

ROMER V. HARDWICK

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The majority decision in *Romer v. Evans*¹ has already gained notoriety as an imperfect text.²

First, as Justice Scalia's dissent notes with indignation,³ the majority scandalously fails even to cite the only Supreme Court case addressed to homosexual rights, *Bowers v. Hardwick*.⁴ And so it fails to address the question whether discrimination against homosexuals is legally tied to the states' power to criminalize "homosexual sodomy"—that is, the question whether "homosexual

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1. 116 S. Ct. 1620 (1996).

2. Critics of the result in *Romer* of course make textual criticisms of it; what is striking is that so many defenders of the decision do so as well. See, for instance, Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 257-58, 278 (1996) (asserting that "*Romer* means no more and no less than what it says (or at least tries to say)"; proposing to "articulate the principle we believe underlies *Romer* but is imperfectly explained in the opinion"; and arguing that "[t]he majority opinion, while not fully satisfactory, contains the seeds of a response" to trenchant criticisms of it); Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 222 (1996) (declining "to say that Justice Kennedy's opinion is flawless"); Pamela S. Karlan, *Just Politics?: Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. (forthcoming 1997) ("There's a vacuum at the core of the Court's analysis that begs to be filled"; "There are interesting imprecisions and elisions in the Court's language."). Several participants in this conference disparage the majority opinion as a text. See Larry Alexander, *Sometimes Better Boring and Correct: Romer v. Evans as an Exercise of Ordinary Equal Protection Analysis*, 68 U. COLO. L. REV. 335, 339, 347 (1997) (noting that, at two important junctures in the majority's reasoning, "the dog . . . did not bark"—that is, important steps in "ordinary equal protection analysis" were omitted); Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387, 389 (1997) ("[T]he majority reached the right result, but for reasons that it articulated only partially or not at all."). Finally, the legal press was quick to provide a forum for law professors, both friendly to and critical of the result in *Romer*, who wished to go on record derogating its form. See, e.g., *Equal Protection or "Kulturkampf,"* RECORDER, May 22, 1996, at 10; Chai Feldblum, *Based on a Moral Vision*, LEGAL TIMES, July 29, 1996, at S31.

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

4. 478 U.S. 186 (1986).

sodomy" is "the behavior that defines the class"⁵ so that *Hardwick's* establishment of a constitutional power to criminalize sodomy also acknowledged, *a fortiori*, the power to impose mere civil disadvantages on homosexuals. I will call this the "*Padula Gap*" in honor of Justice Scalia's quotation from the first federal appeals court decision holding that *Hardwick* mattered in equal protection cases challenging anti-gay discrimination.⁶

Second, there is a complex rupture between the majority opinion's reading of Amendment 2 and its ultimate decision that the Amendment fails rational basis review. Here the text precipitating the difficulty appears to be a brief in the case, the amicus brief submitted by constitutional scholars Laurence H. Tribe, John Hart Ely, Gerald Gunther, the late Philip B. Kurland, and Kathleen M. Sullivan.⁷ The majority opinion seems to reject and then adopt the reading of Amendment 2 offered in the Tribe Brief, and to adopt and then suppress the Brief's novel constitutional objection to the Amendment. Because Justice Scalia's central and most trenchant objection to the majority's reasoning unravels the text at all of these points, the majority opinion's complex, ambivalent reinscription of the Tribe Brief is perhaps even more important than the *Padula Gap*. This second imperfection in the majority opinion is not a lacuna in the fabric of the text but rather a complex set of interrelated textual fissures, which both join the opinion to and divide it from the Tribe Brief and the dissenting opinion. Nevertheless, I will call it the "Tribe Brief Gap."

These gaps have become scandalous, and have produced a nascent academic industry dedicated to the task of filling them up. Already several prominent constitutional scholars have set out to deduce from *Romer* its "missing pages" (to borrow the apt term of Lynn A. Baker's title here).⁸ Akhil Reed Amar seeks to "clarify and support the majority's theory" by showing that Amendment 2 was really a Bill of Attainder and thus offended the "deep constitutional tradition and structure" that ties the Attainder Clause to the Equal Protection Clause.⁹ Daniel Farber

5. *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

6. See *Romer*, 116 S. Ct. at 1631-32 (Scalia, J., dissenting).

7. Brief of Laurence H. Tribe et al., as Amici Curiae in Support of Respondents, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039) [hereinafter Tribe Brief].

8. See Baker, *supra* note 2.

9. Amar, *supra* note 2, at 229. Amar justifies attributing his reading of *Romer* to Justice Kennedy by "teas[ing] as much meaning as possible out of his words" so

and Suzanna Sherry detect a "principle" that is "firmly rooted in existing constitutional law" and yet "imperfectly explained" in the majority opinion, a "pariah principle" that "forbids the government from designating any societal group as untouchable,"¹⁰ from "pass[ing] caste legislation,"¹¹ and from "brand[ing] any group as unworthy to participate in civil society."¹² Both of these projects fill in the *Padula* Gap by determining that Justice Kennedy correctly read Amendment 2 to discriminate against gay men and lesbians not because of what they do but because of who they are,¹³ and both of them fill in the Tribe Brief Gap by attributing to the text of the opinion an unexpressed fundamental principle.¹⁴

Thomas C. Grey reads the missing pages of *Romer* to overrule the rational basis holding in *Hardwick*.¹⁵ He attributes this effect to the text not by discerning any hidden intent of its authors, or by finding constitutional truths outside the opinion that verify it, but by determining that the *Padula* logic is inescapable: if it is a given that the state may criminalize homosexual sodomy when a popular majority morally objects to the practice—if *Hardwick*,

as to discern the "clear, strong, unbroken analytic and rhetorical thread" that "holds" the opinion together in the face of criticism: the "careless or uncharitable critic" might disagree with the resulting deductions, but not the serious and sympathetic one. *Id.* at 222, 225.

10. Farber & Sherry, *supra* note 2, at 258. Farber and Sherry determine that the "pariah principle" justifies *Romer* on grounds of "some indications" in its text that the "majority . . . relied" on it. *Id.* at 270.

11. *Id.* at 266.

12. *Id.* at 269.

