

The **EQUALIZER** **SALT**

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SALT TREASURER STUART FILLER IS RETIRING Fellowship Fund Established in His Honor

— Pat Cain
University of Iowa
College of Law



For the past 20 years Stuart Filler has processed your SALT membership dues, maintained the SALT budget, warned the Board of Governors against overspending, reserved you a space at the annual SALT dinner and cajoled countless hotels, restaurants and caterers into providing SALT dinners to fit the occasion and into including extra spaces for those of you who made last minute plans. He prepares and files the SALT tax return. He oversees the budget for each SALT teaching conference. And now Stuart is retiring from teaching law and from being the SALT Treasurer. My first reaction to this news was hysteria — who would be willing to take dinner reservations during the AALS meeting up until the day of the dinner? My second reaction was a sense of loss —

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President's Column . . .

A CAREFUL WATCH ON *ROMER v. EVANS*

— Jean C. Love
University of Iowa
College of Law

As I did one year ago, I will devote this President's Column to a discussion of teaching gay and lesbian legal issues. Last year, I focused on *Bowers v. Hardwick*, 478 U.S. 186 (1986). "Talking Sex in the Classroom," SALT Equalizer, August 1994, p. 1. This year, I will feature *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S.Ct. 1092 (1995) [hereinafter *Romer v. Evans*], a case that promises to be every bit as important as *Bowers*.

Romer v. Evans is an equal protection challenge to Colorado's "Amendment 2," a state constitutional amendment that primarily prohibits the recognition of claims of discrimination based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Amendment 2 was adopted through the initiative process in the November 1992 general election by a vote of 53.4% to 46.6%. Enforcement of the amendment was preliminarily, and then permanently, enjoined by the Colorado Supreme Court on the ground that Amendment 2 denies gay men, lesbians and bisexuals the "fundamental right to participate equally

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what would a SALT dinner be like without Stuart's warmth and humor? But Stuart assures me that he will never be more than a phone call away and is happy to advise the Board and the new treasurer as needed. As to the annual dinner, he has found it to be such a rejuvenating event that, should he need an emotional shot in the arm or a supportive feeling of camaraderie, he may well come back.

Many of you may know Stuart only by name. For years, you have sent your dues to him. If you joined SALT before 1978, you would have sent your dues to him at Hofstra, where he began his teaching career. More recently you sent dues to Bridgeport, and now to Quinnipiac. His is the

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name you were given at each AALS meeting if you had not yet made a reservation for the SALT dinner. ("Just call Stuart Filler's room and give him your name.") He was the person stationed at the table at the entrance to the SALT dinner each year, checking your name off the list and giving you a receipt if you asked for one. He will do this job one more time.

For those of you who do not know Stuart well, there are some other things you should know. He is a tax teacher who loves the classroom and who believes his students should know something about how the tax structure and the economic system affects the distribution of wealth and the maintenance of poverty. He started the first major tax clinic in the country. The clinic provided necessary services to low-income taxpayers and encouraged law students who planned to work in commercial areas to learn skills they could not get in the classroom. His students honored him this year for his dedication to teaching. They also voted him to be their graduation speaker.

How did Stuart get into law teaching? "Pure happenstance," he says. He earned his BA and MBA from the University of Michigan and

knew he was interested in tax. A relative at Paul Weiss in New York told him he should get a J.D. and, if he was serious about tax, should go to NYU. He did. From 1969-72, he worked in Washington, D.C. in the Office of the Chief Counsel of the IRS (L & R Division). He had always planned to be a tax lawyer with a major firm. But along the way, he had become friends with Irving and Judith Younger. Judith Younger became associate dean at Hofstra, and in 1971 she called Stuart to ask if he had ever thought about teaching. "No" was his frank response. Dean Younger pushed a bit harder. The young man they had just hired to teach tax had experienced a family tragedy and was needed back home to take care of the family business. Stuart agreed to interview for the job. So, rather than becoming a rich tax lawyer, he became a beloved tax teacher, a decision he has not once regretted. The hardest thing about leaving academia, he says, will be leaving the classroom, the challenge and the interaction with young people.

So why leave? There's no need to retire at age 52, is there? Stuart's answer was: "If ever I was going to do anything different, I felt I'd have to do it now or never." So what is this different thing that he plans to do? Stuart has become an active consultant to Community Development Corporations, which seek federal support for their projects through the use of available tax credits. He has worked on developments for the poor and the elderly and the disabled. His vision is to provide quality maintenance and quality services for those who need something more than mere housing. As he explained these projects to me, I could feel the

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love and care he felt for the people he was helping. "You know," he said, "I should pay them for the privilege of doing this work. I love what I'm doing, I'm doing something I care about, I'm creating something of value for people who need it —

and, on top of this, they pay me to do it. It can't get much better than that."

Since he never became a rich tax lawyer with an expensive lifestyle, he doesn't think that he and his wife Ellen will be needing a lot of money. "And, I'll probably find some way to invest whatever money there is in the community I become part of." That community, for the near future, is likely to be Puerto Rico. This is the part that sounds like retirement — Puerto Rico, a warm climate, the ocean, the beach. But when I asked Stuart to imagine his daily life in Puerto Rico (when he wasn't consulting with CDC's by FAX), he explained: "I imagine there will be some young people there in need of something that I can give. I'll do some sort of volunteer work. I'll become active in projects like the ones I started in Bridgeport — like the Nuestra Casa Del Pueblo (to provide housing) and the Institute for the Advancement and Integration of Persons with Disabilities (to provide residential and vocational services for persons with mental disabilities and to ensure that those services were available to persons of color). I need to be part of the community I'm living in."

