points were made primarily to defend the Constitution's structuring of the national government as a representative republic. States like Colorado have properly adopted a different form of government which combines features of representative and direct democracy. Nonetheless, the heterogeneity of state governments and their frequent sacrifice of the purely representative form do not rescue Justice Scalia's invocation of the countermajoritarian difficulty. The main reason is that state judges are bound by the supremacy clause of Article VI to enforce the guarantees of national statutes, treaties, and the Constitution against the desires of statewide popular or legislative majorities. Whatever form of government Colorado has chosen cannot trump the republican

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22. Federalist No. 51 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 320, 322 (Mentor, 1961).

23. Federalist No. 78 (Hamilton), in Clinton Rossiter, ed., *The Federalist Papers* 464, 470 (Mentor, 1961). The quotation in text is from Hamilton's brief discussion of statutory interpretation, but its precept is also applicable to the related discussion of judicial review.

24. *Id.* at 469.

philosophy articulated in Federalist Nos. 10 and 78 and enforced by the Supremacy Clause.

Indeed, Article IV says that the states, too, are supposed to enjoy a "Republican Form of Government."<sup>25</sup> Professor Philip Frickey argues that the this clause supports a rule of interpreting popular initiatives and referenda narrowly, especially when they raise constitutional concerns.<sup>26</sup> I agree with the underlying idea that underenforced constitutional norms such as those in Article IV be given some effect through principles or canons of statutory interpretation,<sup>27</sup> although I am unsure whether popular lawmaking is "nonrepublican" in the sense deployed in Article IV. For example, Madison in Federalist No. 43 defended the clause to protect against "aristocratic or monarchical innovations,"<sup>28</sup> and did not mention the direct democracy he criticized in Federalist No. 10. Popular lawmaking is often inconsistent with an understanding of republicanism as deliberative lawmaking, however, and Frickey's principle might be defended as a theory of "due process of lawmaking." When popular majorities have thoughtlessly picked on unpopular minorities in ill-conceived and broadly drafted initiatives serving no discernible public-regarding goal, a reviewing court ought to construe the initiative narrowly. If the narrowing construction still leaves a gap between the public-regarding goal and the ambit of the statute, a court should at least sometimes strike it down, as Judge Hans Linde has argued.<sup>29</sup>

This is what the courts did to Colorado Amendment 2. The Colorado Supreme Court properly gave it a narrow construction to

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25. U.S. Const., Art. IV.

26. Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy* (forthcoming 1997). Frickey argues that the Republican Form of Government Clause is "underenforced" for institutionalist reasons (standing, political question, federalism). See also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1263-64 (1978). Like other underenforced constitutional norms, the republican form of government norm can still be given force through principles of statutory interpretation, such as Frickey's proposed rule that initiatives be narrowly interpreted, especially to avoid constitutional problems.

27. See William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

28. Federalist No. 43 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 271, 274 (Mentor, 1961) (concluding that a republican form of government should have the authority to protect against "aristocratic or monarchical innovations").

29. Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19 (1993). I do not address the general question whether direct democracy measures should generally be subject to heightened scrutiny. Compare Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L. J. 1503 (1990), with Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 Chi-Kent L. Rev. 707 (1991).

avoid the most obvious abuses of the broadly phrased amendment.<sup>30</sup> For example, under the state court's interpretation, a state agency charged with protecting against race discrimination could not deny relief to an African American claimant simply because she was a lesbian, so long as her claim was based on her race and not her sexual orientation. Even thus narrowed, the high courts of Colorado and the United States found Amendment 2 unconstitutional, again properly. Justice Kennedy's opinion for the Supreme Court found the amendment's legitimate goal, conservation of state enforcement resources, too far afield from its broad prohibition.<sup>31</sup> He inferred from this lack of fit that the amendment was precisely the "fit of spite" (to use Justice Scalia's phrase) that the Constitution's Framers feared from direct democracy.

An example Justice Kennedy does not mention reinforces his point.<sup>32</sup> The Aspen antidiscrimination law protected heterosexuals as well as homosexuals against sexual orientation discrimination in the workplace and with regard to public accommodations. Hence, a gay bookstore would be just as disabled from refusing to hire a straight employee as another bookstore would be from refusing to hire a gay employee. Under Amendment 2, as narrowed by the state court, the gay bookstore is still prohibited from discriminating against the straight applicant, but the straight bookstore is free to discriminate against the gay applicant. The amendment did not eliminate sexual orientation as an enforcement category. By carving gays and lesbians out from its protection, the amendment revealed an interest not in conserving enforcement resources, but in gay-bashing alone.<sup>33</sup>

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30. *Evans v. Romer*, 882 P.2d 1335, 1346 n.9 (Colo. 1994), discussed in *Romer*, 116 S. Ct. at 1626-27; *id.* at 1630 (Scalia, J., dissenting).

31. The state also asserted as a goal protecting people from having to associate with homosexuals. Justice Kennedy treated this as a legitimate state goal, *Romer*, 116 S. Ct. at 1627-29, but such a freedom of association has not been recognized as an exclusionary right where it is engaged in by a public accommodation (which under the common law was required to serve anyone) or a business operating in the larger marketplace. Recall, too, that freedom of association is typically the right invoked to support apartheid, or legal segregation of one group of citizens from another.

32. The following point was made (rather elliptically) in *Brief of the American Bar Association as Amicus Curiae in Support of Respondents, Romer v. Evans*, 116 S. Ct. 1620 (1996) (available on LEXIS, in Genfed Library, USPlus file), and also in Amar, 95 Mich. L. Rev. at 207-08 (cited in note 12).

33. Likewise, the freedom-of-association goal was imperfectly realized by the initiative. It allowed homophobes to avoid gay people, even though there is no demonstrated "harm" that gay people impose on straight people (beyond triggering the homophobe's irrational fears). It did not, however, allow straight-fearing gay people to avoid straight people, even though straight people frequently assault, taunt, and threaten gay people.