13. See Amar, *supra* note 2, at 217 ("Note how this law targets persons for who they are, not for what they do."); *id.* at 215 ("It penalizes them for their status, not their conduct."); Farber & Sherry, *supra* note 2, at 279 ("Homosexuals are hated not just for what they do but for who they are, and thus anti-gay and anti-lesbian sentiment is directed at status as well as conduct."). This is the only place where I think Amar, Farber, and Sherry have given an inaccurate reading of the majority opinion: "status" in *Romer* means not "who they are" but "who they are designated by this law to be." See *infra* text accompanying note 43.

14. For Amar, *Romer* rests on a series of "basic constitutional ideals" "implicate[d]" in the Attainder Clause and made manifest in a "key case," *United States v. Brown*, 381 U.S. 437 (1965). Amar, *supra* note 2, at 211 n.23, 231. For Farber and Sherry, it evinces a "pariah principle" ascertainable in the Constitution as interpreted in a series of key cases, see Farber & Sherry, *supra* note 2, at 265-71, yet not captured in any of them, see *id.* at 271-75. The facts that the two papers ascertain such different fundamental principles, that they differ so markedly in their ideas about where constitutional principles are to be found, and that *Romer* does not specifically endorse either their conclusions or their methods, suggest that these articles fill gaps that the Court left gaping.

15. See Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373 (1997).

which deems such a determination constitutionally rational, remains good law—then mere logic compels the conclusion that states can regulate on the basis of that moral belief about conduct elsewhere.¹⁶ Grey understands that the Tribe Brief offered an escape from this logic, in the form of a reading of Amendment 2 that construes it to have *nothing to do* with homosexual conduct (and indeed, nothing to say about homosexuals); he reads the Tribe Brief Gap as the juncture where the Court declines the offered escape and thus submits to the *Padula* logic.¹⁷ *Hardwick* and *Romer* are thus locked in logical contradiction, so that the latter must be read to overrule the former; indeed, the patency of the escape strategy offered by the Tribe Brief supports Grey in a conclusion that the Justices *knew* they were overruling *Hardwick*, leaving only the question why they failed to come clean about it.¹⁸ Disagreeing with Grey's reading, Baker fills in the *Padula* Gap by determining that the *Padula* logic is logically and legally mistaken,¹⁹ and the Tribe Brief Gap by giving a reading of Amendment 2 that is justified by its text, not by that of *Romer*.²⁰

Unlike the similarly numerous contributions that seek to displace or rebuke the *Romer* majority opinion,²¹ these papers seek to *fix* it, and they seek to do that by generating the words, or some close substitute for them, that logic or law would have compelled the majority Justices to have said if they had tangled with *Padula* and the Tribe Brief. Underlying this approach are certain implicit configurations of the judicial authors, legal

16. See *id.* at 376-81.

17. See *id.* at 381-82.

18. See *id.* at 384 ("The Court's choice of this more dramatic rationale over the low-key formalist line sketched by the amici was evidently deliberate.")

19. See Baker, *supra* note 2, at 389-99.

20. See *id.* at 402-06. In the last part of this paper I conclude that Baker's reading of Amendment 2 is consistent with the Court's language describing the Amendment's scope. See *infra* text accompanying note 74. Baker's method, which focuses on logical and doctrinal justification rather than the text of *Romer*, makes this coincidence a happy but somewhat accidental one.

21. See, for instance, Lino A. Graglia's endorsement of Justice Scalia's dissenting determination that the majority decision is simply and multiply wrong (and dishonest about it), Lino A. Graglia, *Romer v. Evans: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409 (1997); Larry Alexander's implicit critique of the majority opinion for its many departures from "ordinary equal protection analysis," Alexander, *supra* note 2, at 346-47; and Karlan's determination that the majority's rationale is not flawed but empty, symptomatic of the Court's general failure to address "the difficult question of what a just politics would require," Karlan, *supra* note 2.

readers, and the forms of reason that they share. Whether it takes an intentionalist form (in the sense that it assumes the Justices to have had intentions and to have expressed at least some of them with clarity) or a rationalist one (in the sense it assumes only that the opinion must ultimately make sense according to rules that every well-trained lawyer knows), the recuperative project also assumes a great deal about legal reasoning and reasoners. For instance, it posits that the applicable doctrine is rigid and determinate enough to permit writers and readers to become identical in the relevant competences and to permit both of them to make compelling inferences across a gap in logic or explanation. It posits that the rules of logic and explanation are widely shared enough to allow the Justices and their interpreters—sometimes at least—to stand in for one another. Scholarly interpreters can function as amanuenses rather than independent intenders to the extent that the doctrinal and logical parameters are narrow enough to constrain their reading of the “missing pages.” Thus, the recuperative project assumes that judges follow logic, have intentions, are constrained by legal rules and rigid patterns of doctrinal reasoning, and write opinions that transparently represent at least some part of their logic, intentions, rules, and reasoning to readers who also follow logic, have intentions, are constrained, and so on.

Readers of *Romer* run some risks when they adopt these assumptions, not because such figurations of the Justices and their readers are out of step with the decision, but because they are too much *in* step with it. *Romer*, after all, is the decision in which a majority of the Supreme Court proposes to take the *sex* out of homosexuals. To read *Romer* as though it sets up a transparent relationship between authors/text/reader is to become complicit with this representational move, and simultaneously to become unable to construe it. The only really tendentious methodological claim of this paper is that, if we fill in the gaps in *Romer* too quickly, we will become unable to see how they operate *as gaps*—how, *as* silences, omissions, and absences, they make their own distinctive contributions to the range of meanings the text can sustain and to the kinds of readers we can become.

Should a text get the audience it asks for? Perhaps, but we cannot make a good answer to that question without spending some effort to read less cooperatively. My concern is that by reading *through* the decision to the lucid thinking that they suppose to be missing from it, my intentionalist and rationalist

colleagues may render a deceptively clear picture of *Romer*, of *Hardwick*, and of the relationship between the two cases. This essay focuses its gaze not *through* but *on* the *Romer* decision, and seeks to read it not as a partially veiled window onto a logical reality beyond it but as an opaque sign, a gesture, a thing in itself—a speech act. Rather than see the gaps in *Romer* as accidental omissions or canny evasions in the utterance of a fully realized, reasoning, and intending speaker, this paper attempts to understand how they help to constitute the speaker, the spoken, and the spoken-to of this crucial new decision.