In other words, Stuart is not really retiring — as if any of us who know him thought that was really possible. He's just rechanneling his energy into new activities. And if SALT ever needs him, he's only a phone call (or a FAX message) away.

In honor of his many years of service to SALT, and in honor of his pro bono spirit, the SALT Board of Governors passed the following resolution (which Dean Neil Cogan communicated to Stuart and to the Quinnipac community at its commencement ceremony):

"Resolved, that the Society of American Law Teachers honors Stuart Filler for his long term commitment to SALT and to the public interest by establishing the Stuart Filler Fellowship Fund to provide financial support for students who wish to practice public interest law."

The details of this Fellowship Fund will be announced at the SALT annual dinner in San Antonio. We hope to provide one or two stipends a year for summer employment with public interest agencies. Stuart will work with us in setting up the program. We are soliciting funds for this program from SALT members. If you wish to honor Stuart and at the same time contribute to a public interest cause, you should send a check or pledge today.

Make checks payable to SALT.

Send checks to me, Pat Cain, University of

Iowa College of Law, Iowa City, IA 52242 and indicate that they are contributions to the Filler Fund. All contributions are tax deductible. ■



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in the political process." *Evans v. Romer*, 854 P.2d 1270 (1993) (preliminary injunction granted); 882 P.2d 1335 (1994) (permanent injunction granted).

Amendment 2 is a unique constitutional provision. It effectively repeals existing Colorado anti-discrimination laws and policies insofar as they prohibit discrimination against homosexuals and bisexuals, but not insofar as they prohibit discrimination against heterosexuals or any other protected group, such as women or racial minorities. 854 P.2d 1270, 1284 (1993). (In 1992, three cities had ordinances prohibiting discrimination on the basis of sexual orientation; the Governor had issued an executive order prohibiting such discrimination; and at least two state colleges had adopted policies prohibiting such discrimination.) Furthermore, the amendment prohibits any governmental entity in the future from recognizing a

"Romer v. Evans is an equal protection challenge to . . . a state constitutional amendment that . . . prohibits the recognition of claims of discrimination based on . . . sexual orientation . . ."

claim of discrimination based on homosexual or bisexual orientation, conduct, practices or relationships unless and until the state constitution is amended to permit the adoption of such antidiscrimination laws or policies. *Id.* at 1285. Specifically, Amendment 2 provides:

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

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school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

The precise scope of Amendment 2 is a matter of dispute between the parties in *Romer v. Evans*. *Id.* at 1285 n. 25. It clearly alters the jurisdiction of governmental entities in Colorado by barring all levels of government from adopting state or local laws or policies that protect gay men, lesbians and bisexuals from any form of public or private discrimination in any context. Just as clearly, it does not affect the applicability of federal

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law (due to the operation of the Supremacy Clause), and the Colorado courts must therefore continue to exercise jurisdiction over federal claims of discrimination filed by gay people (e.g., § 1983 claims alleging a denial of equal protection). The focal point of the dispute between the parties is the question of whether Amendment 2 alters the jurisdiction of all three "branches" of government, or whether it speaks only to the legislative and executive branches of government. *Id.* A related question is whether Amendment 2 prohibits the adoption of nondiscrimination policies by private companies and other private actors and, if not, whether Amendment 2 bars the enforcement of

such policies by the Colorado courts. *Id.* The Colorado Supreme Court declined to resolve these questions regarding the precise scope of Amendment 2 because the parties agreed that, at the very least, the amendment prohibits "the enactment of anti-discrimination laws by state or local entities." *Id.* That restriction alone, in the eyes of the court, was sufficient to warrant a holding that Amendment 2 infringes upon the fundamental right of gay men, lesbians and bisexuals to participate equally in the political process. *Id.* at 1285.

The plaintiffs in *Romer v. Evans* (people who sought the enactment of antidiscrimination policies through the political process) filed a complaint alleging violations of the Equal Protection Clause on two grounds: 1) Amendment 2 "places unique burdens on plaintiffs' ability to participate equally in the political process"; and 2) Amendment 2 creates a classification that denies to the plaintiffs the equal protection of the laws without rationally advancing a legitimate governmental interest. *Id.* at 1272 n. 2. Under the first prong of their Equal Protection argument, the plaintiffs sought heightened scrutiny; under the second prong, they sought only low-level scrutiny. In addition to their Equal Protection claims, the plaintiffs alleged numerous violations of the First Amendment, including a violation of their right to petition their government for redress of grievances; a violation of their rights to free expression and association; and a violation of the constitutional prohibition against the establishment of religion. They also alleged that the initiative process is a violation of the Guarantee Clause, which guarantees to every state "a Republican Form of Government."

