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SYMPOSIUM: ROMER v. EVANS*

ROMER v. EVANS AND INVIDIOUS INTENT

Andrew Koppelman**

In this Essay, Professor Koppelman argues that, notwithstanding numerous scholarly claims to the contrary, the Supreme Court's decision in Romer v. Evans was based on the invalidated law's impermissible purpose.

Professor Koppelman examines the Court's understanding of the Fourteenth Amendment, and concludes that its current doctrine is designed to ferret out unconstitutional intent. Such impermissible intent, Koppelman argues, was evident in the law challenged in Romer. Nonetheless, Koppelman acknowledges, Romer is a hard case, and its precedential significance is unclear, particularly in light of Bowers v. Hardwick, which upheld the constitutionality of laws against homosexual sodomy. Laws that facially disadvantage gays, he argues, will always reflect both impermissible prejudice and permissible moral judgments.

* * *

I. INTRODUCTION

Laws that discriminate against gays will always be demonstrably rational, because such laws will always further the state's legitimate moral objection to homosexual sodomy. Thus teaches *Bowers v. Hardwick*.¹ Laws that discriminate against gays will always be constitutionally doubtful, however, because

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** Assistant Professor of Law and Political Science, Northwestern University. An earlier draft of this Essay was presented at the Association of American Law Schools Annual Meeting, January 1997. For helpful comments, I am grateful to the audience and to my fellow panelists, especially Akhil Amar. Douglas Laycock also provided useful comments on an earlier draft, and I have benefited from conversations with Robert P. George, Lino Graglia, Samuel Issacharoff, and Cass Sunstein. Thanks, also, to Madeline Morris for her assistance, long ago, with my research into the lower federal courts' use of the intent test. It has finally borne fruit. Finally, this Essay is gratefully dedicated to the members of the ReligionLaw list on the internet, with whom I argued the merits of *Romer* in the days after it was handed down; this Essay grows out of what I wrote then, and attempts to address objections that were raised there. A disclosure: during the trial in *Romer*, I advised the plaintiffs' attorneys and agreed to be listed as a potential expert witness on the plaintiffs' side, but was never called to testify.

¹ 478 U.S. 186 (1986).

they will always arouse suspicion that they rest on a bare desire to harm a politically unpopular group. Thus teaches *Romer v. Evans*.² Both of these teachings are coherent, and neither of them is necessarily inconsistent with the other. They leave the courts, however, with a doctrinal dilemma that has no obvious solution.

In order to sustain this claim, I must defend the reading of *Romer* just stated. This puts me into a thicket of constitutional argument. The scholarly reaction to *Romer v. Evans* has been remarkable. The Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment was violated by an Amendment to the Colorado Constitution that prohibited antidiscrimination protection of gays, because "the amendment seems inexplicable by anything but animus toward the class that it affects."³ The Court's inference of unconstitutional animus was central to its holding, but almost no scholar who has read the opinion has been willing to believe that this was what really was going on.

Some think that the Court was *sub silentio* following the Colorado Supreme Court's theory that the Amendment impaired gays' "right to participate equally in the political process."⁴ Ronald Dworkin and Robert Bork, who rarely agree,

² 116 S. Ct. 1620 (1996).

³ *Id.* at 1627.

⁴ *Evans v. Romer*, 854 P.2d 1270, 1285 (Colo. 1993). The losing counsel in the case so reads it. See Timothy M. Tymkovich et al., *A Tale of Three Theories: Reason and Prejudice in the Battle Over Amendment 2*, 68 COLO. L. REV. 287, 333 (1997). So does Justice Scalia in his dissent.

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others.

Romer, 116 S. Ct. at 1630 (Scalia, J., dissenting). Pamela Karlan is similarly persuaded that "the core of the injury to gays and lesbians concerned the political process." Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 296 (1997); see also Carol M. Swain, *Not "Wrongful" By Any Means: The Court's Decisions in the Redistricting Cases*, 34 HOUS. L. REV. 315, 316 (1997) (endorsing Karlan's reading of *Romer*). For another scholarly reading of *Romer* that comes close to finding this principle in the majority opinion, see Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445 (1997). Zeppos says he is concerned only with statewide laws that thwart the formation of distinctive local political communities, but *all* constitutional restrictions on municipal law do this. For example, the religion clauses of the First Amendment forestall the formation of local theocracies. Note should also be taken here of Caren Dubnoff, who argues that the Court *should* have relied on the theory adopted by the court below. See Caren G. Dubnoff, *Romer v. Evans: A Legal and Political Analysis*, 15 LAW & INEQ. J. 275 (1997).