THE TEXTUAL STRUCTURE OF *HARDWICK*: SEX AND HATE

Hardwick frankly acknowledged its textual character by inviting its audience to become engaged in reading it; *Romer* quietly fails to reissue the invitation.

The majority decision in *Hardwick* coyly pretends that the plaintiff had committed the act, “homosexual sodomy.” Now we all know that there is no single physical deed that *is* sodomy, and even under the quite specific statute challenged in *Hardwick* the range of acts defined as sodomy—fellatio, cunnilingus, and anal/genital contact—can be committed by all types of persons with all types of persons—by men and women, with men and women; by homosexuals and heterosexuals, with homosexuals and heterosexuals—mix and/or match as you wish. When Justice White asked whether the Constitution protected “homosexuals” engaging in “such conduct,”²² he divided his audience by personhood and only *as such* did he invite it to contemplate acts taxonomized by personhoods: “homosexuals” were invited to read differently from “heterosexuals.” But “that act”²³ is obscure enough to escape Justice White’s explicit taxonomy, and to set in motion a troubled survey of the relationship between acts and identities. If we have any reason to suppose that our act/identity persona does not map directly onto the one supposed to exist by the Court, we may ask ourselves: Have I done that? Could I do that? If faced with the opportunity, would I do that? If my answers are “no,” what do I suppose I do and can do instead, and

22. *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986).

23. *Id.* at 188.

is that different in any important way from what Hardwick did? If so, why so? If not, why not?

If we are readers of *Hardwick* at all, we are sexually identified readers: we are homosexuals and heterosexuals, or perhaps just persons with various physical facilities for sodomy; we are men or women who have had and will have sexual contact with other people similarly gender-marked; we have pervasive practical, emotional, and phantasmatic investments in how we use those parts of our bodies and enact the rituals of our genders—investments so strong that the vast majority of us believe that they do and should structure our everyday lives; and we are used to thinking that people with different physical equipment and different investments (in acts and/or identities) *are different*. Readers of *Hardwick* cannot, I think, negotiate the text without making some reference, however fleeting, to these bodies, investments, and identifications.

Romer achieves several effects by failing to mention *Hardwick*, and one of them, surely, is the suppression or avoidance of this intense, and tense, relationship between the text and its readers. It invites us to forget ourselves in a way *Hardwick* does not. That is, *Romer* reconfigures its audience: it asks not for the differentiated, viscerally implicated, embodied, and identified audience of *Hardwick* but for a homogenous, reasoning, intending audience. It asks for an audience that mimics the judicial qualities assumed by the recuperative project I have described.

For many readers of *Romer* this readerly oblivion is more than welcome. *Hardwick's* most rigorous interpellation of gay-identified readers is succinctly described in William B. Rubenstein's statement: "I don't think about sex when I read *Hardwick* and I don't think about what sex acts are at issue. *I think how they hate me.*"²⁴ *Romer* interrupts that vituperative call to homosexual readers, implicitly promising them that the Supreme Court can address them in the register of cool, objective reason, as persons without personhoods.

24. Letter from William B. Rubenstein, Consulting Associate Professor, Stanford Law School, (Nov. 11, 1996) (emphasis added) (on file with author). By "interpellation," I mean the interaction in which "ideology 'acts' or 'functions' in such a way that it 'recruits' subjects among the individuals . . . or 'transforms' the individuals into subjects." Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Toward an Investigation)*, in *ESSAYS ON IDEOLOGY* 123, 162-63 (Ben Brewster trans., 1971) (footnote omitted).

It would be a mistake, however, to suppose that this smooth, bland interaction between text and reader fully describes *Romer*. After all, Justice Scalia is a reader too, and he is very very angry. As his dissent vigorously points out, the majority Justices held Amendment 2 unconstitutional because they read *it* to originate in irrational *animus* towards homosexuals. The case has losers, after all, and Justice Scalia reminds us that they are entitled to an engaged response to it: they have been *insulted*.²⁵ Their injury emerges from the *Padula* Gap, which illegitimately hides the fact that Amendment 2 was about the same conduct involved in *Hardwick*:

Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*. . . .

. . . Coloradans are, as I say, *entitled* to be hostile toward homosexual conduct²⁶

And the readerly engagement figured by Justice Scalia emerges as well from the Tribe Brief Gap, in which (he says) the majority misread Amendment 2 as a sweeping harm to homosexuals, when the provision merely expresses tempered disapproval of homosexual conduct in the form of a bar on “special rights.” To invalidate such a measured expression of disapproval as the product of irrational *animosity* is to condemn it substantively: it “places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias”;²⁷ “pronounc[es] that ‘animosity’ toward homosexuality is evil”;²⁸

25. See *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting). “To suggest, for example, that this constitutional amendment springs from nothing more than “a bare . . . desire to harm a politically unpopular group,” quoting *Department of Agriculture v. Moreno*, is nothing short of insulting.” *Id.* (Scalia, J., dissenting) (citation omitted).

26. *Id.* at 1633 (Scalia, J., dissenting).

27. *Id.* at 1629 (Scalia, J., dissenting).

28. *Id.* (Scalia, J., dissenting) (citation omitted).

and “disparag[es] as bigotry adherence to traditional attitudes.”²⁹ The fitness of Colorado’s majority to participate in democratic decisions is impugned, Justice Scalia concludes, and the rational supporter of Amendment 2 is entitled to react as though accused: “They hate me.”

Sex is imbricated with hate at the nexus of *Romer* with *Hardwick*, and key questions about the meaning and “rightness” of the majority opinion can be addressed only at that intersection. The question “Did the supporters of Amendment 2 act out of animus or reason?” has become the somewhat different question: “Did they vote out of invidious hostility to homosexual persons or rational antagonism to homosexual conduct?” Most academic controversy about *Romer* seeks a *right* answer to this question and looks fondly on the status/conduct distinction as the place where one can be right or wrong. But hate, vituperation, and personal insult have been let out of their boxes and probably cannot be entirely pushed back into them.