The trial court addressed neither the First Amendment and Guarantee Clause arguments. *Id.* at 1273-74. Instead, both the trial and appellate courts rested their holdings on the "fundamental rights" prong of the Equal Protection claim. *Id.* The trial court originally ruled that there was a "fundamental right not to have the state endorse and give effect to private biases." *Id.* at 1274. The Colorado Supreme Court, at the plaintiffs' urging, modified the characterization of the fundamental right at issue, describing it as a "fundamental right of political participation." *Id.*

The Colorado Supreme Court wove together several strands of prior precedents to fashion the "fundamental right to participate equally in the

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A SALT RETREAT AMIDST BUDDHISTS: RECOLLECTIONS ABOUT A FIRST BOARD MEETING

— Margaret E. Montoya
University of New Mexico
School of Law

Trips have different beginning points for me. This one began with my realization that my husband would be in Montreal at an academic meeting at the same time I would be near San Francisco for the SALT retreat. So, what to do about our daughters, (Diana, about-to-be 13 and Alex, 6 but yearning-to-be-12)? Charles suggested we fly them to Phoenix for a weekend visit with my sister since I was scheduled to fly there from San Francisco to deliver a speech on the following Monday morning. So on Friday afternoon the four of us flew off in three directions.

I got on the plane headed for Green Gulch Farm, hoping that the retreat would be low-key in keeping with the Zen Center's traditions. The materials we'd gotten in the mail contained this tantalizing nugget: "Our effort at Green Gulch is to awaken in ourselves and the many people who come here the bodhisattva spirit, the spirit of kindness and realistic helpfulness."

I arrived at the airport and met up with Judith Resnik and Cynthia Bowman, who had rented a car for the drive up to the Stinson Beach area. The day was rainy and overcast. We arrived in time for dinner, served promptly from 6:05 to 6:40. To delay, we learned, was to miss out on the food. The food served over the three days seemed penitential — eaten in atonement for past caloric and culinary sins. Cooked carrots and seaweed have that effect on me.

Green Gulch is a working farm and a Buddhist retreat house. While we were meeting, there were meditation sessions going on. The participants were dressed in black Japanese kimonos, and there was an air of contemplative solemnity. The quiet that hung over us was soothing. Our meetings were held in a large living room kind of area with overstuffed white sectional sofas arranged in a U-shape. The fire in the wood stove reminded me that the temperature was cooler than I would have preferred in mid-May.

The first session led by Pat Cain involved filling in on a time line our participation in SALT, beginning in the early seventies with Sylvia Law and Jean Love and moving into the mid-90's. Each

of us stepped forward and wrote ourselves into SALT history. It was informative for all of us. Some admitted to not being members until being voted onto the Board of Governors! Sylvia and Jean talked about how the "society" had changed from one made up of men deeply concerned primarily with teaching to one made up of a more diverse membership concerned about teaching but also in the forefront on such issues as pay equity and affirmative action.

We slept in a building in which the dominant feature — floors, walls, banisters, futon frames — was natural wood of a teak-like color and texture. That night I fell asleep by reading the Buddhist primer left on the desk. I remember reading something to the effect that the main objective in Zen Buddhism is to retain the mind set of the beginner, to value and emulate the mentality of the initiate with curiosity but free of judgmentalness. The sentiment seemed particularly salient for law teachers.

The morning sessions began with steaming hot pumpkin bread obviously made during the early hours by the staff. The content of the discussions over the next day and a half blend together

"I remember reading something to the effect that the main objective in Zen Buddhism is to retain the mind set of the beginner, to value and emulate the mentality of the initiate with curiosity but free of judgmentalness. The sentiment seemed particularly salient for law teachers."

in my memory. What remains is the impression of a group of people (and the legal talent in the room was, as Diana would say, awesome) engaged by the details of managing an organization that makes a difference. All could have been doing others things, grading exams, catching up on writing, planting and weeding. That they/we were here and attending to the fairly mundane tasks of running this progressive organization was, for me, an antidote to the reactionary politics blanketing the national scene.

We found time for leisurely, albeit muddy, walks to the beach. Some escaped under the cover of night to find high fat, red meat, processed sugar,

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and white flour menus. We talked late into the night, healing our souls and charging our psychic batteries. The sessions featured spirited discussions followed by consensual decision-making. There was trust among the group and a willingness to listen. Perhaps SALT meetings are always like this or maybe there's a lesson here about meet-

"We talked late into the night, healing our souls and charging our psychic batteries. The sessions featured spirited discussions followed by consensual decision-making. There was trust among the group and a willingness to listen."

ing places and spaces. The AALS should engage Stephanie Wildman and the Zen community to plan the national meetings.

On Sunday, Cynthia and I left for the San Francisco airport. On arriving, Cynthia discovered she had left her airline tickets and other irreplaceables at Green Gulch. With a lump in her throat, she called the number on the pamphlet in our materials, what we assumed was the outdoor pay phone we had used. Someone answered and she agreed to go look for the missing totebag. Meanwhile we headed for the United ticket counter to negotiate with the clerk. Cynthia again called Green Gulch. The totebag had been found, the ticket number was read to the clerk for issuance of a new ticket, and assurances were given that the totebag would be Federal Expressed the next day.