## II. JUDICIAL REVIEW AS A PROTECTION AGAINST KULTURKAMPF

To establish his argument that the rule of law required the Court to uphold Amendment 2, Justice Scalia relied on two precedents of the Court: *Davis v. Beason* and *Bowers v. Hardwick*. The first has been thoroughly overruled by the Supreme Court.<sup>34</sup> Its complete rejection reflects a principle at the heart of judicial review's protection against Hamilton's "unjust and partial laws": The independent judiciary should be the guardian against Kulturkampf, the phenomenon Justice Scalia, probably mistakenly, invoked in his dissent. To the extent that history's rejection of *Beason* reflects a robust principle that Kulturkampf is constitutionally questionable, *Bowers v. Hardwick*—the most uniformly criticized Supreme Court decision in my lifetime—should be overruled as well. *Beason* and *Bowers* are invalid precedents pursuant to the same constitutional meta-principle, that the judiciary should resist state Kulturkampf. The rule-of-law invalidity of those precedents provides constitutional doctrinal support for the Court's disposition in *Romer*.

A. *Beason and Anti-Mormon Kulturkampf*

In *Beason*, the Supreme Court acquiesced in a Kulturkampf. Justice Scalia claimed that the precedent remains good law, except for its willingness to uphold criminal prosecution for mere advocacy of polygamy.<sup>35</sup> Contrary to his position, however, *Beason* is a precedent as thoroughly repudiated and normatively unsustainable as just about any the Court has ever delivered. Consider the context of that decision.

After the 1840s, the LDS Church advocated, and many of its members practiced, "plural marriage" (polygamy) as a matter of religious faith. The Mormons were persecuted for this and other reasons in the several places where they originally settled, so they resettled in the barren terrain around the Great Salt Lake in what is now Utah. Their practice of plural marriage was prohibited as bigamy by federal law, and the Supreme Court held that the Free Exercise Clause of the First Amendment provided no defense to criminal prosecutions in *Reynolds v. United States*.<sup>36</sup>

Emboldened by *Reynolds*, the enemies of the Mormons launched a broader campaign to destroy the Latter Day Saints, so

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34. *Patrick v. Le Fevre*, 745 F.2d 153 (2d Cir. 1984).

35. *Romer*, 116 S. Ct. at 1635-36 & n.3 (Scalia, J., dissenting).

36. 98 U.S. 145, 166-67 (1878).

long as they adhered to polygamy.<sup>37</sup> Presidents Hayes, Garfield, and Arthur all made it their business to lead a federal war against Mormon polygamists. Their ally in Congress, Senator George Edmunds, Republican of Vermont, procured legislation making "unlawful cohabitation" (easier to prove than polygamy) a federal crime, depriving polygamists of the right to vote and to serve on juries or in public office, and offering amnesty to polygamists who renounced their religious practice.<sup>38</sup> Apostle John Henry Smith witnessed the House vote for Edmunds's bill in 1883 and had this to say: "The Republicans were filled with venom and were bent upon the accomplishment [sic] of their purpose. . . . God our Father must judge these men for their evil design and [I] doubt not he will do so in his own due time."<sup>39</sup>

The Republicans' venom was unleashed in a campaign of violent persecution. More than 1000 Mormon polygamists, or "cohabs," were hunted down by federal marshals who specialized in their capture, convicted by juries packed with non-Mormons, and sentenced to imprisonment, some for long periods of time.<sup>40</sup> In prison, the polygamists were attacked by convicted murderers, thugs, and legions of bedbugs. Latter Day Saints found they could avoid these horrors by renouncing their religious practice, for judges were inclined to let penitents off with fines. Yet Mormon resistance continued. The federal government responded with the Edmunds-Tucker Act of 1887,<sup>41</sup> which disenfranchised not only Mormon polygamists but also any person advocating polygamy, declared the property of the Church of the Latter Day Saints forfeit to the United States for the church's crimes against marriage, made it easier to prove guilt in polygamy cases, abolished elective offices in Utah and made officials subject to

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37. The campaign against the Latter Day Saints is described in Van Wagoner, *Mormon Polygamy* at 115-22 (cited in note 8); Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 Utah L. Rev. 308 (1964).

38. The Edmunds Act, 22 Stat. 30 (1882), codified at 48 U.S.C. § 1461, upheld in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (disenfranchisement); *Clawson v. United States*, 114 U.S. 477 (1885) (jury service); *Cannon v. United States*, 116 U.S. 55 (1885) (criminal cohabitation). The Act was repealed by Pub. L. No. 98-213, § 16(a),(b),(g)-(u), 97 Stat. 1462, 1463 (1983).

39. Quoted in Merlo J. Pusey, *Builders of the Kingdom: George A. Smith, John Henry Smith, George Albert Smith*, 135 (Brigham Young U., 1981).

40. See generally Van Wagoner, *Mormon Polygamy* at 115-22 (cited in note 8) and Linford, 9 Utah L. Rev. at 308 (cited in note 37).

41. The Edmunds-Tucker Act, 24 Stat. 635 (1887), codified at 48 U.S.C. § 1480(a), upheld in *Davis v. Beason*, 133 U.S. 333, 347-48 (1890) (membership in LDS Church can be the basis for denying the right to vote); *The Late Corp. of the Church of Jesus Christ of Latter-Day-Saints v. United States*, 136 U.S. 1 (1890) (confiscation of LDS property). The Act was repealed by Pub. L. No. 95-584, § 1, 92 Stat. 2483 (1978).

federal appointment, declared children of plural marriages illegitimate and prohibited their inheriting from their parents, and abolished female suffrage in Utah. The United States Supreme Court upheld these various invasions of civil and religious liberties in two decisions, *The Late Corporation of the Church of Jesus Christ v. United States* (1890),<sup>42</sup> and *Davis v. Beason* (1890).<sup>43</sup>

*Late Corporation* and *Beason* are harder to reconcile with the free exercise of religion than *Reynolds*, because they not only severely penalized a person for practicing his faith, but they sanctioned extreme civil and criminal penalties against a religious community itself. Those Supreme Court decisions lent constitutional sanction to Kulturkampf, a state campaign to destroy religious nonconformity. The campaign was successful in that the leadership of the LDS Church abandoned polygamy as a religious principle soon after *Beason*.<sup>44</sup> The campaign was less successful in that it drove polygamy underground; even today, there are sects of fundamentalist Mormons who preach and practice polygamy as a religious principle.<sup>45</sup>

Except among Mormon fundamentalists, much of the above was largely forgotten history until Justice Scalia reminded us of this Kulturkampf in *Romer*. Justice Scalia maintained that some of the *Beason* decision remains substantially good law, a point that the Court barely quibbled with.<sup>46</sup> In light of the context of the decision, Justice Scalia understated the Court's repudiation of the *Beason* precedent. As he conceded, the Court's free speech jurisprudence is inconsistent with *Beason's* holding that the state can criminally punish mere advocacy of polygamy. There are other dimensions of *Beason's* invalidity, however. The cases recognizing a fundamental right to vote would probably require a different result than *Beason's* willingness to deny Mormons the right to vote because of their status.<sup>47</sup> The constitutional right to privacy is inconsistent with *Beason's* willingness to criminalize consensual cohabitation,<sup>48</sup> the

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42. 136 U.S. 1 (1890).