The difficulty with any argument of this sort is that pointed out by Justice Scalia: [I]t seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (*i.e.*, by the state legislature rather than local government, or by the people at large in the

both think that *Romer* holds that the law may not draw moral distinctions based on the sexual practices of consenting adults.⁵ Cass Sunstein similarly thinks "[t]he underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior."⁶ Daniel Farber and Suzanna Sherry claim that *Romer* stands for a narrowly confined "pariah principle," which "forbids the government from designating any societal group as untouchable."⁷ Others think that the case "discovered a . . . sweeping right for all citizens to be free from all private discrimination," which would imply that any state antidiscrimination law "would be required to include gays (and Republicans, and left-handed people) on the list of protected classes."⁸ Louis Michael Seidman finds a slightly more modest equality principle, under which the state's obligation to protect gays from discrimination "holds only so long as Colorado continues to provide protection for other vulnerable groups."⁹ Still others think that the law's problem is that it singles out a named class to suffer a disadvantage.¹⁰ The editors of

state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection.

Romer, 116 S. Ct. at 1630-31 (Scalia, J., dissenting). Scalia is right to deem this principle "ridiculous," *id.* at 1631 (Scalia, J., dissenting), and it was expressly repudiated by the Court, which declared that it affirmed the judgment "on a rationale different from that adopted by the State Supreme Court." *Id.* at 1624. Professor Karlan concedes that if *Romer* is read this way, one must infer that the decision "awards the victors a quasi-property right in prior political success without ever determining whether that success was a constitutional entitlement or whether the pre-existing system was fair." Karlan, *supra*, at 293.

⁵ See Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. OF BOOKS, Aug. 8, 1996, at 49; ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 112-14 (1996). They disagree about whether the holding in *Romer* is correct.

⁶ Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996).

⁷ Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 258 (1996).

⁸ Editorial, *Taking the Initiative*, NEW REPUBLIC, June 10, 1996, at 8. One reading of the amicus brief filed in *Romer* by Lawrence Tribe and his colleagues would attribute this view to them. See *infra* text accompanying notes 147-49.

⁹ Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 89 n.80. Even this modified principle is not a very modest one, since it would invalidate legislation whose constitutionality seems beyond question. "The Civil Rights Act of 1964 prohibits discrimination based on some characteristics, but not sexual orientation. It seems indisputable that this limitation does not render the Civil Rights Act unconstitutional." Anthony M. Dillof, *Romer v. Evans and the Constitutionality of Higher Lawmaking*, 60 ALB. L. REV. 361, 365 (1996) (footnotes omitted); see also Karlan, *supra* note 4, at 295.

¹⁰ The principal proponents of this view are Akhil Amar and (based upon another reading of their amicus brief) the Tribe group. Their arguments are considered below. See *infra* text accompanying notes 147-49 and 154-61.

the *Harvard Law Review* take a similar line, but stress the nature of the disadvantage: "The Court founded its decision on a rule that legislation making it more burdensome for a single group of citizens to seek the government's protection is a per se denial of equal protection of the laws."¹¹ Richard Duncan and Roderick Hills, who filed briefs on opposite sides in the case, both think that the law was invalidated because it was overbroad.¹² Larry Alexander attempts to understand it as an exercise of ordinary equal protection analysis, though he concedes that under that analysis the result the Court reached is difficult to defend.¹³ To my knowledge, however, no one has been willing to suggest that the Court might have meant what it said: that the Amendment was invalid because of its impermissible purpose.

In this Essay, I will argue that *Romer* is defensible in the terms on which it was decided. The opinion is concededly "puzzling and opaque."¹⁴ There are, as Lynn Baker has observed, "missing pages."¹⁵ I will try to supply those pages and explain why they were absent from the opinion, without throwing away any of the pages that *are* there. I will offer a parsimonious defense of the decision, discarding as little as possible of the reasoning actually set forth by the Court and adding as little as possible regarding what the Court did *not* say.¹⁶

¹¹ *The Supreme Court, 1996 Term—Leading Cases*, 110 HARV. L. REV. 155, 163 (1996) [hereinafter *Leading Cases*] (footnote omitted). This is yet another possible reading of the Tribe group's amicus brief.

¹² See Richard Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 151 & n.24 (1997); Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L. REV. 236, 238 (1996).

¹³ See Larry Alexander, *Better Boring and Correct: Romer v. Evans as an Exercise of Ordinary Equal Protection Analysis*, 68 U. COLO. L. REV. 335 (1997).

¹⁴ Sunstein, *supra* note 6, at 9. Other writers, even those friendly to the result, have been similarly critical of the opinion. See Janet E. Halley, *Romer v. Hardwick*, 68 COLO. L. REV. 429, 429 n.2 (1997) (collecting articles).