Green Gulch's pamphlets had described its "spirit of kindness and realistic helpfulness." Cynthia and I were certainly made believers. Thanks, Stephanie, for locating the meeting where we could reflect on what should matter more in our lives. ■

Green Gulch Farm Zen Center, 1601 Shoreline Hwy., Sausalito, CA 94965. (415) 383-3134. Green Gulch Farm is a Buddhist practice center in the Japanese Soto Zen tradition offering training in Zen meditation and ordinary work. It is one of three centers that make up the San Francisco Zen Center which was founded by Shunryu Suzuki-roshi. Green Gulch is located just north of San Francisco in a valley opening out onto the Pacific Ocean. It is an organic farm and garden, as well as a guest and conference center.

SALT BOARD MEETS FOLLOWING TWO-DAY RETREAT

— Joyce Saltalamachia
New York Law School

With eighteen stalwart Board members gathered in a circle around her in the canvas-topped yurt, co-President Pat Cain ceremoniously called the group to order by banging on a large Buddhist gong. It was a fitting start to the Board meeting, which followed a two-day retreat in the peaceful surroundings of Green Gulch Farm.

NOMINATIONS COMMITTEE

After talking about the future of SALT for two days, it was somewhat of a relief to sit down and discuss the *present* state of SALT. The first item of business was to elect members to the Nominations Committee. The Committee is charged with nominating individuals to fill annual vacancies on the rotating SALT Board of Governors. The new Committee is chaired by Liz Schneider and consists of Art Leonard, Juan Perea, Judy Scales-Trent, Phoebe Haddon and Angela Harris. The Board then discussed our nominations process and the qualities that we looked for in SALT Board members. All agreed that we are looking for people with a history of activism who are committed to the spirit and practice of collective work. The Board seeks to be a diverse group of engaged leaders from affiliated groups who are willing to commit the time to make a contribution to the goals of SALT. Elections for the Board are normally held each November, with new Board members taking office at the annual Teaching Awards dinner in January.

FIRST MONDAY

Ann Shalleck reported on behalf of SALT's "First Monday" Committee, which had worked with the Alliance for Justice in last year's national effort to organize a new progressive agenda. Ann reported that law schools had reported experiences of varying quality. The Alliance now wants to change the structure of the event to eliminate the formal regional meetings but to continue producing the video. Schools wishing to have activities could plan them around a showing of the video, since that proved to be the most popular attraction from last year. Again, the Alliance is looking for SALT support, both in the area of funding and in the area of working on programs. There was discussion about the advantages of participating in

the "First Monday" effort, particularly for our students. Board members felt that this was a valuable concept, but wanted to focus on encouraging a wider number of schools to join in. While we realize that our significance is not so much in the financial support we can give, we felt that it was nonetheless important for SALT to contribute something to the effort. It was decided that we contribute \$2,500 directly to the Alliance, and make available another \$2,500 to distribute to our own members who want to organize events at their schools. Ann Shalleck, Margaret Montoya and Pat Cain agreed to form a Committee to work with Nan Aron and the Alliance for Justice on this project. [See Ann's article on page 11 herein.]

PUBLIC POSITIONS

Two issues were brought to the Board which required decisions about SALT support. Larry Tribe had contacted Pat Cain to ask SALT to join in on a brief he is writing for *Romer v. Evans*, currently before the U.S. Supreme Court. The Colorado Supreme Court had previously declared that state's Amendment 2 to be unconstitutional and the state has appealed this ruling to the U.S. Supreme Court. The Tribe brief would argue that Amendment 2 is a violation of Equal Protection *pro se* because it prevents the state from providing any protection to a group. The Board decided to deputize Pat Cain to read the brief when completed and sign on for SALT if she felt that it was appropriate. [See Pat's article on page 10 herein.]

Nadine Taub raised the possibility of SALT members signing on as individuals to the brief in *Sheff v. O'Neil*, which concerns school desegregation in Hartford, Conn. The reason that she did not ask that SALT sign on as an organization was that no one had actually seen the brief at that time. Harlon Dalton expressed the hope that we would have enough time to study the brief and sign on as a group. Harlon and Pat Cain were then deputized to read the brief to determine if SALT should sign on.

NEW BUSINESS

Margaret Montoya talked about plans for the first Southwest Indian Law Clinic Conference, November 18-20, which will focus on issues concerning Indian law clinics. She described the conference as one which is seeking a different structure and voice, and suggested that SALT might want to send observers in order to find a new model for future conferences. There was a discussion about the possibility of SALT sponsorship and

financial support. The Board agreed to send several interested members and to contribute \$500 for scholarships for Native American attendees. [See accompanying article below.] ■



Indian Law Teaching, In and Out of Clinics

November 16, 17 and 18, 1995

*University of New Mexico
School of Law*

An Indian Law clinical conference, the first of its kind, will be held in Albuquerque, New Mexico. The conference will focus on the history and the promise of Indian Law teaching in the clinical and traditional classroom settings. The conference will begin with a half-day session for clinicians in which the methodologies of story-telling, role-playing, videotaping, and collaborating will be explored.

The next day will feature panels of distinguished educators discussing the philosophies and visions of Indian Law clinics, descriptions of existing programs, relationships of law schools/universities with tribes, Indian clients and organizations, and international groups.

The panels on the final day will examine the teaching of Indian perspectives and will conclude with case studies from clinic files raising issues such as customary law, membership, status, ethics and language.

The conference will begin at the Isleta Pueblo and move to the Indian Pueblo Cultural Center. Native American drummers, poets, writers and artists will participate in scheduled activities throughout the three days.