43. 133 U.S. 333 (1890).

44. See Van Wagoner, *Mormon Polygamy* at 133-42 (cited in note 8).

45. See *id.* at 177-218.

46. Compare *Romer*, 116 S. Ct. at 1635-36 and n.3 (Scalia, J., dissenting) (stating that the criminalization of polygamy and the denial of convicted polygamists the right to vote remains good law under *Beason*), with *id.* at 1628 (opinion of the Court).

47. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (recognizing "a constitutionally protected right to participate in elections on an equal basis with other citizens").

48. See *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (citing privacy cases for the proposition that state housing regulation may not intrude on the private realm of the family). Five justices voted to invalidate a regulation making it a *civil* violation for unmarried people to live together, four justices on privacy grounds and one justice (Stevens) on

crime for which most Mormon polygamists were convicted. Modern free exercise clause jurisprudence is strongly inconsistent with the Court's willingness in *Beason* (and *Late Corporation*) to allow the state to destroy a religious practice that popular majorities consider immoral.<sup>49</sup> Even the minimal rationality requirement of due process and equal protection is at odds with a precedent upholding serious criminal penalties for belief and consensual practices. There is scarcely a fundamental right in the modern constitutional lexicon that does not undermine the precedential force of *Beason*, a precedent generally at war with the Framers' original understanding that courts would stand in the way of majority hysteria against minorities.

### B. Bowers and Antihomosexual Kulturkampf

The generation after World War II witnessed a state-led Kulturkampf against homosexuals in the United States. The anti-homosexual terror in the United States from 1947 to 1961 was a chilling echo not only of the anti-Mormon crusade between 1882 and 1887, but also of the antihomosexual terror in Nazi Germany from 1933 to 1945.<sup>50</sup> Although originally adopted for moralist reasons and long applied primarily to nonconsensual sex by males against animals, minors, and women, sodomy laws became the focal regulatory mechanism for persecuting homosexuals and their subcultures.

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takings grounds. *Id.* at 496-97, 499, 521. *Moore* very probably would have garnered at least five votes for a *criminal* penalty: although Justice Stevens's property-protecting rationale would have been inapplicable, it is very likely that he, and possibly that one or more of the dissenting justices, would have joined the plurality's privacy-based invalidation.

49. See *Wisconsin v. Yoder*, 406 U.S. 205, 232-36 (1972) (allowing Amish parents to control their children's education); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993), which stand for the proposition that the state cannot seek to dictate a religious life. *Beason* stands for the proposition that polygamy can be the basis for denying a civil right and, read with *Reynolds*, imprisonment. *Beason*, 133 U.S. at 341-42, 347 (denying the right to vote); *Reynolds*, 98 U.S. at 146, 150, 168 (affirming conviction for polygamy and sentence of two years at hard labor). One can be critical of polygamy as an institution, while still being open to tolerance of polygamy as a religious practice that seems to have been productive for many people. See John Stuart Mill, *On Liberty* 160-62 (Penguin, 1978), for precisely this position.

50. The legal features of the Nazi antihomosexual terror are documented in Güntor Grau, ed., *Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933-45* (Cassell, Patrick Camiller, trans., 1995), and Richard Plant, *The Pink Triangle: The Nazi War Against Homosexuals* (Henry Holt & Co., 1986). The legal features of the American antihomosexual terror are documented in William N. Eskridge, *The Jurisprudence of Privacy and the Apartheid of the Closet, 1947-1961*, 26 Fla. St. L. Rev. (forthcoming 1997), and Eskridge, *Gaylaw* at ch. 2 (cited in note 1).

The homosexual in 1961 was smothered by law.<sup>51</sup> He or she risked arrest and possible police brutalization for dancing with someone of the same sex, cross-dressing, propositioning another adult homosexual, possessing a homophile publication, writing about homosexuality without disapproval, displaying pictures of two people of the same sex in intimate positions, operating a lesbian or gay bar, or actually having sex with another adult homosexual. The last, consensual homosexual sodomy, was a serious crime in all the states, and a felony in all but one; several states imposed life sentences. A felony conviction (and in some states merely a felony charge) subjected the homosexual to special psychiatric evaluation as a potential "sexual psychopath." If found to be such a creature, the homosexual was incarcerated indefinitely in a mental institution—for many inmates a horror chamber of electroshock and mental torture and for some a life sentence. In several states the convicted sodomite or solicitor would have to register as a sex offender. If the homosexual were not a citizen, she or he would likely be deported. If the homosexual were a professional—a teacher, lawyer, doctor, mortician, beautician—she or he would likely lose the certification needed to practice that profession. Even if the homosexual was not convicted of sodomy, arrest for loitering, solicitation, or attempt to commit sodomy meant more than a fine and an overnight stay in jail. Misdemeanor arrests for such offenses meant that the homosexual might have her or his name published in the local newspaper, and would probably lose his or her job. If the charged homosexual were a member of the armed forces, she or he might be court-martialed, and would likely be dishonorably discharged and thereby lose all veterans' benefits, however distinguished the individual's service record.

As it had largely acquiesced in the anti-Mormon Kulturkampf in *Beason* and *Late Corporation*, the Supreme Court largely acquiesced in the antihomosexual Kulturkampf. The Warren Court's decision in *Boutilier v. INS*<sup>52</sup> upheld the immigration exclusion of homosexuals and even bisexuals as people afflicted with "psychopathic personality."<sup>53</sup> The Burger Court's decision in *Bowers*<sup>54</sup> rhetorically segregated "homosexual sodomy" from "heterosexual sodomy" as a proper object of state regulation.<sup>55</sup> *Boutilier*, a statutory case, was

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51. Examples and documentation for the descriptions in this paragraph can be found in Eskridge, *Gaylaw* at ch. 2 (cited in note 1).

52. 387 U.S. 118 (1967).

53. *Id.* at 122-23.

54. 478 U.S. 186 (1986).