¹⁵ Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387 (1997). In attempting to supply those pages, I am not disputing Janet Halley's cogent observation that the Court's silences are themselves significant and deserving of study. See Halley, *supra* note 14, at 388.

¹⁶ These parameters exclude the interpretation of the decision offered by Professor Duncan, who argues that the case was decided on overbreadth grounds. See Duncan, *supra* note 12, at 147, 151 & n.24. Duncan's analysis ignores the fact that the passages emphasizing the Amendment's breadth were only steps in the argument leading to the conclusion that the law's purpose was impermissible. Duncan has nothing to say about the passages throughout the opinion discussing the law's intent. Moreover, it would be hard to defend the opinion on the grounds Duncan offers. Duncan has argued elsewhere that, if the Court had considered only the likely applications of the law, no overbreadth challenge could have been sustainable. See Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345, 353-55 (1997). Finally, Duncan does not attempt to answer the defense of *Romer* that is offered here. He does not dispute that invidious animus

Romer is a case about impermissible purpose. It fits quite comfortably into a body of doctrine that has made the concept of purpose fundamental to the adjudication of equal protection claims. The missing pages can easily be filled in by the reader, who need only take note of the hatred and stereotyping of gays that has been ubiquitous in American culture for a long time. Once this obvious cultural fact is recognized as part of the context in which the Colorado amendment was enacted, the Court's attribution of invidious purpose to the law makes eminent sense.

The filling of this ellipsis has implications that go well beyond *Romer*. The Court's opinion implicitly invokes a defect in the political process that contaminates, at least to some extent, *all* laws that discriminate against gays. That contamination, however, implies that gays ought to be a "suspect class,"¹⁷ and that laws discriminating against gays should be presumptively unconstitutional. The principal doctrinal obstacle to this conclusion is *Hardwick*, which held that a state can have a legitimate moral interest in prohibiting homosexual conduct.¹⁸ *Hardwick* established that a state will always have an innocent explanation for a law that discriminates against gays. *Romer* implicitly recognized that the widespread animus against gays (which is *not* the same thing as moral objection to homosexual conduct) undermines, to an extent that is hard to determine, the credibility of such explanations. The constitutional status of laws that discriminate against gays, therefore, is uncertain after *Romer*.

* * *

Begin by looking at the bare bones of what the Court said in *Romer*. *Romer* involved an amendment to the Colorado Constitution (referred to on the ballot as "Amendment 2"), which provided that neither the state nor any of its subdivisions could prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."¹⁹ In his opinion for

against gays exists and is constitutionally relevant.

¹⁷ I use this term because its use is ubiquitous and it is an obvious way of describing the referent of a "suspect classification," but put it in scare quotes because it is perhaps the most infelicitous locution in constitutional law. Victims of discrimination are not themselves suspected of anything.

¹⁸ See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

¹⁹ The full text of the Amendment follows:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b, *cited in Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996).

the Court, Justice Kennedy observed that the Amendment "has the peculiar property of imposing a broad and undifferentiated disability on a single named group."²⁰ This was unusual, and called for "careful consideration to determine whether [this law was] obnoxious to the constitutional provision."²¹ The State defended the law by citing "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."²² The Amendment, however, was "[n]ot confined to the private sphere."²³ The State also cited "its interest in conserving resources to fight discrimination against other groups."²⁴ The Amendment, however, seemed to "deprive[] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."²⁵ Such a universal license to discriminate against gays "would compound the constitutional difficulties the law creates."²⁶ "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."²⁷

The Court thus felt compelled to "conclude that Amendment 2 classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else."²⁸ The broad disability imposed on a targeted group

raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."²⁹

Romer's rule of decision may thus be summarized as follows: If a law targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest, then the Court will infer that the law's purpose is simply to harm that group, and so will invalidate the law.

²⁰ *Romer*, 116 S. Ct. at 1627.

²¹ *Id.* at 1628 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). It appears that "careful consideration" is a synonym for heightened scrutiny.

²² *Id.* at 1629.

²³ *Id.* at 1626.

²⁴ *Id.* at 1629.

²⁵ *Id.* at 1626.

²⁶ *Id.* The majority opinion argued with Justice Scalia's dissent about whether a saving construction, eliminating the unconstitutional applications, had authoritatively been placed upon Amendment 2 by the Colorado Supreme Court. *See id.*

²⁷ *Id.* at 1629.