In the pages that follow I will detail several ways in which Justice Scalia revives the speech-act structure of the majority opinion in *Hardwick*. To be sure, he rings some changes on it: whereas in *Hardwick* anti-gay reason echoes from an empty subject position, Justice Scalia gives it a social location in the popular will; and whereas in *Hardwick* the Justices explicitly rebuke homosexual sodomites and reasoners, Justice Scalia receives a rebuke from the majority Justices which it is possible to say they never delivered. But he at least reminds us that Amendment 2 involves our passions. The majority Justices, on the other hand, present a bland, apersonal, almost faceless speaker; the *Padula* Gap (and less directly the *Tribe* Brief Gap) function to refigure the majority Justices as speakers without sexual orientation identities, and to allow them to attribute animus without directly manifesting or engaging in it.

THE *PADULA* GAP

As Grey demonstrates in an elegant paper included in this volume, the omission of *Hardwick* really pinches where the *Romer* majority holds Amendment 2 constitutionally irrational.³⁰

29. *Id.* at 1637 (Scalia, J., dissenting).

30. See Grey, *supra* note 15.

Hardwick, after all, held that popular majorities were entitled to express their disapproval of homosexuality by criminalizing homosexual sodomy: when the *Romer* majority says that the people of Colorado have manifested constitutionally irrational animus, it cuts deeply through the rational fabric of doctrine and logic and into the very body of the *Hardwick* holding.

Of course it is rational to say that homosexuals—real homosexuals, professed homosexuals, or people designated by others as homosexuals for good conventional reasons—are more likely to engage in homosexual sodomy than everyone else. (To my mind that is one of the great things about homosexuals, but I acknowledge that many people disagree with my moral position on this point.) And it also makes good sense to say that *Hardwick*'s rationality holding emerges as a potential logical limit on pro-gay equal protection claims: as long as *Hardwick* is good law it will be hard to find reasons to say that due process rational basis review is different from equal protection rational basis review. Anti-gay discrimination based on homosexual conduct or the likelihood of it may well be permitted by *Hardwick*; *Romer*, then, may well have overruled some part of *Hardwick*.

Interpretation of *Hardwick* misses something when it abstracts its rational basis holding, and the implicit image of reason set up in it, from the text of the opinion, severing it from its implied speaker and its implied audience. The majority held that the Georgia sodomy statute *rationaly* expressed a popular majority's view that *homosexuality* was morally objectionable, flying directly in the face of the Georgia sodomy statute and its express prohibition of anal intercourse, fellatio, and cunnilingus between any two people.³¹ Clearly, if the people of Georgia had anything to express at the time they (through their representatives) adopted this statute, it could not have been a view about homosexuality.³² By parity of reasoning, the Court would have had to say that the legislature wished to express moral condemnation of heterosexuality too, but of course we are dealing here not with parity, but parody, of reasoning.

31. See GA. CODE ANN. § 16-6-2 (1984).

32. The argument that the majority was right to focus on homosexual sodomy in *Hardwick*, because it was considering the statute as applied to Michael Hardwick's act of male/male fellatio, does not repair its error: the Justices inferred legislative intent, which, if it exists at all, must be supposed to come into existence before, and independent of, particular enforcements.

If the rational basis holding of *Hardwick* is so flagrantly irrational, why, one wonders, don't people say so more often? Why does it seem reasonable? This question turns attention from the sole text of *Hardwick* to its *situation* in a culture of readers, and thus to the *Hardwick* majority's implicit appeal to those tense, intense readers described in the introduction to this essay. The rational basis holding says to those readers: if your acts of sodomy are heterosexual acts of sodomy, they can be forgotten, omitted, erased—not only not prosecuted but not remembered. Indeed, it is *reasonable* to forget heterosexuals and their sodomy. The rational basis holding contradicts one of the key premises of the recuperative project: that readers are impersonally engaged in an objective logical project. It is identitarian in its textual appeal, and reading it as rational involves the reader in an invidious designation of an interested conceptual manipulation as reason.

Read as a revision of the textual structure of *Hardwick's* rational basis holding, the *Padula Gap* performs a rearrangement of the identities so invidiously inflected by *Hardwick's* construction of reasoning about conduct. The claim that "sodomy" is "the behavior that defines the class" implies a thick description of the sexual orientation categories, and has precipitated a series of legal struggles to control their description and thus the legal understanding of the real people inhabiting them.³³ *Romer* makes a major departure from this dispute, a shift from thick to thin description, from realism to nominalism.³⁴ It describes and populates the class under consideration in a self-consciously nominal gesture: "the *named* class, a class *we shall refer to as* homosexual persons or gays and lesbians."³⁵ This is "a single

33. Several skirmishes in this war took place in the litigation of the *Romer* case itself. The plaintiffs supported a "gay gene" claim (implicitly a claim that biological difference, not behavior, defines the class) by putting Dean Hamer on the stand, while the defendants' witnesses consistently described the targeted class in terms of conduct and denied that it was an "identifiable social group" at all. See Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 *FORDHAM URB. L.J.* 1057, 1062, 1064, 1065-67, 1072, 1076 (1994). These disputes share a realist premise: everyone agrees that real gay men and lesbians exist; the object of struggle is their definition.

34. See John Boswell, *Revolutions, Universals, and Sexual Categories*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 17, 17-19 (Martin Bauml Duberman et al. eds., 1989).

35. *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996) (emphasis added). Thus, when the Court speaks of "homosexuals" or "gays and lesbians," as it does

named group”³⁶ defined by “a single *trait*.”³⁷ “Homosexuals, by state decree, *are put in a solitary class*”:³⁸ the Amendment “*classifies* homosexuals . . . to *make them* unequal to everyone else”;³⁹ “It is a *classification of persons undertaken for its own sake*” and *in that sense* it is a “status-based enactment”:⁴⁰ “[C]lass legislation . . . [is] obnoxious”⁴¹

After *Robinson v. California*,⁴² legal readers tend to assume that “status” can indicate only a pathological personality type deemed to be real by the scientific epistemics of personality psychology: drug addict, kleptomaniac, pedophile. The *Romer* majority returns to the historical sense of the term, rendering it as a conventional classification of persons defined by law for purposes of assigning them a rigid, enduring, ascriptive relation to the social and legal orders. Indeed, *Black’s Law Dictionary* defines status not as a type of person but as a type of *relationship*: it is “[a] legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned.”⁴³ Not kleptomaniac or drug addict but commoner, prince, infant. The jurisprudential linchpin of the Court’s objection to Amendment 2 is the supercession of feudal society by civil society: Amendment 2 is held to depart radically from the tenets of a *civil* order. For purposes of the majority’s analysis, then, the *real* content of the class is quite

frequently—see, e.g., *id.* at 1625 (“[h]omosexuals, by state decree, are put in a solitary class”); *id.* (“withdraws from homosexuals”); *id.* at 1626 (“bars homosexuals”); *id.* (“laws passed for the benefit of gays and lesbians”); *id.* at 1627 (“[h]omosexuals are forbidden”)—it commits itself to no real view of their nature or their definition.