55. *Id.* at 190.

overridden by Congress in 1990,<sup>56</sup> and *Bowers*, a constitutional case, should be overruled by the Court. Its reasoning and result have been criticized from every point of view known to law professors, including and particularly rule-of-law perspectives.<sup>57</sup>

Damned by every knowledgeable commentator, *Bowers* has been treated cautiously and sometimes disrespectfully. Immediately after *Bowers* was delivered, the Missouri Supreme Court, in *State v. Walsh*, upheld the application of its consensual homosexual sodomy law to public fondling and solicitation of oral sex.<sup>58</sup> Justice Donnelly, who authored the decision, felt constrained to reject the federal constitutional claims on the basis of *Bowers* but responded to the dissenting justices with a separate statement opining that privacy claims under the state constitution were preserved for future claimants.<sup>59</sup>

As Justice Donnelly suggested, challenges to sodomy laws have shifted from the U.S. Constitution to state constitutions, and met with some success. In *Commonwealth v. Wasson*,<sup>60</sup> a divided Kentucky Supreme Court invalidated a law criminalizing consensual "deviate sexual intercourse with another person of the same sex," as inconsistent with the Kentucky Constitution's right to privacy.<sup>61</sup> Finding *Bowers's* originalism "misdirected" and its assumptions ignorant, the Kentucky court applied to gay people the principle that "[i]t is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone

56. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067.

57. See Eskridge, *Gaylaw* ch. 4 (cited in note 1) (inconsistent with history and political theory); Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 81-84 (Simon & Schuster, 1991) (inconsistent with precedent); Richard A. Posner, *Sex and Reason* 341-50 (Harvard U., 1992) (ignorant); Eve Kosofsky Sedgwick, *Epistemology of the Closet* (U. of California, 1990) (manipulative); Anne B. Goldstein, *Comment: History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 Yale L. J. 1073, 1102-03 (1988) (inaccurate); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 Va. L. Rev. 1721 (1993) (slippery); Frank Michelman, *Law's Republic*, 97 Yale L. J. 1493, 1496 (1987) (authoritarian); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. of Chi. L. Rev. 648 (1987) (homophobic); Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1461 (1992) (upholding "state-legitimized violence"). According to eminent conservative constitutionalist Earl M. Maltz's learned opinion, commentators have overwhelmingly opposed the result and reasoning of *Bowers*. Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 Ga. L. Rev. 629, 645 n.95 (1990) (examining more than thirty leading articles).

58. 713 S.W.2d 508, 509, 513 (Mo. 1986).

59. *Id.* at 514-15.

60. 842 S.W.2d 487 (Ky. 1992).

61. *Id.* at 488, 491.

is concerned, or to prohibit him any liberty the exercise of which will not directly injure society."<sup>62</sup>

Two intermediate appellate court decisions from other states were to similar effect. The Tennessee Court of Appeals, in *Campbell v. Sundquist*, followed *Wasson* to issue a declaratory judgment that its consensual same-sex sodomy law is unconstitutional.<sup>63</sup> The Tennessee Supreme Court denied review in the case, leaving the state's consensual homosexual sodomy law apparently void. In contrast, after the Texas Court of Appeals granted a similar declaratory judgment under the state constitution's right to privacy, in *State v. Morales*<sup>64</sup> the Texas Supreme Court vacated the judgment on the ground that there was no justiciable case or controversy.<sup>65</sup> Similarly, a Michigan trial judge held, in an unpublished opinion that was not appealed by the state attorney general, that Michigan's sodomy laws cannot constitutionally be applied to consensual same-sex intimacy.<sup>66</sup>

It is fair to say that no reported state court decision since *Bowers* has applied a state sodomy law to private consensual intimacy between two adults of the same sex (the *Bowers* facts).<sup>67</sup> The Supreme Court has also been skittish about its decision. Justice Powell, the fifth vote for the majority opinion, publicly confessed in 1989 that it was the vote he most regretted.<sup>68</sup> Justice O'Connor, another member of the five-Justice *Bowers* majority, co-authored the joint opinion in *Planned Parenthood v. Casey*,<sup>69</sup> which rejected *Bowers*'s originalist methodology for figuring the contours of the liberty protected by the Due Process Clause. "Neither the Bill of Rights nor the specific

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62. *Id.* at 494-95 (quoting *Commonwealth v. Campbell*, 133 Ky. 50, 117 S.W. 383, 385 (Ky. Ct. App. 1909)) (emphasis omitted).

63. 926 S.W.2d 250, 265-66 (Tenn. Ct. App. 1996), appeal denied, (Tenn. Sept. 9, 1996).

64. 826 S.W.2d 201 (Tex. Ct. App. 1992), rev'd on jurisdictional grounds, 869 S.W.2d 941 (Tex. 1994).

65. *Morales*, 869 S.W.2d at 949.

66. *Michigan Org. for Human Rights v. Kelly*, No. 88-815820 (CZ) (Wayne County Cir. Ct., July 9, 1990). Michigan's appellate courts have left the issue open. Compare *People v. Lino*, 196 Mich. App. 672, 496 N.W.2d 385 (Mich. App. 1992) (finding that the statute criminalizing consensual same-sex intimacy was not unconstitutionally vague).

67. State sodomy laws have been applied to public sex, see *State v. Baxley*, 656 So.2d 973 (La. 1995); *People v. Lynch*, 179 Mich. App. 63, 445 N.W.2d 803 (Mich. App. 1989); *Walsh*, 713 S.W.2d at 508. But see *Wasson*, 842 S.W.2d at 487. State sodomy laws have also been applied to commercial sex, see *State v. Gray*, 413 N.W.2d 107 (Minn. 1987); and oddly, sex between different-sex couples outside of marriage, see *Fry v. Patsevouras*, 1992 U.S. Ct. App. LEXIS 21048 (4th Cir. 1992); *State v. Lopes*, 660 A.2d 707 (R.I. 1995). But see *Schochet v. State*, 580 A.2d 176 (Md. Ct. App. 1990). The federal sodomy law applicable to members of the armed forces is sometimes applied to private same-sex intimacy. See, for example, *United States v. Baum*, 30 M.J. 626 (Mil. Rev. 1990).

68. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 530 (Macmillan, 1994).

69. 505 U.S. at 833 (1992).

practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects,"<sup>70</sup> she wrote, pointedly ignoring *Bowers* (her co-authors were Justices Kennedy and Souter who were not on the Court for *Bowers*). If due process protects bodily integrity and personal autonomy, as *Casey* suggests, the right to engage in consensual intimacy would seem a logical corollary.