The registration fee will be \$125. For more information, please contact Professors Christine Zuni (505-277-5265 or zuni@law.unm.edu), Margaret Montoya (505-277-3010 or montoya@law.unm.edu) or Gloria Valencia-Weber (505-277-4101).

SALT'S AGENDA

With the leadership and perspectives of current co-presidents **Pat Cain** and **Jean L...** past president (and member for more than 20 years) **Sylvia Law**, and president-elect **Linda Greene**, the SALT Board has sought to establish our agenda for the close of the millenium.

IN LEGAL EDUCATION

- **Creating and Maintaining a Diverse Law Faculty**
Fund and publish studies on faculty diversity. Develop more effective network and referral services, working closely with AALS sections and other interest groups. Monitor hiring efforts at problem schools. Publish a "fame" and "shame" list of law schools that takes account of faculty diversity. Consider focused actions and protests.
- **Enrollment of Minority Students and Lowering of Attrition Rates**
Fund and publish studies of enrollment and graduation rates. Identify schools with successful outreach programs and share successful tactics with SALT members at other schools. Promote the development of academic support programs (and the first-class citizenship of their directors).
- **Teaching With a Progressive Agenda**
Continue to present regional conferences, focusing on classroom use of materials that are responsive to current societal concerns as well as on other professional concerns. Provide a SALT network for teachers who are developing cutting-edge teaching materials. Increase our outreach to clinical teachers, especially during this funding crisis facing clinical programs and legal services programs generally. Continue to present our annual SALT Teaching Awards. Regularly publish case book reviews.
- **Development of Public Interest Curricula (and Programs and Events)**
Survey law school curricula. Profile the best public interest offerings. Maximize joint efforts with other organizations, e.g. Alliance for Justice, National Association for Public Interest Law, National Lawyers Guild. Continue to present Cover Conferences and consider regional conferences to ease accessibility.
- **Mentoring Colleagues in Professional Development**
Assist SALT members with the tenure (and salary) process. Review manuscripts and help with article placement. Encourage progressive work, yet prepare younger colleagues for subsequent marginalization. Revise current Annual Salary Survey to include ethnic/gender salary data.
- **Provide a Support Community for One Another!**

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Representing nearly 900 law professors nation-wide, we have been a major, influential voice within legal education, and we now have the potential, greater than ever before, to guide the direction of national debates on law and public policy.



We seek
your expertise,
your participation
and
your support.

IN THE LARGER ARENA

Addressing Policy Matters Which Directly Affect the Academy or Which, More Generally, Involve Issues of "Equality, Diversity or Academic Freedom."

Continue to speak out on, for example, the future of affirmative action, AALS non-discrimination policy regarding recruiters on campus, clinic funding, judicial nominations, Colorado's Amendment 2, California's Proposition 187, abortion rights, school desegregation, health reform legislation.

- Draft amicus briefs
- Issue position papers, policy statements and press releases
- Lobby Congress and state legislatures
- Make media appearances
- Testify before legislative bodies
- Organize letter writing campaigns

INTERNALLY

Seek Greater Membership Involvement and Organizational Productivity

- Improve Board / membership dialogue
- Computerize communications among members
- Develop more active committees and interest groups
- Build grassroots support, perhaps through regional vice-presidents
- Consider permanent staff position ("administrative assistant" / "executive director")
- Connect with more student groups



UPDATE ON SALT AMICUS BRIEFS

— Pat Cain
*University of Iowa
College of Law*

Jane L. v. Bangerter (abortion rights). At the trial level in Utah, public interest lawyers successfully challenged portions of the 1991 Utah abortion law. Despite their partial success on the merits, the trial judge ordered the plaintiffs to pay more than \$50,000 of defendant's attorneys' fees. The judge treated the separate legal theories in the case as distinct claims and ruled that the claims based on the 13th amendment (involuntary servitude), the 14th amendment (equal protection) and the establishment clause were "frivolous." See 828 F. Supp. 1544 (1993). SALT filed an amicus brief in this case, currently on appeal before the 10th Circuit. SALT thanks Professor Eileen Kaufman (Touro) for writing the brief.

Romer v. Evans (lesbian and gay rights). Final briefs were submitted to the Supreme Court on June 19 in this important civil rights case, challenging the anti-gay initiative (Amendment 2) in Colorado. [See Jean Love's article on page 1 herein.] The Colorado Supreme Court held the amendment unconstitutional because it denies gays and lesbians the right of equal participation in the political process. There were four amicus briefs submitted on the equal protection issues in the case, one arguing that the amendment fails the rational basis test, one arguing that sexual orientation deserves heightened scrutiny, one arguing that the amendment is a per se violation of the equal protection clause, and one arguing that gays and lesbians constitute an "independently identifiable group" for equal protection purposes apart from their common interest in antidiscrimination laws. SALT joined this latter brief prepared by Stephen Bomse of San Francisco and law professors Frank Michelman and Martha Minow of Harvard. The SALT statement of interest states, in part, as follows:

The SALT Board of Governors has worked with other legal education groups to monitor the status of lesbians, bisexuals and gay men in legal education. Because of concerns about discrimina-

tion, SALT encouraged the Association of American Law Schools (AALS) to amend its Bylaw 6-4 prohibiting discrimination on the basis of race, color, religion, national origin or sex, so as to include sexual orientation (as well as age, handicap or disability). At least two AALS law schools in Colorado are affected by amendment 2. The University of Colorado and the University of Denver, as political subdivisions of the state, would be prevented under amendment 2 from prohibiting discrimination against their lesbian, bisexual and gay students, staff and faculty. SALT believes that it is essential to quality legal education that all persons in an institution, including lesbian, gay and bisexual persons, be assured that they will not be the victims of prejudicial, hateful or hostile actions.