²⁸ *Id.*

²⁹ *Id.* at 1628 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

How defensible is this inference? Justice Scalia thought that, far from manifesting a bare desire to harm gays, the Amendment was “rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”³⁰ “The Court’s portrayal of Coloradans as a society fallen victim to pointless, hate-filled ‘gay-bashing’ is so false as to be comical.”³¹

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 conduct³²

The inference of impermissible motive, Scalia thought, was therefore uncalled for. Justice Scalia concluded that the Court’s opinion, “disparaging as bigotry adherence to traditional attitudes,” was “nothing short of insulting.”³³

Whether the Court correctly decided *Romer* (at least, according to the rationale on which the Court relied) would seem to depend on whether the Court’s inference of animus was justified. As Justice Scalia’s response shows, however, any answer to that question is likely to rest on an unspoken response to other, more fundamental questions: Why does motive matter, and what sort of motivation renders a law unconstitutional under the Equal Protection Clause of the Fourteenth Amendment? Only after we have determined just what the “animus” is that is prohibited, and why it is prohibited, can we even begin to determine whether such animus underlay Colorado’s Amendment 2.

Part I of this Essay examines the way in which the Court has understood the Fourteenth Amendment. I shall show that the Fourteenth Amendment analysis that now prevails is best understood as a means of pursuing unconstitutional intent. I then consider the reasons for so understanding the Equal Protection Clause, and how these reasons, in light of certain institutional constraints, justify the present doctrinal structure, which rarely focuses directly on intent.

Part II then examines the way in which the Court decided *Romer*. I will claim that the Court was wrong to say that no innocent explanation could be

³⁰ *Id.* at 1629 (Scalia, J., dissenting).

³¹ *Id.* at 1633 (Scalia, J., dissenting).

³² *Id.* (Scalia, J., dissenting).

³³ *Id.* at 1637 (Scalia, J., dissenting).

offered for the Amendment. The logic that led to the inference of animus was incomplete; there was a gap in the reasoning. Nonetheless, in the context of the widespread hatred and stereotyping that constitutes, in significant part, the stigmatization of homosexuality in contemporary American society, it would have been inappropriate for the Court to apply only minimal scrutiny to a law that on its face singled out gays for special disadvantage.

Part III addresses the problem of reconciling *Romer* and *Hardwick*. I conclude that *Romer* is a hard case because the Court is presented with an unsolvable tangle of permissible and impermissible motives. This difficulty, moreover, is not confined to *Romer*, but is likely to be present whenever a court must adjudicate an equal protection challenge to a law that facially disadvantages gays. Given this tangle, it is unsurprising that the Court did not even suggest in its opinion that, as a general matter, laws discriminating against gays would be subjected to heightened scrutiny. After *Romer*, however, it is clear that minimal scrutiny cannot be the answer, either.

II. HOW AND WHY THE COURT FOCUSES ON INVIDIOUS INTENT

A. *The Court's Equal Protection Analysis*

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."³⁴ The Supreme Court has interpreted this provision as prohibiting arbitrary discrimination, or treating similar things dissimilarly. Without more, this produces a very deferential standard of judicial review. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."³⁵ Because this stress on mere rationality threatens to transform the Clause into a minor protection against legislative carelessness,³⁶ the Clause has been given teeth in cases where the challenged classification is based on race: "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."³⁷ When legislation employs such classifications, "these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."³⁸ This higher level of scrutiny has been justified with the explanation that race is "so seldom relevant to the achievement of any legiti-

³⁴ U.S. CONST. amend. XIV, § 1.

³⁵ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

³⁶ Perhaps not even against that, since any statute's terms suggest a purpose that the statute rationally serves. See Robert Nagel, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

³⁷ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

³⁸ *Cleburne*, 473 U.S. at 440 (1985).

mate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”³⁹ Almost no legislation has been able to satisfy that test, whereas almost any legislation can meet “minimal scrutiny,” which asks whether the statute is rationally related to a legitimate state interest.⁴⁰ In the 1970s, the Court devised a third, intermediate level of scrutiny: classifications based on sex⁴¹ or illegitimacy⁴² are what has been infelicitously called “quasi-suspect;” they “will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.”⁴³ The Court has not, however, explained how it is determined whether a given type of classification is suspect or quasi-suspect.⁴⁴ Moreover, it has been noted that the insistence on a close fit between the means and the end, varying in strictness with the level of scrutiny, has only an indirect relation to the evils of racial oppression against which the Clause was originally enacted.⁴⁵ As for cases in which a law does not overtly employ a suspect classification, but disproportionately harms blacks, the Court has said that there is no constitutional violation unless the legislators were motivated by discriminatory intent.⁴⁶

The prevailing understanding of equal protection builds on the famous footnote four of *Carolene Products*, which declared that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly

³⁹ *Id.*

⁴⁰ See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

⁴¹ See *Craig v. Boren*, 429 U.S. 190 (1976).