International experience supports the proposition that laws criminalizing same-sex intimacy are anachronistic for modern urbanized societies and inconsistent with a citizen's right of privacy in those polities recognizing such a right. Virtually all the countries with laws against consensual sodomy are nonindustrialized societies—Japan, Hong Kong, China, Taiwan, South Korea, Canada, Mexico, Brazil, Argentina, Columbia, Venezuela, and most of the states in Europe have no consensual sodomy laws.<sup>71</sup> The few straggler countries (such as Ireland and Cyprus) or provinces (such as Tasmania [Australia] and Northern Ireland [United Kingdom]) have been subjected to legal as well as political pressure to abandon laws that are anachronistic for modern urbanized societies that have sizeable gay populations.<sup>72</sup> Most member states of the European Community ("EC") have repealed their sodomy laws, and the few that have not have been found in violation of the privacy guarantees of the European Convention on Human Rights.<sup>73</sup>

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70. *Id.* at 838. Justice Scalia's position that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against state interference in 1868 (when the Fourteenth Amendment was ratified), failed to command a majority of the Court in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Justice O'Connor, later an author of the joint opinion in *Casey*, concurred in the opinion in *Michael H.*, specifically rejecting Scalia's vision of the Due Process Clause. *Id.* at 132 (O'Connor, J., concurring).

71. James Wilets, *International Human Rights Law and Sexual Orientation*, 18 *Hastings Int'l. & Comp. L. Rev.* 1, 64-66 (1994). See Rob Tielman and Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, in Aart Hendriks, Rob Tielman, and Evert van der Veen, eds., *The Third Pink Book: A Global View of Lesbian and Gay Liberation and Oppression* 249-342 (Prometheus Books, 1993) (reviewing sodomy laws country-by-country as of 1993).

72. Tielman and Hammelburg, *World Survey*, in Hendriks, Tielman, and van der Veen, eds., *Third Pink Book* at 249-342 (cited in note 71).

73. In *Dudgeon v. United Kingdom*, 4 *Eur. Hum. Rts. Rep.* 149 (*Eur. Ct. Hum. Rts.*, 1981), the European Court of Human Rights ruled that Northern Ireland's consensual sodomy prohibition contravened the right to privacy set forth in Article 8 of the European Convention. *Id.* at 168. The decision affected only Northern Ireland; the remainder of the United Kingdom had already decriminalized same-sex intimacy. The Court in *Norris v. Ireland*, 13 *Eur. Hum. Rts. Rep.* 186 (*Eur. Ct. Hum. Rts.* 1991), applied *Dudgeon* to require an entire country, Ireland, either to decriminalize homosexuality or stand in violation of the Convention. *Id.* at 200-01. In 1993, the Court held that Cyprus's antisodomy law was likewise in derogation of the Convention, thereby completing a clean sweep of such regulations in the EC. *Modinos v. Cyprus*, 16 *Eur. Hum. Rts. Rep.* 485, 493-94 (*Eur. Ct. Hum. Rts.* 1993).



After *Bowers*, only one state in Australia—Tasmania—continued to proscribe private, consensual sex between adult men. In 1992, the Human Rights Commissioner in Australia asked the federal government to override Tasmania's law. The Commissioner found that the Tasmanian law breached Australia's obligation under the International Covenant on Civil and Political Rights ("ICCPR") to ensure its citizens' privacy and equality rights. Upon petition of the Tasmanian Gay & Lesbian Rights Group, the United Nations Human Rights Committee agreed to review Tasmania's law for consistency with the ICCPR. In *Toonen v. Australia*,<sup>74</sup> the Committee held that Tasmania's policy violated article 17(1) of the ICCPR,<sup>75</sup> which protects against "arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."<sup>76</sup> *Toonen* is of special significance, because the United States, like Australia, has signed and ratified the ICCPR.<sup>77</sup> Having ratified the ICCPR, the United States has accepted international obligations under the covenant, although it has not agreed to amenability to international adjudication of grievances before the U.N. Human Rights Committee, nor is the treaty self-executing in American courts.

Even when a treaty is not self-executing, U.S. courts will often interpret federal law as consistent with America's international commitments or with customary international law.<sup>78</sup> It is doubtful whether the ICCPR, as interpreted in *Toonen*, would alone justify the Supreme Court's overruling *Bowers*,<sup>79</sup> but the ICCPR and the other

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74. *Report of the Human Rights Committee*, Communication No. 488/1992, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40 at 230, U.N. Doc. A/49/40 (1994).

75. *Id.* at 235.

76. International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), G.A. Res. 2200A (XXI), 21st Sess., Supp. No. 16 at 55, U.N. Doc. A/6316 (1966).

77. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 172.

78. See for example, *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (avoiding application of an act forbidding trade with France by American citizens by holding that an American-born sea captain who had taken oath of allegiance to Denmark was a Danish citizen); *Restatement (Third) of Foreign Relations Law* § 114 (1987) (stating that a United States statute is to be construed so as not to conflict with international law or an international agreement of the United States where possible). In particular, non-self-executing treaties "may sometimes be held to be federal policy superseding State law or policy." *Id.* § 115, comment (e). See *Toll v. Moreno*, 458 U.S. 1, 15-17 (1982) (invalidating, under the Supremacy Clause, a Maryland law denying non-immigrant aliens holding G-4 visas domiciled in Maryland "in-state" tuition status).

79. For arguments that it does, see James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 Colum. Hum. Rts. L. Rev. 33, 45-47 (1995) (stating that *Toonen* could be used to challenge *Bowers* with respect to the right of privacy).

international authorities are relevant to any reevaluation of *Bowers* by state as well as federal courts. Reasoned judgments such as *Toonen* and the EC decisions are subsequent developments that support a reconsideration of precedent and, more pointedly, that highlight the anachronistic quality of *Bowers's* rule and its reasoning.