The Hartford (Connecticut) desegregation case. SALT Board member Harlon Dalton is coordinating SALT participation on an amicus brief in this case. ■



**If you, your
clinical colleagues
or
progressive members
of the bar
are engaged in
litigation
involving issues
of "equality, diversity
or academic freedom",
let us know. An amicus
brief from SALT could
make the difference.**

SALT to Co-Sponsor FIRST MONDAY 1995 Fighting for Justice in the 1990s

Plans are underway for this year's *First Monday*, a nationwide event dedicated to celebrating the public interest law movement and sparking enthusiasm about the role of lawyers in ensuring equal justice for all. It has been a tumultuous year for our system of justice. The Supreme Court issued stunning pronouncements that undermine established civil rights and civil liberties and threaten to turn the clock back on eradicating discrimination and advancing equal opportunity. Meanwhile, on Capitol Hill, draconian budget and legislative proposals portend the erosion of legal services for the poor and important environmental, consumer and workplace protections upon which we all rely.

SALT will once again be a co-sponsor of this important annual event. With the theme of "Fighting for Justice in the 1990s," *First Monday 1995* will take place on October 2 to coincide with the opening of the Supreme Court's 1995-96 term. Additional co-sponsors include the National Association for Public Interest Law (NAPIL), the National Lawyers Guild (NLG) and the American Bar Association's Law Student Division. The Alliance for Justice will serve as the event organizer.

First Monday 1995 will focus on organizing within our community — lawyers, law students, law faculty, and other advocates — to create a network that will fight to ensure justice for all. Rather than lamenting the setbacks of the last year, we will explore ways to effect progressive change.

The success of *First Monday* lies in its unique format: a national presentation around which participants build their own local programs. *First Monday 1995* will consist of a 30-minute, nationally-oriented video, produced by Abby Ginzberg, spotlighting pioneers in the "fight for justice." After Representatives Barney Frank (D-MA) and Eleanor Holmes Norton (D-DC) discuss the overall climate for progressive action, Ralph

Nader and other advocates will talk about the need for new strategies.

Vignettes showing the inspiring and novel work of lawyers advancing social justice in the 1990s form the core of the video. It features a lawsuit in California successfully challenging conditions at Pelican Bay, a prison initially lauded for its high-tech design and modern approach to incarceration; a recent law graduate using a range of advocacy tools to halt rampant home equity fraud against poor and elderly residents of Los Angeles; a statewide organizing campaign for handgun control in Maryland; and organizers and litigators involved in Justice for Janitors, a national, state and local advocacy campaign to achieve wage equity for janitors.

Participating law schools will design their own local programs, with support from the Alliance for Justice and SALT. The SALT Board encourages members, working with student groups, placement offices, or local advocacy organizations, to plan an event. In addition to making a contribution to the creation of the video, the SALT Board is making funds available to assist schools without resources to organize their activities. Ann Shalleck, Pat Cain, Margaret Montoya and Cynthia Bowman are on the SALT Committee coordinating our participation. You should contact any one of them for ideas or encouragement. Exciting and manageable events are not difficult to produce. The Alliance for Justice is asking participating schools to contribute \$25 towards the costs of producing and distributing the video. If you need funds for your event, write or call Ann Shalleck at American University, Washington College of Law, (202) 885-2658.

For more information on *First Monday 1995*, contact the Alliance for Justice at (202) 332-3224 (phone), (202) 265-2150 (fax), or HN5866@hand-snet.org (e-mail).

See you on October 2! ■

political process," including 1) cases that struck down preconditions on the exercise of the fundamental right to vote [e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (annual \$1.50 poll tax on all residents over 21)]; and 2) cases that struck down constitutional amendments enacted through the initiative process which sought to limit the ability of independently identifiable groups to have desired legislation enacted or implemented through the normal political processes [e.g., *Hunter v. Erickson*, 393 U.S. 385 (1969) (Akron, Ohio charter amendment repealing a fair housing ordinance and requiring that any future ordinance regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry must first be approved by a majority" of the voters) and *Reitman v. Mulkey*, 387 U.S. 369 (1967) (California constitutional amendment repealing the state's fair housing laws and prohibiting the state in the future from denying "the right of any person [to] decline to sell, lease or rent [real property] to such person or persons as he, in his absolute discretion, chooses," thereby making private discrimination "immune from legislative, executive, or judicial regulation at any level of the state government")]. The Colorado Supreme Court held that, when considered together, these cases stand for the "principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." 854 P.2d at 1279.