⁴² See *Mathews v. Lucas*, 427 U.S. 495 (1976).

⁴³ *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

⁴⁴ See JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 260-64 (1983).

⁴⁵ See Owen Fiss, *Groups and the Equal Protection Clause*, in *EQUALITY AND PREFERENTIAL TREATMENT* 84-123 (Marshall Cohen et al. eds., 1977). It is sometimes argued that this approach to Fourteenth Amendment interpretation is a mistake and is inconsistent with the Amendment’s underlying purposes. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 57-114 (1996). I won’t try to adjudicate this dispute here, but, rather, will take as given the process-based approach that now prevails. *Romer*, I shall argue, can be defended without going beyond that approach.

⁴⁶ See *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985); *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 246-48 (1976).

more searching judicial inquiry."⁴⁷ The Court eventually developed this suggestion into a doctrine:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.⁴⁸

The settled doctrine today is that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."⁴⁹ This view draws its power from the fact that the idea of equality does not entail that any specific substantive right should be guaranteed. John Hart Ely, the leading scholarly exponent of the theory that the Fourteenth Amendment is concerned primarily with prejudice infecting the legislative process, explains that "unconstitutionality in the distribution of benefits that are not themselves constitutionally required can intelligibly inhere only in the way the distribution was arrived at."⁵⁰

Intent, then, obviously plays an important role in at least one part of the Court's equal protection doctrine—the part that deals with suspect classifications.⁵¹ Ely has argued, moreover, that even the formalistic, levels-of-scrutiny approach that applies to suspect or quasi-suspect classifications is best understood as "a handmaiden of motivation analysis."⁵² "Racial classifications that disadvantage minorities are 'suspect' because we suspect they are the product of racially prejudiced thinking of a sort we understand the Fourteenth Amendment to have been centrally concerned with eradicating."⁵³ Even if a challenger cannot prove the discriminatory intent behind a statute,

⁴⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁴⁸ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

⁴⁹ *Washington v. Davis*, 426 U.S. at 240.

⁵⁰ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 145 (1980).

⁵¹ For a long time, confusion reigned as to whether motive mattered at all in determining the constitutionality of a law. The Supreme Court often has stated that legislative motive is not subject to judicial review, but it also has handed down many important decisions that can be explained only in terms of motive. See Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 106-10 (1977). *Washington v. Davis* may have ended this confusion, at least to the extent that it conclusively declared that motivation is relevant. See 426 U.S. at 238-39.

⁵² ELY, *supra* note 50, at 145.

⁵³ *Id.* at 243 n.11.

a classification that in fact was unconstitutionally motivated will nonetheless—thanks to the indirect pressure exerted by the suspect-classification doctrine—find itself in serious constitutional difficulty. For an unconstitutional goal obviously cannot be invoked in a statute's defense. That means, where the real goal was unconstitutional, that the goal that fits the classification best will not be invocable in its defense, and the classification will have to be defended in terms of others to which it relates more tenuously. . . . The "special scrutiny" that is afforded suspect classifications . . . insists that the classification in issue fit the goal invoked in its defense more closely than any alternative classification would. There is only one goal the classification is likely to fit *that* closely, however, and that is the goal the legislators actually had in mind. If that goal cannot be invoked because it is unconstitutional, the classification will fall. Thus, functionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of "flushing out" unconstitutional motivation, one that lacks the proof problems of a more direct inquiry and into the bargain permits courts (and complainants) to be more politic, to invalidate (or attack) something for illicit motivation without having to come right out and say that's what they're doing.⁵⁴

Why should the judiciary think that it is authorized to police the motives of legislative decisionmakers in this way? The best explanation is that of Ely, whose work contributed to "a modest paradigm shift in the analysis of constitutional suspiciousness . . . from a victim perspective (who's getting screwed, and how) to a perpetrator perspective (who made this allocation, and with what incentives)."⁵⁵ Ely is troubled by Alexander Bickel's claim that "judicial review is a counter-majoritarian force in our system" and that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."⁵⁶ Since Bickel, many constitutional theorists have seen their task as reconciling unpopular judicial decisions, such as *Brown v. Board of Education*, with Bickel's "counter-majoritarian difficulty."

⁵⁴ ELY, *supra* note 50 at 146 (footnotes omitted).

⁵⁵ JOHN HART ELY, ON CONSTITUTIONAL GROUND 362 (1996).

⁵⁶ ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2nd ed. 1986).