36. *Id.* at 1628 (emphasis added).

37. *Id.* (emphasis added). Elsewhere the Court uses “trait” not to mean “natural feature” but merely “characteristic.” For example, in one passage the Court lists the prohibited grounds of discrimination in modern antidiscrimination statutes—“age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates”—as “traits.” *Id.* at 1626. There’s no reason to think the term has more “real” content when the Court applies it to Amendment 2.

38. *Id.* at 1625 (emphasis added).

39. *Id.* at 1629 (emphasis added).

40. *Id.* (emphasis added); see also *id.* at 1625 (“change in legal status”; “[t]he change that Amendment 2 works in the legal status of gays and lesbians in the private sphere . . .”).

41. *Id.* at 1629 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)) (alteration in original).

42. 370 U.S. 660 (1962) (holding that California’s statute making it a crime to be a drug addict impermissibly criminalized a “status”).

43. See BLACK’S LAW DICTIONARY 1410 (6th ed. 1990).

beside the point: if the same discrimination were inflicted on blondes or burglars, the same conclusion would follow.

Doctrinally, this feature of the *Romer* opinion constitutes its answer to the *Padula* challenge. It is not quite the same as the answer achieved by constitutional recuperators Amar, Farber, and Sherry. Indeed, these scholars' reliance on extrinsic principles leads them to seek to save the *Romer* decision by misreading it. They construe *Romer* to read Amendment 2 to target homosexuals "not just for what they do but for who they are" and thus to posit a *real* class of homosexuals,⁴⁴ whereas the Court reads Amendment 2 to *create* a "legal personal relationship" or status with no real basis in conduct or anything else.

If as a doctrinal matter the *Padula* Gap reframes the status-not-conduct argument by shifting from "discriminate against whom?" to "discriminate how?," as a textual or representational matter it does so by declining to know or say anything about the social representational world of sexual orientation personhoods. This "speech act of a silence"⁴⁵ is not without its effects, including the particularly subtle structural one of leaving the attribution of status on the basis of conduct and the attribution of conduct on the basis of status to the political sphere whose actions are under judicial review. It is here that the Court maps rather than states a reply to Grey's contention that the *Padula* logic ties *Hardwick* to Amendment 2 with an iron link.

The textual relationships that become possible because of this gesture of deferral are most clearly dramatized when Justice Scalia's realism and Justice Kennedy's nominalism give divergent readings of an old polygamy case, *Davis v. Beason*.⁴⁶ The Idaho statute challenged in *Beason* criminalized any attempt to register to vote by anyone who (1) practiced plural marriage or (2) encouraged others to practice plural marriage or (3) belonged to an organization or group that encouraged people to practice

44. See *supra* note 13.

45. I borrow Eve Kosofsky Sedgwick's term, EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 3 (1990), and we both rely on MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOLUME I: AN INTRODUCTION* 27 (Robert Hurley trans., 1978) ("Silence itself—the things one declines to say, or is forbidden to name, the discretion that is required between different speakers—is less the absolute limit of discourse, the other side from which it is separated by a strict boundary, than an element that functions alongside the things said, with them and in relation to them within over-all strategies.").

46. 133 U.S. 333 (1890).

plural marriage. The defendant attempted to register to vote. His indictment alleged not that he had more than one wife, or that he had urged the cause of plural marriage, but that he was a member of the Church of Jesus Christ of Latter-day Saints. It was the Church, not the defendant, that advocated and practiced the rites of plural marriage.⁴⁷

Justice Scalia's realist understanding of the status/conduct relation sets him up for some crude misreadings of the anti-polygamy laws. He concludes that provisions in several state constitutions "forever prohibit[ing]" polygamy "single out" "[p]olygamists, and those who have a polygamous 'orientation.'"⁴⁸ Scare quotes around the anachronistic term "orientation" mark a deep skepticism that the term means anything at all, and implicitly deny that there is any socially or legally meaningful fact about the class of "homosexuals" besides the "fact" that they practice same-sex sodomy. And that skepticism prompts Justice Scalia to collapse the entire Idaho statute challenged in *Beason* into its first ground: construing *Beason* as a conduct case, he casts doubt on "the extent, *if any*, that [*Beason*] permits the imposition of adverse consequences upon *mere abstract advocacy* . . ."⁴⁹ Two points there: "if any" drenches the Idaho statute's second and third grounds in scornful denial, and "mere advocacy" stands in for advocacy *and* membership. But the *Beason* indictment alleged not advocacy *but* membership.

Justice Scalia's status/conduct equation squeezes out of the picture the very features of *Beason* that are most salient to Justice Kennedy. Likening the Idaho statute to Amendment 2, Justice Kennedy insists that *Beason* would have to be decided differently today: "To the extent that [*Beason*] held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not [today] stand without surviving strict scrutiny . . ."⁵⁰ The really trenchant citations in the following lines are those to *United States v. Brown*⁵¹ and *United States v. Robel*.⁵² These are Communist

47. See *id.* at 333, 341.

48. *Romer v. Evans*, 116 S. Ct. 1620, 1635 (1996) (Scalia, J., dissenting).

49. *Id.* (Scalia, J., dissenting) (emphasis added).

50. *Id.* at 1628.

51. 381 U.S. 437 (1965) (holding that a statute making it a crime for a Communist Party member to serve as an officer in a labor union was a Bill of Attainder).

52. 389 U.S. 258 (1967) (holding that a statute making it a crime for a

Party *membership* cases, each of them richly attentive to the lexical practices of imputing conduct on the basis of group affiliation.⁵³ Justice Kennedy's reliance on these cases indicates that his concern about status runs not to the *nature of the group* but to the *inferences about particularized conduct that an allegation of group membership could sustain*: in different ways each case held that the Constitution would interfere with the infinite proliferation of those inferences.