In selecting strict scrutiny as the appropriate standard of judicial review, the Colorado Supreme Court did not rely on the ground that there was a "fundamental right" at issue. Presumably the court shied away from that explanation because it realized that the fundamental right at stake was not explicitly mentioned in the text of the Constitution, and therefore intermediate level scrutiny might seem more appropriate under certain prior precedents [see, e.g., *Plyer v. Doe*, 457 U.S. 202 (1982)]. Rather, the court rested its selection of the strict scrutiny standard on the fact that the presumption of constitutionality is "based on the assumption that the institutions of state government are structured so as to represent fairly all of the people" and, when the challenge to a statute "is in effect a challenge of this basic assumption," as "when participatory rights are at issue," the assumption can "no longer serve as the basis for presuming constitutionality." *Id.* at 1277 n. 9. In

other words, the Colorado Supreme Court accorded the same type of "close scrutiny" to classifications burdening the implied fundamental right to participate in the political process as the United States Supreme Court accorded to classifications burdening the "precious," but implied, fundamental right to vote in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Both fundamental rights are of paramount importance because they ensure that all voters' voices will be heard in our democratic system of government.

After the Colorado Supreme Court had found a "new" fundamental right to participate in the political process, and after it had decided that any classification infringing upon that right should

"The Colorado Supreme Court held that . . . laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest."

be subjected to strict scrutiny, it turned to the facts of the case before it. First, the court had to determine whether Amendment 2 actually did burden the exercise of the fundamental right at issue. The defendants argued that the plaintiffs continued to have the ability to participate in the political process because the plaintiffs could overturn Amendment 2 by using the very same initiative procedure that the defendants had invoked successfully when they obtained the enactment of Amendment 2. Additionally, the defendants reminded the court that state and local governments have no duty to enact anti-discrimination laws and that any governmental entity that has enacted such laws may modify or repeal them. Finally, the defendants emphasized that there is no "right to successful participation" in the political process. 854 P.2d at 1285.

Without rejecting any of these propositions, the Colorado Supreme Court nevertheless held that Amendment 2 burdens the plaintiffs' fundamental right to participate in the political process because the constitutional amendment "alters the political process so that a targeted class is prohibited from obtaining legislative, executive and judicial protection or redress from discrimination

absent the consent of a majority of the electorate through the adoption of a constitutional amendment." *Id.* Although the court did not cite to *Washington v. Seattle School Dist. No. 1* 458 U.S. 457 (1982) (holding that the initiative 350, a state constitutional amendment intended to curb mandatory busing plans adopted by local school boards, denies equal protection to racial minorities), it could have found support for its position in the following quote from that case:

[The Initiative] works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decision-making authority over the question at a new and remote level of government . . . [O]ne group cannot be subjected to a debilitating and often insurmountable disadvantage. 458 U.S. at 438-484.

The Colorado Supreme Court's holding that Amendment 2 "burdens" unequally the rights of gay men, lesbians and bisexuals to participate in the political process is premised on two features of the text of the amendment. First, Amendment 2 is worded *specifically* so as to withdraw from state and local control *only* the issue of discrimination against homosexuals and bisexuals. It is *not* worded *generally* so as to "withdraw anti-discrimination issues as a whole from state or local control." *Id.* See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (majority interprets the constitutional amendment at issue as a "specific" law; dissent interprets the same constitutional amendment as a "general" law). Second, Amendment 2 is a constitutional provision that *explicitly* targets a *minority* group—namely, people who claim discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* This feature of Amendment 2 makes it an even stronger case for an equal protection challenge than *Hunter v. Erickson*, 393 U.S. 385 (1969), where the Supreme Court struck down a charter amendment that required prior voter approval of any future fair housing ordinance prohibiting discrimination "on the basis of race, color, religion, national origin or ancestry." Before the Court could rule that the charter amendment was invalid under the Equal Protection Clause, however, it first had to determine that the intent of the ordinance was to burden "racial minorities" and other "minority" groups. *Id.* In *Romer*, by contrast, the intent to burden a

minority group appears on the face of the constitutional amendment. As a result, the Colorado Supreme Court was able to quickly conclude that Amendment 2 "expressly fences out an independently identifiable group." 854 P.2d at 1285.

The second question that the Colorado Supreme Court had to resolve was whether Amendment 2 could survive strict scrutiny. The defendants' first asserted governmental interest was "in protecting the sanctity of religious, familial

"In Romer, . . . the intent to burden a minority group appears on the face of the constitutional amendment."

and personal privacy." 822 P.2d 1334, 1342 (1994). Given the First Amendment, the court said: "There can be little doubt that ensuring religious freedom is a compelling state interest." *Id.* However, the court found that Amendment 2 was not a "narrowly tailored" means to that end because an "equally effective, and substantially less onerous, way of accomplishing that purpose would simply be to require that anti-discrimination laws which include provisions for sexual orientation also include exceptions for religiously - based objections." *Id.* at 1343.

With respect to familial privacy, the court acknowledged that parents have a "constitutionally protected [liberty] interest in inculcating their children with their own values," but the court was unaware of any authority "holding that parents have a corresponding right of ensuring that government endorse those values." *Id.* Therefore, although familial privacy might be a compelling state interest in some contexts, it was not in fact a justification that supported the enactment of Amendment 2. *Id.* at 1344.