Ely aspires to develop a constitutional theory in which "the selection and accommodation of substantive values is left almost entirely to the political process"⁵⁷ and judicial review is concerned solely with "what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government."⁵⁸ Ely's answer to Bickel's counter-majoritarian difficulty is to assign to the judiciary only that task with which the legislature cannot be trusted: "the task of keep[ing] the machinery of democratic government running as it should."⁵⁹ The basis of this concern about process is the theory of representative government, which requires

not simply that the representative would not sever his interests from those of a majority of his constituency but also that he would not sever a majority coalition's interests from those of various minorities. Naturally that cannot mean that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to *represent* them, the denial to minorities of what Professor Dworkin has called "equal concern and respect in the design and administration of the political institutions that govern them."⁶⁰

This constraint entails a role for judicial review. Ely concludes that, in order for legislation to be legitimate, the citizens must all "be represented in the sense that their interests are not to be left out of account or valued negatively in the lawmaking process."⁶¹ A law that is generated by a process tainted by prejudice, in which the legislators are biased against or hold stereotyped views of some of their constituents, is unconstitutional. It is for legislatures, not courts, to determine whether a law is in the public interest, but, as Paul Brest has argued,

when the decisionmaker has treated an illicit objective as desirable—as a benefit rather than as a cost or a neutral factor—he has not properly evaluated the "goodness" of the decision. The argument for judicial review of motivation is that it is the court's task to assure, to the limited extent of forbidding the decisionmaker to weigh improper objectives,

⁵⁷ ELY, *supra* note 50, at 87.

⁵⁸ *Id.* (footnote omitted).

⁵⁹ *Id.* at 76.

⁶⁰ *Id.* at 82 (footnotes omitted).

⁶¹ *Id.* at 223 n.33.

that the decisionmaker himself determines that his decision is good.⁶²

B. *Philosophical Underpinnings*

Ely's commitment to "equal concern and respect"⁶³ as a basis for law-making relies on the work of Ronald Dworkin, who has made this commitment the centerpiece of his political theory. Professor Dworkin, however, has never undertaken to demonstrate why government is obligated to endorse this conception of equality.⁶⁴ Nonetheless, the idea has widespread appeal. John Rawls, for example, has recently written that

the deliberative conception of democracy . . . restricts the reasons citizens may use in supporting legislation to reasons consistent with the recognition of other citizens as equals. Here lies the difficulty with arguments for laws supporting discrimination The point is that no institutional procedure without such substantive guidelines for admissible reasons can cancel the maxim "garbage in, garbage out."⁶⁵

The most elegant demonstration that a constitution necessarily embodies certain substantive commitments that demand equal concern and respect for all citizens is that developed by Walter Murphy.⁶⁶

⁶² Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 128. Jane Schacter argues that Ely's process-based theory cannot explain the result in *Romer*, but she takes no account of the theory's focus on unconstitutional motive. See Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 395-98 (1997). Ely's theory is less purely proceduralist than Schacter implies; Ely understands that democracy implies a substantive commitment to the idea that all citizens are equally entitled to concern and respect. For further discussion of this aspect of Ely's theory, see KOPPELMAN, *supra* note 45, at 38-43.

⁶³ ELY, *supra* note 50, at 82.

⁶⁴ See KOPPELMAN, *supra* note 45, at 18 n.22.

⁶⁵ JOHN RAWLS, *POLITICAL LIBERALISM* 430-31 (2d ed. 1996). The relevance of this passage to the analysis of *Romer* has been noted by Cass Sunstein. See Sunstein, *supra* note 6, at 59.

⁶⁶ Rawls's debt to Murphy is particularly clear in his discussion of the possibility that certain constitutional amendments, though enacted through appropriate procedures, may nonetheless be invalid because they are inconsistent with basic constitutional values. See RAWLS, *supra* note 65, at 238-40. Rawls acknowledges that he owes this idea to Stephen Macedo, but does not mention that Macedo reports that he is merely restating an argument devised by Murphy. See *id.* at 238 n.26 (citing STEPHEN MACEDO, *LIBERAL VIRTUES* 182-83 (1990)).

Murphy observes that Constitutional democracy is a hybrid of two political theories—constitutionalism and democracy. Constitutionalism holds that there are some fundamental rights that cannot be violated, even with the consent of the majority. Democratic theory holds that in order for the people to have an obligation to obey the law, they must be in some sense its authors.⁶⁷

Both constitutionalism and democracy imply limits to the scope of legitimate decisionmaking. "When such a polity consciously, seriously, and systematically violates its fundamental principles, it destroys its justification for existence, and public officials lose their authority to speak as agents of the people."⁶⁸ According to constitutionalism, "[a]ny change that would transform the polity into a political system that was totalitarian, or even so authoritarian as not to allow a wide space for human freedom, would be illegitimate"⁶⁹ According to democratic theory, "a people could not legitimately use democratic processes to destroy the essence of democracy—the right of others, either of a current majority or minority or of a minority or majority of future generations, to meaningful participation in self-government."⁷⁰ Both theories presuppose some notion of human worth. That constitutionalism does so is self-evident, but democracy shares the same commitment. "A system that denies human worth cannot claim consent as the foundation of its legitimacy, for what is worthless can confer nothing."⁷¹