However deeply Grey disagrees with Amar, Farber, and Sherry, Justice Kennedy disagrees more, and more suggestively, with all of them. Amar's, Farber's, and Sherry's misreadings of the case, to focus on status as personhood ("who they are") rather than status as a "legal personal relationship," leaves them open to Grey's critique of status-not-conduct arguments. Conduct cannot be rendered irrelevant by positing status as a type of real personhood: homosexuals are more likely to commit real *same-sex* sodomy than heterosexuals. As Grey insists, if it is assumed to be rational to criminalize the conduct, it is probably also rational to discriminate against those who are likely to engage in it.⁵⁴ But the status model proposed in *Romer*, and the reading practices that can notice it, enable one to make a better response to the *Padula* challenge than Grey thinks possible. His analogies assume away the very applications of *Padula* that *Brown* and *Robel* would counsel courts to scrutinize: whereas *Padula* equates status with conduct, Justice Kennedy's Communist Party cases attend to the strength of inferences of conduct from membership, and the relatedness of the risk of conduct to the regulated setting. Worrying about whether a state could ratio-

Communist Party member to work at a defense facility violated defendant's First Amendment associational rights). The majority's citation of *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding that denials of the right to vote are subject to strict scrutiny), implicitly concedes Justice Scalia's retort that the impairment of voting rights is constitutionally special. Since Amendment 2 is not directly controlled by *Dunn*, the real work of this string cite is done by *Brown* and *Robel*.

53. See *Brown*, 381 U.S. at 453-56 (rejecting government's argument that Communist Party membership was a "convenient shorthand" designating persons "likely to incite political strikes," and requiring "a demonstrable relationship between the characteristics of the person involved and the evil Congress sought to eliminate"); *Robel*, 389 U.S. at 265-66 (holding that the challenged statute was overbroad inasmuch as it applied without regard to the defendant's degree of involvement in the Communist Party, his awareness of or agreement with its unlawful aims, and the sensitivity of his employment).

54. See Grey, *supra* note 15, at 376-79.

nally fire a middle school teacher who joins a North American Man-Boy Love Association (or a NAMGLA, or a NAWBLA, or a NAWGLA) does not really capture the problem.⁵⁵ A better example would be the new military anti-gay policy, which allows the discharge of any service-member whose conduct—not only sexual contacts but any observed conduct—manifests to a reasonable person that he or she has a propensity—however slight—to engage in homosexual sex, and who cannot then prove to an unreviewable military hearing board that he or she entirely lacks such a propensity.⁵⁶ The resulting hermeneutic world permits virtually unbounded ascriptions of homosexual status as long as they can be found in the potentially paranoid lexicon of the “reasonable [heterosexual?] person.” And because every stage in the proceedings is governed by the term “propensity to engage in homosexual conduct,” the policy purports to stay within the protective aegis of *Hardwick* thanks to *Padula*. Justice Kennedy’s nominalism would at least make it possible to observe the inferential activities orchestrated by these new military regulations.

Reading the *Padula* Gap without filling it in suggests that Supreme Court adjudication about anti-gay enactments can differ markedly from the speech-act structure and the interpretive apparatus of *Hardwick* and indeed of *Padula*. Note first how *Hardwick* lives on in Justice Scalia’s dissenting opinion. In his consistently erroneous readings of *Beason*, he reenacts the interpretive gestures of *Hardwick*’s rational basis holding, both by purporting to produce an objective foundation in defined real conduct and by hiding the many inferential activities he engages in to achieve this representational effect. And by adopting a posture of judicial disengagement (“I would not myself indulge . . . official praise for heterosexual monogamy”⁵⁷) he covers over the historical fact that, while egging political actors on in a sexual-orientation “Kulturkampf,”⁵⁸ his model is Bismark’s *statist* suppression of the Catholic Church and of Polish nationalist

55. See *id.* at 377-78, 379.

56. See 10 U.S.C. § 654 (1993); Dept. of Defense Directives 1304.26, 1332.14, 1332.30 (Feb. 5, 1994). For an analysis of the propensity features of the new policy, see Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy: A Legal Archaeology*, 3 GLQ: J. LESBIAN & GAY STUDIES 159 (1996).

57. *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting).

58. See *id.* at 1629 (Scalia, J., dissenting).

cultural activity.⁵⁹ This occlusion of a heterosexually identified speaker behind a mask of judicial deference reenacts the central gesture of Justice White's rational basis review, which managed to make heterosexual speakers and readers both crucial and invisible. Justice Kennedy's opinion undoes both of these gestures. He neither endorses nor relies upon any real sexual-orientation readership, and by turning his attention to status not as a personhood but as a "legal personal relationship," he makes himself a more agile reader, able to observe an amplitude of conceptual relationships between status and conduct. For him, membership is not conduct but it can give rise to an inference of it; even where the legislature legitimately acts to prevent certain conduct it must satisfy courts as to the strength of the inference of conduct and its relatedness to the project at hand. Even as he withdraws into an objective, rational voice, he constitutes the political world under review as a scene in which situated legal actors make those inferences under a cold judicial eye.

THE TRIBE BRIEF GAP

The Tribe Brief Gap provides another scene in which Justice Scalia reenacts the textual gestures of *Hardwick* in the face of the majority Justices' bland failure to do so. Before this literary appeal can be made clear, a brief restatement of the relationship between the Tribe Brief, the majority opinion, and the dissenting opinion is in order.