### C. A Constitutional Presumption Against Kulturkampf

*Beason* is clearly an invalid precedent, and *Bowers* probably so. That these were the only cases Justice Scalia deployed to flail the Court for departing from precedent strengthens Justice Kennedy's claim that Amendment 2 was exceptional in a polity reflecting rule of law values. Moreover, the problems with *Beason* and *Bowers* are not limited to their inconsistency with the Supreme Court's free exercise and privacy jurisprudence. Our experience with such cases suggests an important role for an independent judiciary as a buffer against state-sponsored Kulturkampf.<sup>80</sup>

In a pluralist political system, some groups will not only dislike one another, but will be committed to the erasure of others. If a group bent on destroying another group is large or powerful enough, it might be able to deploy the political system to spearhead the effort. This, historically, is what Kulturkampf is—the state's effort to erase a normative subculture of its citizens. When the state seeks to confiscate an entire religion, as it did to the LDS Church, it presumptively violates the Free Exercise Clause, but the anti-Kulturkampf idea should not be limited to such cases.

What was wrong with the anti-Mormon Kulturkampf of the 1880s? The campaign against polygamy between 1882 and 1890 was largely successful: people changed their religious practices; outward conformity in one generation gave rise to inward conformity in the next. Religious polygamy substantially disappeared from the United States.<sup>81</sup> Yet the experience leaves a moral stench. It invoked the power of the state in a cruel way—and without any good justification.

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80. Like the original right of privacy, see *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); the right of judicial review, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); and the idea of sovereign immunity, *Hans v. Louisiana*, 134 U.S. 1, 16-17 (1890); the presumption against Kulturkampf discussed in this part is derived from the structure and underlying principles of the Constitution. See also Professors Farber and Sherry, who derive their "pariah principle" (a sibling to my rule against Kulturkampf) from unstated assumptions of our constitutionalism. Farber and Sherry, 13 Const. Commentary at 269-70 (cited in note 12) (noting the broad principle expressed by the Supreme Court that "government cannot brand any group as unworthy to participate in civil society").

81. See Van Wagoner, *Mormon Polygamy* 177-218 (cited in note 8).

There is little evidence that anyone was hurt by the plural marriages practiced by the Mormons.<sup>82</sup>

Kulturkampf is just as politically pernicious as it is morally questionable. By demonizing otherwise productive citizens for consensual conduct that is deeply meaningful to them, Kulturkampf not only impedes individual human flourishing, but removes functional people from contributing to overall social flourishing. Worse, Kulturkampf is socially divisive. By empowering one group that wishes to impose its morals on another, it risks empowering the most vicious people in that group, creates anger and bitterness among the persecuted, and invites other groups to deploy the state to achieve their conformist goals. Worst, Kulturkampf is at war with the goal of cultural diversity. Formal conformity risks social, intellectual, and political ossification.

The foregoing political evils are among those that the Framers believed could be regulated by judicial review. Recall Madison's concern with laws that "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good,"<sup>83</sup> as well as Hamilton's concern that the legislature would enact "unjust and partial laws."<sup>84</sup> Madison's and Hamilton's concerns were not with state campaigns to preserve public order against persons who invaded the property or liberty of others, but can best be understood to be with state campaigns to enforce moral conformity, precisely the sort of campaigns that have been termed Kulturkampf.<sup>85</sup>

*Beason* directly sanctioned anti-Mormon Kulturkampf at its apex, and *Bowers* did the same thing for antihomosexual Kulturkampf, albeit long after it had peaked in the 1950s. Colorado's Amendment 2 was not nearly so severe as the other two measures, and came long after the heyday of antihomosexual Kulturkampf. Yet

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82. My own view is that in the context of western culture, polygamy is not a good deal for women, but many women involved in plural marriages believe otherwise. (Recall, too, that nineteenth-century marriage generally was not a great deal for women.)

83. Federalist No. 10 (Madison), in Rossiter, ed., *The Federalist Papers* at 79 (cited in note 18).

84. Federalist No. 78 (Hamilton), in Rossiter, ed., *The Federalist Papers* at 470 (cited in note 23).

85. Neither historians nor I consider anti-drug campaigns Kulturkampf the way anti-religious and antigay campaigns of persecution have been—even though campaigns are usually aimed at "conduct" (polygamy, sodomy) rather than "status" (being a Mormon, a homosexual). I would, on the other hand, consider it Kulturkampf if the state sought to erase a nomic community whose ideas I consider pernicious, like the KKK. I am not certain what conduct or threat to public order would justify anti-Klan Kulturkampf, but surely such a threshold has not been reached.

only the mild measure adopted in Colorado was felled by the Court. This contrast suggests a depressing anomaly: the Supreme Court will often lack the courage to stand up to Kulturkampf at its political apex, when the persecuted group is most vulnerable, but will retroactively condemn it when such condemnation is politically safer (that is, the forces of Kulturkampf have faded and the persecuted group has become a respectable socio-political force).<sup>86</sup> This descriptive point requires us to ask what normative role *Romer* really plays, for Justice Scalia was just as wrong to call Amendment 2 a "Kulturkampf" as he was to praise *Beason* and *Bowers* as exemplars of the rule of law. What actually is the relationship of *Romer* to Kulturkampf? Of Kulturkampf to democracy? These quandaries can be better understood by reference to the role of the closet in the political economy of the homosexual.

### III. DEMOCRACY, KULTURKAMPF, AND THE CLOSET

For lesbians, gay men, and other sexual minorities, the closet is the link between Kulturkampf and democracy. Specifically, the antihomosexual Kulturkampf of the 1950s was a phenomenon whereby democracy undermined its own functioning by pressing its gay citizens into a political as well as a personal closet. When the state declares war on a community whose members are characterized by their ideas, feelings, and associations, members of the persecuted minority have several options: they can capitulate and embrace the state orthodoxy, they can flee the polity either by going underground or traveling to another society, or they can "pass," pretending to follow state orthodoxy but secretly perpetuating their heresy. The last strategy has been characteristic of lesbians, gay men, and bisexuals in twentieth century America.<sup>87</sup>

The state actively hunted homosexuals like dogs in the 1950s. Homosexuals were more adaptive than dogs, however, and responded to the McCarthy-era terror by closeting their sexual identity. American society soon enough lost interest in waging a costly cam-

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86. This is a lesson from the theory developed in William N. Eskridge, Jr., and Philip P. Frickey, *Law as Equilibrium*, 108 Harv. L. Rev. 26, 54 (1994).