Any constitutional democracy, therefore, is committed to "acknowledg[ing] the right of each member to exist as a full human being."⁷² This implies certain relevant process rights. Specifically, every citizen has a right to "treatment as being equal in worth to every other person, whether private individual or public official."⁷³

If Murphy is right, then so long as there are cultural tendencies that devalue certain groups of people and so long as those tendencies are strong

⁶⁷ The two theories are set out in detail in WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 41-53 (2d ed. 1995).

⁶⁸ Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163, 178 (Sanford Levinson ed., 1995).

⁶⁹ *Id.* at 179 (footnotes omitted).

⁷⁰ *Id.* at 178-79 (footnotes omitted).

⁷¹ *Id.* at 180.

⁷² Walter F. Murphy, *Consent and Constitutional Change*, in *HUMAN RIGHTS AND CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF BRIAN WALSH* 143 (James O'Reilly ed., 1992).

⁷³ *Id.* For another transcendental argument favoring equal consideration as a postulate of moral and political reasoning, emphasizing the need to be able to defend social arrangements to all participants in the system, see AMARTYA SEN, *INEQUALITY REEXAMINED* 16-19 (1992).

enough politically to contaminate the process of political decisionmaking, *any* coherent constitution logically must include at least some rights against discrimination. It does not *necessarily* follow, however, that these antidiscrimination rights must be judicially enforceable. As Jeremy Waldron has observed, moral realism does not entail the legitimacy of judicial review unless it can be shown that judges have greater expertise in moral matters than do legislatures.⁷⁴ Nonetheless the decision to embody this kind of antidiscrimination right in the Fourteenth Amendment did entail a commitment to federal oversight of state decisions, and it is easy to see why it should.

The Equal Protection Clause reflects an unmistakable determination that state legislatures are not to be trusted to refrain from engaging in racial discrimination. The drafters of that provision were clear in their intention to establish some means to police state action to ensure that it is not discriminatory. State political processes were not to have the last word on the question whether they were discriminating on the basis of race.⁷⁵

The basis of judicial review under the Fourteenth Amendment is not that federal judges possess any special expertise, but rather, that the legislatures are unable to judge themselves impartially.

C. *The Equal Protection Doctrine at Work*

In practice, the Equal Protection doctrine of unconstitutional motive has given legislatures a great deal of freedom. As noted earlier, motive is often not at issue in Fourteenth Amendment litigation. "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."⁷⁶ In cases in which there is no suspect classification, the Court has constructed a doctrine that makes it exceedingly difficult for plaintiffs to prove discriminatory intent. Successful challenges to state action under the Equal Protection Clause hardly ever depend on a direct showing of invidious intent. Most often, the challenger

⁷⁴ See Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 158, 180-82 (Robert P. George ed., 1992).

⁷⁵ David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 985 (1989); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁷⁶ *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979). It should be noted, however, that this statement is immediately preceded by the following: "Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm." *Id.*

points to objective facts from which bad intent is inferred. *Romer* is unusual only in that the Court plainly indicated that it relied upon an inference of bad intent.

Absent a suspect classification, Ely thought, "it will be next to impossible for a court responsibly to conclude that a decision was affected by an unconstitutional motivation whenever it is possible to articulate a plausible legitimate explanation for the action taken."⁷⁷ This is because, inasmuch as laws are never enacted with only one motive, "courts will be unable to determine—as between a rational and otherwise legitimate explanation for a choice and an unconstitutional explanation—which one in fact motivated the choice."⁷⁸ Ely resists the conclusion, occasionally endorsed by a court that wavered on the question, that this difficulty renders motive irrelevant. Rather, "proof of unconstitutional motivation, on those occasions where it is relevant at all, properly functions simply to trigger the ordinary demand for a legitimate defense."⁷⁹

Ely's view has been borne out in the Supreme Court's decisions. Daniel Ortiz has shown that the Court's approach to government decisions that have a disparate impact on minorities, at least with respect to housing and public employment, amounts in practice to minimal scrutiny. "Instead of asking whether the decisionmaker *would* have made the same decision without the discriminatory motivation, the Court asks something a bit closer to whether it *could* have done so."⁸⁰ This approach fails to satisfy the requirements of Ely's process theory because "the presence of permissible goals—even very substantial ones—supporting a decision simply does not reveal how important the impermissible goals were."⁸¹ With this approach, "impermissible motivation might have changed the ultimate result of the decisionmaking process and yet still be excused."⁸²

⁷⁷ ELY, *supra* note 50, at 138.