The Tribe Brief reads Amendment 2 to bar gay men and lesbians from making *any* "claim . . . of discrimination," even under general laws prohibiting state agents from acting arbitrarily. It argues that, on that reading and even on some less sweeping construals, the provision was a "per se violation" of the Fourteenth Amendment's guarantee of the "equal protection of the laws."⁶⁰ The Brief repeatedly advises the Court that it is not obliged to reach questions of suspectness, fundamental rights, or even rationality because Amendment 2 poses a "prior and more basic question . . . : May a state set some persons apart by declaring that a personal characteristic that they share may not be made the basis for *any* protection pursuant to the state's laws

59. See ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 129 (1992).

60. Tribe Brief, *supra* note 7, at 1.

for *any* instance of discrimination, however invidious or unwarranted?"⁶¹

The majority decision declines to say that laws of general application were affected by Amendment 2, but it nevertheless determines that the provision has many of the characteristics attributed to it by the Tribe Brief, and concludes that because of those characteristics it flunks—surprise!—rational basis review. The majority opinion's conceptual proximity to the Tribe Brief is striking. The nominalism that so marks the majority opinion, examined above, is even more express in the Tribe Brief, where it emerges as an explicit reason to ignore *Hardwick*.⁶² There are even some echoes that almost sound like borrowing: the Tribe Brief said that Amendment 2 was a "quite literally unprecedented" provision "mak[ing] the full reach of the state's system for making and enforcing laws and regulations available only to *some* of the state's people and not to selected and specified others";⁶³ while the majority opinion concluded that Amendment 2 was "unprecedented in our jurisprudence" because by it Colorado "denie[d homosexuals] protection across the board" and thus made "a class of persons a stranger to its laws."⁶⁴ The Court even seems at one point to have adopted the Tribe Brief's view that Colorado had "*by definition* denie[d] the equal protection of the laws"⁶⁵ when it adopted Amendment 2: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of the equal protection of the laws *in the most literal sense*."⁶⁶

The discontinuities between the Tribe Brief and the majority opinion are also striking, however. First, the opinion treats the Tribe Brief's conclusion that Amendment 2 affects general laws to a chary approach/avoidance ritual in which avoidance ulti-

61. *Id.* at 3 (emphasis added); *see also id.* at 13.

62. *See id.* at 2 ("To recognize that Amendment 2 works a *per se* violation of the Equal Protection Clause requires no benign or even neutral view of what Amendment 2 calls 'homosexual . . . orientation, conduct, practices or relationships. For literally *any* characteristic—even one on the basis of which a state may properly deny benefits or impose disabilities in a wide variety of circumstances—can sometimes become the basis for deprivations that are prejudiced rather than justified . . .") (emphasis added).

63. *Id.* at 12-13.

64. *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

65. Tribe Brief, *supra* note 7, at 3 (emphasis in original).

66. *Romer*, 116 S. Ct. at 1628 (emphasis added).

mately prevails.⁶⁷ Second, it refuses the “per se violation” theory in favor of a holding under rational basis review. Even its objection that Amendment 2 denied “the equal protection of the laws in the most literal sense” appears in the course of the Court’s rational basis analysis: are we to understand that it is irrational to violate the equal protection clause too literally?

Justice Scalia’s dissent builds its central argument on this rupture. If Amendment 2 did not interfere with laws of general application, he reasons, then all it did was prevent Colorado towns and cities from adopting ordinances protecting residents from discrimination based on homosexual orientation, and Colorado agencies from adopting regulatory policies to the same effect; that is, all it did was to allocate the decision whether to provide antidiscrimination protection to the state constitution rather than to localities and executive agencies; and if that were all it did, then it was not “sweeping” at all and the majority’s only reason for holding it unconstitutional must be its substantive quarrel with (or contempt for) the people of Colorado. The majority’s response to this challenge is nothing other than its complex, ambivalent adoption of the Tribe Brief. This internally riven, gappy answer is disturbing, because it would be impossible to justify the opinion if all Amendment 2 did was to allocate a matter of state policy to the state constitution rather than localities and executive agencies.

Justice Scalia insists that Amendment 2 bears only two possible readings: *either* it *merely* invalidates special rights ordinances and regulations *or* it interferes with laws of general application that require government agents to act rationally, to execute their jobs, and so on.⁶⁸ But there are several ways of establishing the middle excluded by Justice Scalia, and at least two of them are indicated by language in Justice Kennedy’s opinion.

Virtually *passim* the majority opinion observes that Amendment 2 made claims of discrimination more difficult to lodge for

67. See *id.* at 1626 (“Amendment 2’s reach *may not* be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, *if not necessary*, inference”); *id.* (“If this consequence flows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties. . . . The state court did not decide whether the amendment has this effect, however, *and neither need we* *In any event, even if, as we doubt*, homosexuals could find some safe harbor in laws of general application”) (emphasis added).

68. See *id.* at 1629-31 (Scalia, J., dissenting).

“homosexuals,” “for this targeted class”.⁶⁹ “[T]he amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”⁷⁰ If the point is obscure in the majority decision, it can only be because it is so diffusely made as to be hidden in plain sight: as one Justice put it at oral argument, “[T]here is a *discrimination in the reservation* of the subject matter.”⁷¹ Amendment 2 does not bar state agencies from recognizing claims of discrimination based on *sexual orientation*, but only claims based on *homosexual orientation*. It follows that Amendment 2 did not *repeal* the antidiscrimination ordinances of Aspen, Boulder, and Denver, and the antidiscrimination regulations governing employment in the executive branch and public higher education, which prohibited any discrimination on the basis of sexual orientation:⁷² it merely carved out of them any protection from discrimination based on *homosexual orientation*. As a doctrinal matter these conclusions, framed out of the case by Justice Scalia, are surely enough to save the majority opinion from accusations that its reading of Amendment 2 provides no basis for an equal protection violation. And there is more than a doctrinal point to be made here: Justice Scalia’s act of forgetting and thus retaining a protection of heterosexual residents is homologous to the *Hardwick* Court’s act of forgetting and thus protecting heterosexual sodomy.

The majority determines that Amendment 2 not only “identifies persons by a single trait” but also “denies them protection across the board.”⁷³ It reaches this conclusion even on the reluctant assumption that Amendment 2 did not interfere with general laws. How can this be?

In her contribution to this volume, Baker offers a plausible rationalist answer based on the text of Amendment 2: the provision denies homosexuals protection “across the board”

69. *Id.* at 1626.

70. *Id.* at 1626-27.

71. Transcript of Oral Argument at 11, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039) (emphasis added).

72. See COLO. REV. STAT. § 10-3-1104 (1994) (“sexual orientation”); ASPEN, COLO., MUN. CODE § 13-98 (1977) (“affectional or sexual orientation”); BOULDER, COLO., REV. CODE §§ 12-1-2(a), 12-1-3(a), 12-1-4(a) (1987) (“sexual orientation”); DENVER, COLO., REV. MUN. CODE art. IV, §§ 28-93(a), 28-94(a) (1991) (“sexual orientation”); Colo. Exec. Order No. D0035 (Dec. 10, 1990) (“sexual orientation”).