Finally, with regard to personal privacy (which the court interpreted to mean "associational privacy"), the court recognized that "preserving associational privacy" might "rise to the level of a compelling state interest," but Amendment 2 was not "narrowly tailored" to accomplish that objective. *Id.* First, Amendment 2 affects the adoption of nondiscrimination policies in the public sphere (e.g., employment) as well as in the private sphere (e.g., housing). Second, to the extent that antidis-

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crimination laws protecting gay people might implicate associational privacy rights, "a narrower way of avoiding this conflict would be to exempt the sort of intimate associations [at issue here]" by recognizing such exemptions to the anti-discrimination laws as the owner-occupied exemptions that often appear in fair housing legislation. *Id.* at 1345.

The defendants' second asserted governmental interest was a desire to confine the scope of civil rights laws so that state and local governments could "focus government's limited resources upon those circumstances most warranting attention," such as "combatting discrimination against suspect

"... [C]ases which have held that a constitutional amendment may not be used to restructure the political process so as to fence out an 'independently identifiable group' have all been litigated by plaintiffs who were members of racial minority groups . . . [R]espondents . . . are asking the Court to construe these precedents broadly - to . . . [include] any 'independently identifiable group.'"

classes." *Id.* The Colorado Supreme Court responded to this argument by saying: "It is well - settled that the preservation of fiscal resources, administrative convenience and the reduction of the workload of governmental bodies are not compelling state interests." *Id.* Furthermore, the trial court found that protecting gay people from discrimination under the laws enacted by three Colorado cities and by a few other states "has not increased costs or impaired the enforcement of other civil rights statutes or ordinances." *Id.* at 1346.

The defendants' third asserted governmental interest was achieving statewide uniformity and deterring factionalism "through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government." *Id.* at 1348. More specifically, they argued that "the deeply divisive issue of homosexuality's place in our society" would "frag-

ment Colorado's body politic" unless "city-by-city and county-by-county battles" over the issue were eliminated. *Id.* The Colorado Supreme Court rejected the argument that "deterring factionalism" rises to the level of a compelling state interest. *Id.* Quite to the contrary, the court thought that the First Amendment cases prohibiting content-based or viewpoint-based restrictions on free speech precluded the state from arguing that it has any legitimate interest "in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or 'factionalism'." *Id.*

The petitioners in *Romer v. Evans* have phrased the issue before the United States Supreme Court as follows: "Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections." Brief for Petitioners at p.i. Thus, there are two key questions before the Court. First, is there a "fundamental right to participate in the political process." Second, if there is such a right, may it be invoked by anyone other than members of a "suspect class," such as racial minorities. The problem for the respondents is that those cases which have held that a constitutional amendment may not be used to restructure the political process so as to fence out an "independently identifiable group" have all been litigated by plaintiffs who were members of racial minority groups. *e.g., Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).

The petitioners are asking the Court to construe these precedents narrowly—to interpret them as cases in which the Court invoked the "fundamental rights" doctrine to shore up its decision to apply strict scrutiny to constitutional amendments that did not contain facial classifications that expressly burdened racial minorities. The respondents, on the other hand, are asking the Court to construe these precedents broadly—to interpret them as cases in which the Court struck down constitutional amendments designed to lodge the decisionmaking authority over anti-discrimination legislation at a "new and remote level of government" in order to fence out any "independently identifiable group." We probably won't find out who prevails until this time next year, but I'll bet you can guess how I'd like the case to come out! ■

NEW DEFENSE DEPARTMENT REGULATIONS PRESERVE "SUB-ELEMENT" EXEMPTION

— Arthur S. Leonard
New York Law School

On May 30, the Defense Department (DoD) published an "interim rule" to implement Section 558 of the National Defense Authorization Act for Fiscal Year 1995 (Pub. L. 103-337) (See 60 Fed. Reg. 28050.) Section 558 forbids the Defense Department from spending any of its appropriations at institutions of higher education that bar military recruiters. After this ban was enacted last year, there was considerable suspense about whether the Defense Department would suspend research funding and other financial assistance to universities whose law schools barred military recruiters in compliance with AALS requirement. The suspense has been lifted — at least temporarily — because the interim rule preserves the carve-out for law schools that had been contained in earlier policies.

Ever since anti-war protesters disrupted recruitment activities during the Vietnam War era, Congress has regularly included in DoD appropriations bills a ban on funding institutions that forbid recruitment. The DoD has long interpreted these restrictions as applying only to the unit or "sub-element" of an institution that bans military

recruiters. Thus, law schools, which would rarely be in the position of receiving DoD funding, could ban discriminatory employers (including DoD) without posing any danger either to continued Defense funding for research in other departments or to military scholarship assistance for students in other parts of the university.

U.S. Representative Gerald Solomon (R.-NY), author of Section 558, which is referred to as the Solomon Amendment, has stated that he intended his amendment to eliminate the "sub-element" exemption, but DoD evidently has decided not to interpret it that way. Section 216.4(a) of the interim rule, which when made permanent would be codified at 32 CFR part 216, provides: "This prohibition on use of DoD funds applies only to sub-elements of an institution of higher education that are determined to have such a policy or practice."

Rep. Solomon introduced legislation in the current Congress intended to do away with the "sub-element" exemption and extend the ban to all federal funding, not just Defense funding, but his bill has not yet moved out of committee.

The Defense Department set a July 31st deadline for receiving written comments on the new regulations. Belated comments might still find an audience, however, and should be directed to the Director for Accession Policy, Office of the Assistant Secretary of Defense for Force Management Policy, 4000 Defense Pentagon, Washington, D.C. 20301-4000. ■

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