87. Leading explications include Sedgwick, *Epistemology of the Closet* (cited in note 57); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 932-63 (1989); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev. 1753, 1794-1802 (1996) (discussing the symbol of the closet). This is a theme I explore in my forthcoming book, Eskridge, *Gaylaw* (cited in note 1).

paign to track down homosexuals. Hunter and hunted worked out this accommodation: the mutually protective closet—whereby the state would stop rooting out homosexuals if they denied their sexual identities, at least in public.<sup>88</sup> The straight-threatening closet of the 1950s saw homosexuals as an aggressive criminal class and sought to exterminate them. The mutually protective closet sought to reconstitute homosexuals as a disfavored caste. The evolving federal justification for excluding gay men and lesbians from the civil service reflects a shift from the straight-threatening closet of the 1950s to the mutually protective one of the 1960s.

A Senate subcommittee report on "Employment of Homosexuals and Other Sex Perverts in Government" was issued on December 15, 1950.<sup>89</sup> The report made the case against "homosexuals and other sex perverts" in the government. According to the subcommittee, "[t]he social stigma attached to sex perversion is so great that many perverts go to great lengths to conceal their perverted tendencies," making them easy prey for "gangs of blackmailers."<sup>90</sup> Also, "those who engage in overt acts of perversion lack the emotional stability of normal persons," and "indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility."<sup>91</sup> Finally, the report stated, "perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert."<sup>92</sup> Based upon these findings, the subcommittee urged aggressive tactics to search for and exclude all "homosexuals and other sex perverts" serving in the federal government, a recommendation carried out by the Truman and Eisenhower Administrations.

Federal employment exclusions of homosexuals were justified differently in the 1960s. The Civil Service Commission explained its exclusionary policy in a February 1966 letter. Civil Service Chair John Macy claimed that the Commission did not exclude "homosexuals" per se, only people who engaged in "overt" homosexual "conduct" that became public through an arrest or general knowl-

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88. The mutually protective closet and its instability are explored in Eskridge, 26 Fla. St. L. Rev. (cited in note 50).

89. *Employment of Homosexuals and Other Sex Perverts in Government*, S. Doc. No. 241, 81st Cong., 2d Sess. (1950).

90. *Id.* at 3.

91. *Id.* at 4.

92. *Id.*

edge.<sup>93</sup> So long as the homosexual did not “publicly proclaim that he engages in homosexual conduct” or “prefers such relationships,” Macy suggested he could serve and the Commission would not pry. But once the word was out, the Commission would consider the “revulsion” of coworkers and “offense to members of the public.” What Macy was offering was the mutually protective closet, whereby the homosexual could serve so long as she or he was not openly gay.<sup>94</sup> This was an advance from the 1950 subcommittee report, but only an advance from viewing homosexuals as a dangerous criminal class to viewing homosexuals as a socially despised undercaste.

The purpose and effect of the mutually protective closet was to deny gay people any presence or influence in American public life. Individual lesbians or gay men could come out to coworkers only if they were discreet and the coworkers were not offended,<sup>95</sup> and they certainly could not engage in public activism without fear of stirring heterosexual resentment.<sup>96</sup> The purpose was to protect heterosexuals from being upset by a gay public presence, but the political effect was deeper. The state or federal employee living in fear of telling even close friends about her or his sexual orientation was in no position to refute inaccurate stereotypes commonly held concerning homosexuality, to engage in political activism seeking to change homophobic policies, or to form lasting political organizations that could effectively participate and bargain in the legislative and administrative processes by which law is made and remade. Consider this last point—the ability to organize politically—in more detail.

Interests in our pluralist polity must be organized in order to have influence, but in getting organized all political interests face the “free-rider problem.”<sup>97</sup> Because political influence is a “public good” the benefits of which will be shared by some who do not contribute to

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93. Letter from J.W. Macy, Jr., Chairman, U.S. Civil Service Commission, to The Mattachine Society of Washington, D.C. (Feb. 25, 1966) (on file with the FBI, FOIA File HQ 100-403320 [Mattachine Society] § 7). This letter is reproduced at Appendix A to William N. Eskridge, *Out of the Closets, Establishing Conditions for Gay Intimacy, Norms, and Citizenship, 1961-1981*, \_\_ Hofstra L. Rev. \_\_ (forthcoming 1997).

94. On the eve of Stonewall, Chief Judge Bazelon rejected the Commission's compromise in *Norton v. Macy*, 417 F.2d 1161, 1168 (D.C. Cir. 1969).

95. See *Rowland v. Mad River School Dist., Montgomery County, Ohio*, 730 F.2d 444, 446 (6th Cir. 1984).

96. See *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 248-51 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977); *Acanfora v. Bd. of Educ. of Montgomery County*, 491 F.2d 498, 499-500 (4th Cir. 1974).

97. See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard U., 1971); Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 724-26 (1985).

its creation, members of a group of similarly interested persons will rationally choose to free ride on the efforts of others, thereby weakening the influence of the group as a whole. The free-rider problem applies with triple force to groups suffering under outlaw or underclass status. Under a regime of the closet, people with the same interests (1) will have difficulty even identifying each other and (2) will have much stronger incentives to avoid open political activity of any sort, thereby (3) exacerbating the free-rider tendency of organized groups not to form or to enjoy limited resources.

Gay people started to gain political influence only after modest numbers came out—or were pushed out—of the closet in the 1960s. Once gays were seen and heard in the political process, most of the state exclusions melted away, as did many of the laws criminalizing homosexual solicitation and sex between consenting adults. Today, it is unlikely that a lesbian or a gay man who engages in private consensual intimacy will be subject to criminal prosecution. Nonetheless, a large majority of gay people remain substantially in the closet, in large part because they fear losing their jobs in the private sector. Evidence supports the fact that many, and perhaps a majority, of openly gay employees face workplace discrimination.<sup>98</sup> Unlike race and sex, sexual orientation is rarely apparent upon casual observation, unless the person self-identifies. Hence, all lesbian, gay, and bisexual workers have a strong incentive to remain closeted—and most do so in order to avoid discrimination and harassment. Just as African Americans and other ethnic minorities gained political representation only after apartheid cracked open and they could mobilize openly in the political arena, so gays and lesbians can be effectively represented only after the apartheid of the closet cracks completely.

The tyranny of the closet is a solid political theory reason to justify laws prohibiting private as well as public employment discrimination based on sexual orientation. Without such laws, many gay people will be afraid to participate openly on the only issues that matter to them. Such laws contribute to a transition from a regime of the closet, in which the state materially participated, to a regime of free speech and political participation. Nine states, the District of Columbia, and dozens of municipalities have such employment non-

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98. See M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 *Indus. & Labor Relations Rev.* 726, 728 (1995); *Employment Non-Discrimination Act of 1994: Hearings on S.2238 before the Committee on Labor and Human Resources*, 103d Cong., 2d Sess. (1994).

discrimination laws—including Aspen, Denver, and Boulder, Colorado.