73. *Romer*, 116 S. Ct. at 1628.

because it bars any entity of state government from establishing a litigable "claim" involving reference to their sexual orientation.⁷⁴ But there is a more surprising, and more interesting, reading of Amendment 2 located right in the Tribe Brief Gap, where the Court deviates subtly from the vision of Amendment 2's operation offered by the amici. The Court notes with obscure gravity that Amendment 2 inflicts a severe deprivation upon homosexuals "no matter how *local* or *discrete* the harm"⁷⁵—a line that can only be given meaning as a reading of Amendment 2 to permit minute, everyday deprivations. "Local" and "discrete" harms are unlikely to result from the slamming of the courthouse door; their direct causes will emerge in the infinite and infinitesimal locales where people come into contact with the state's executive branch. Whereas the Tribe Brief focuses entirely on the prohibition of "any . . . claim of discrimination," one of the reasons there is a Tribe Brief Gap is the Justices' persistent acknowledgment that the state is barred from making "any . . . policy" as well. The *Romer* majority repeatedly emphasized this element of the enactment: it reads Amendment 2 to "do[] more than repeal or rescind [existing ordinances and express policies]. It prohibits all legislative, *executive* or judicial action *at any level of state or local government* designed to protect the named class . . ." ⁷⁶ It "applies to policies as well as ordinary legislation."⁷⁷ And although the Court declines to say that Amendment 2 interferes with laws of general application, or with administrative determinations of whether general laws can provide homosexuals any systematic protection from arbitrary acts of discrimination,⁷⁸ the Court does not rule out the possibility that low-echelon policy formation, outside the aegis of the few general laws that might apply, would be barred.

74. See Baker, *supra* note 2, at 403-06.

75. *Romer*, 116 S. Ct. at 1627 (emphasis added).

76. *Id.* at 1623 (emphasis added).

77. *Id.* at 1626.

78. See *id.*

At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a determination to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality and so would *appear to be* no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

Id. (emphasis added).

For example, let us suppose a lesbian resident were denied a library card by a clerk who explains her refusal with the words: "Lesbians have no place in a public library." Under the majority Justices' reading of Amendment 2, the staff member would be free to check herself, and reluctantly to issue the card, thinking "discriminating against this person on the grounds of her lesbian status is arbitrary and capricious"; and if she failed to do that the applicant would be free to assert any remedies available in the general laws. But the library supervisor could not anticipate the occurrence or repetition of this incident—no matter how often it happened—by telling staff members not to discriminate on the basis of sexual orientation. The supervisor's memo to library staff would be just as invalid as an executive order. If deprivations of this sort were indeed legitimated by Amendment 2, the harms would indeed be local in the sense that they would affect people one at a time in everyday settings, and discrete in the sense that they would be difficult to discern from a vantage point in the public sphere. They would change people's lives "across the board."

Justice Kennedy concluded that Amendment 2 exposes its target population to "exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."⁷⁹ As he read the provision, it immunizes public agents and private actors to engage in unreviewable, minute acts of discrimination against people they believe to be homosexual. The nominal group of "gays and lesbians" is subjected by Amendment 2 to a kind of civic buckshot: its members need not be excluded from public life, but they *can* be; they can be excluded *en masse* or one by one, out in the open for all to see or in the unobserved minute interactions that make up everyday life.

Amendment 2, as it is read by Justice Kennedy, tracks Michel Foucault's conception of micropower with uncanny proximity. It authorizes not "a general system of domination exerted by one group over another" but a "multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization"; not a rigid institutionalization of domination but a "moving substrate of force relations [that are] always local and unstable."⁸⁰ The "local and discrete

79. *Id.* at 1627.

80. FOUCAULT, *supra* note 45, at 92-93; see also HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 184-97

harms" authorized by Amendment 2 and ungoverned by the general laws provide a vivid example of Foucault's prediction that "[p]ower is everywhere; not because it embraces everything but because it comes from everywhere."⁸¹ Foucault's notion of power as dispersed into and emerging from the most minute social locations may also help to illuminate how profoundly Justice Scalia misreads the "animus" which Justice Kennedy attributes to Colorado's voters. Foucault cautions against looking for malicious individual agents responsible for power relations: "it is often the case that no one is there to have invented them, and few who can be said to have formulated them: an implicit characteristic of the great anonymous, almost unspoken strategies which coordinate the loquacious tactics whose 'inventors' or decision-makers are often without hypocrisy."⁸² And indeed, Justice Kennedy attributes just such a systematic psychological and intentional disengagement to Amendment 2's supporters, whose "across the board" cancellation of trivial securities removes "protections *taken for granted* by most people either because *they already have them or do not need them*."⁸³ He attributes to the voters of Colorado not an animosity "as reprehensible as racial or religious bias"⁸⁴ but a kind of blithe insouciance about the range of their action. I am reminded of the rational basis holding in *Hardwick*, in which an unaccountable, absconding heterosexual speaker occupies a posture of inattentive immunity while it carelessly creates vast networks of vulnerability. To put it bluntly, a popular majority setting out to imitate the *Hardwick* majority might well come up with something like Amendment 2.

Justice Kennedy sets out analytic tools that could be used to dismantle the speech act dynamics of *Hardwick*. Indeed, the same tools can and should be used to critique Justice Scalia's construal of Amendment 2: if the people of Colorado are guilty of eliminating for others protections that they "take[] for granted . . . because they already have them or do not need them," then so are the dissenters. But the majority wields these tools only against Amendment 2: *Hardwick's* textual structure remains intact, and the *Romer* dissenters are treated as the rational,

(2d ed. 1983).

81. FOUCAULT, *supra* note 45, at 93.

82. *Id.* at 95.

83. *Romer*, 116 S. Ct. at 1627 (emphasis added).

84. *Id.* at 1629 (Scalia, J., dissenting).

objective, sexless speakers enacted by the majority. Here is the great silence in the decision, right at the intersection of the *Padula* Gap and the Tribe Brief Gap, right at the nexus of sex and hate that is the legacy of *Hardwick*. Because that silence is part of the world in which we now live, I would just as soon not fill it up.