The effect, and surely also the purpose, of Colorado's Amendment 2 was to reinforce a regime of the closet for gay people.<sup>99</sup> Amendment 2 was not only sending a message of disapproval to a traditionally despised minority—itsself potentially chilling or incendiary or both—but was removing an important prerequisite for political participation by many gay people (job protection).<sup>100</sup> Though Amendment 2 was enacted by a democratic process, it would have had the antidemocratic effect of impairing the ability of gays to mobilize politically. This inverts Justice Scalia's accusation that the Court's opinion in *Romer* is simply antidemocratic and provides a democracy-enhancing justification for Justice Kennedy's opinion for the Court. Reading Justice Kennedy's opinion most ambitiously, Professor Michael Seidman maintains that the state has an affirmative obligation to enact laws protecting lesbians, gay men, and bisexuals from discrimination in employment, housing, and public accommodations.<sup>101</sup> The foregoing analysis provides some normative support for Professor Seidman's ambitious reading of *Romer*. Because the state in the 1950s aggressively contributed to the creation of a closeted identity that crippled homophilic political mobilization, the state in the 1990s has a remedial obligation to correct some of the damage through nondiscrimination laws. Hence Amendment 2 is properly invalid because it seeks to return state policy to one of antidemocratic closetry.

The foregoing analysis provides a link to the Supreme Court's decisions striking down race-based initiatives. In *Reitman v. Mulkey*<sup>102</sup> and *Hunter v. Erickson*,<sup>103</sup> the Court invalidated initiatives repealing laws adopted to remedy housing and public accommodation discriminations against African Americans and imposing special, more difficult, procedures for adopting new laws with the same effect.

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99. Compare *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995) (upholding Cincinnati's antigay initiative and refusing to consider homosexuality a "suspect classification" because it is a feature of one's makeup easily hidden), vacated and remanded, 116 S. Ct. 2519, 135 L. Ed. 2d 1044 (1996).

100. I am not saying that "most" gay people would be willing to come out of the closet if they were protected against job discrimination, and there is no basis for believing that many would do so in the short term. The more important focus is the longer term. With employment discrimination protections in place, new entrants into the employment marketplace would feel freer to be openly gay or lesbian.

101. Seidman, 1996 S. Ct. Rev at 67 (cited in note 12).

102. 387 U.S. 369 (1967).

103. 393 U.S. 385 (1969).



Although the initiatives were most vulnerable because they deployed suspect race-based classifications, they also can be criticized as anti-democratic. The state shares responsibility for racial apartheid in American history, and this responsibility bespeaks a moral and sometimes constitutional obligation to remedy its continuing effects. Any premature rollback in enacted protections should be viewed with suspicion, for the rollback would threaten the democratic value of empowering minority political participation. Neither decision necessarily stands for the proposition that the Court in the 1960s would have invalidated any rollback, but the decisions certainly support the idea that a democracy-enhancing Court should apply heightened scrutiny to such measures.

Note that the Supreme Court never had to resolve the race analogue closest to Colorado's Amendment 2. Practices such as the poll tax and literacy requirements, which were key to Jim Crow efforts to render African Americans politically as well as socially marginal, kept African Americans off the voting rolls. Assume that a state with county literacy tests that reduced minority voter registration adopted a statute abolishing those tests, so that people of color could equally participate in the political process. Assume, further, that a popular referendum repealed that statute and directed that future statutes of that sort could only be accomplished by amending the state constitution. Under ordinary precepts of judicial review, the move would be hard to fault: there is no suspect classification such as race, and the Supreme Court has held, in a much-criticized decision, that literacy tests are constitutionally permissible.<sup>104</sup> The Court that decided *Reitman* and *Hunter*, however, would probably invalidate such a referendum and reinstate the prior statute.

Three principles support this result. One is that referenda cannot repeal constitutionally mandated remedies; in deciding what is constitutionally mandated the Court can consider the judgment of the legislative body being overridden. Thus, if the state legislature has determined that literacy tests perpetuate racial apartheid, the Court should be emboldened to hold the abolition of such tests unconstitutional, in this particular case even if not more generally. A second principle is based on remedial justice: When the state itself has contributed to an antidemocratic apartheid, the state has a special responsibility to correct it, and efforts to repeal corrections will be

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104. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). The analysis in *Lassiter* is at some odds with *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668-69 (1966) (striking down poll taxes and overruling *Breedlove v. Suttles*, 302 U.S. 277 (1937)), but *Lassiter* has never been overruled and might survive in today's Court even if reconsidered.

strictly scrutinized to assure that they serve genuinely important state interests. A third principle is procedural: When popular referenda repeal measures that seek to redress democratic dysfunctions, they should be scrutinized with more than the usual bite. This third principle can be justified not only from John Hart Ely's representation-reinforcement theory, but also from Hans Linde's theory that Article IV's assurance of a republican form of government empowers judges to demand more than plausibility when initiatives target an out-group such as gay people.<sup>105</sup>

These principles also justify the *Romer* Court's willingness to strike down Amendment 2. The remedial justice principle is implicated, because Amendment 2 was a retreat from local and state directives that sought to ameliorate the apartheid of the closet that federal, state, and local policies had long supported. While the state might not be flatly prohibited from repealing such remedial policies, repeal efforts should be subjected to means-ends scrutiny that has real bite (unlike the toothless rational basis test as usually deployed). When the repeal efforts are by popular referendum or initiative, the third principle suggests that judicial scrutiny ought to be even more demanding. If the legislature is sensibly remedying a defect in the democratic process, that process cannot be trusted when it seeks to preserve the dysfunction.

At bottom, Justice Scalia's *Romer* dissent does us all a service by insisting that the Court and the nation consider the consequences of the decision for the operation of American democracy. Like Judge Linde and Professor Schacter, I believe the consequences are good. They will be improved if the Court, perhaps slowly and over time, discourages the political process from focusing on sexual orientation as an obsessional classification.

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105. Ely, *Democracy and Distrust* (cited in note 13); Linde, 72 Or. L. Rev. at 19 (cited in note 29).