⁷⁸ John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1278 (1970).

⁷⁹ *Id.*

⁸⁰ Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1115 (1989). Thus, in *Washington v. Davis*, the Court found the employment test was "neutral on its face and *rationally* may be said to serve a purpose the government is *constitutionally empowered* to pursue." 426 U.S. 229, 246 (1976) (emphases added). In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the exclusion of blacks by the village's refusal to rezone for low-income housing was described as "essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be *legitimate*." *Id.* at 279 n. 25 (emphasis added). Ortiz observes that the emphasized words in both of the above quotations "resonate with the language of reduced scrutiny." Ortiz, *supra*, at 1115.

⁸¹ Ortiz, *supra* note 80, at 1116.

⁸² *Id.*

Moreover, the Court has interpreted the concept of impermissible intent in a remarkably deferential way by holding that a state action does not violate the Fourteenth Amendment unless the action was taken "‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group."⁸³ It should not be surprising that courts applying this standard have almost never found state action to be unconstitutional.⁸⁴ David Strauss observes that by limiting unconstitutional intent to deliberate malice, the Court has held "that the government is free to undervalue the interests of a class of citizens, to treat them with indifference, to ignore the burdens it imposes on them, so long as it does so in order to achieve an objective other than injuring the group."⁸⁵ If this is the standard for a Fourteenth Amendment violation, then even the deliberate segregation invalidated in *Brown v. Board of Education* is probably constitutional because "it is not obvious that the architects of Jim Crow invariably desired to hurt blacks."⁸⁶

Strauss argues that the reason the Court adopted the discriminatory intent standard was to contain the disruptive implications of the Equal Protection Clause. Alternative conceptions of discrimination, focusing on such results of decisionmaking as subordination, stigma, second-class citizenship, or encouragement of prejudice, were unacceptable to the Court because "they seemed far more vague than the discriminatory intent standard, and they seemed far more threatening to established institutions."⁸⁷ The Court's cautious rationale for adopting the intent test may explain why it has applied the test in such a halfhearted way. Strauss argues convincingly that the intent test, "rigorously applied, . . . is no less threatening to established institutions" than are the alternatives.⁸⁸ The problem with the intent test, according to this account, is not that the underlying constitutional theories focus on motive rather than result, but that the Court has biased the test

⁸³ *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

⁸⁴ In addition to the Supreme Court cases cited above, in which no plaintiff ever prevailed, see, for example, *Price v. Austin Indep. Sch. Dist.*, 945 F.2d 1307, 1319 (5th Cir. 1991); *Lee v. Lee County Bd. of Educ.*, 639 F.2d 1243, 1268 (5th Cir. 1981); *Mihalcik v. Lensink*, 732 F.Supp. 299, 302 (D. Conn. 1990); *Larry P. v. Riles*, 495 F. Supp. 926, 975-76 (N.D. Cal. 1979); *Harris v. White*, 479 F. Supp. 996, 1001-1006 (D. Mass. 1979); *Debra P. v. Turlington*, 474 F. Supp. 244, 254-57 (M.D. Fla. 1979), *aff'd*, 644 F.2d 347 (5th Cir. 1981) (each citing and following *Feeney*).

⁸⁵ Strauss, *supra* note 75, at 963.

⁸⁶ *Id.* at 964.

Some of them may have sincerely desired only to promote social stability and the harmonious development of both races. Some may have sincerely believed that segregation aided blacks. Or they may have recognized its harmful effects but considered them a regrettable byproduct of a system that was best for society as a whole.

Id. (footnote omitted).

⁸⁷ *Id.* at 939.

⁸⁸ *Id.*

against the party challenging the law. A surgical technique is not discredited by a low success rate if it becomes clear that the surgeons were trying to kill their patients.⁸⁹

There is, however, an alternative explanation for why the Court has not pursued the intent test with any zeal. Intent-based analysis is costly. As already noted, invidious intent must always be difficult to prove. Moreover, as Kenneth Karst argued soon after the Court adopted the intent test, because judges are reluctant to impugn the motives of other officials, such a doctrine inevitably will tend to validate official decisions.⁹⁰ Finally, as Strauss observes, a serious application of the intent test necessarily leads to speculative or meaningless questions. A court must ask, "suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different?"⁹¹ But this means that we must ask, for example, whether abortion would be outlawed if men could get pregnant. Such a question is unanswerable. Thus, any test that directly seeks to find unconstitutional intent is bound to fail. Like the sun, the thing can only be looked at indirectly.

There is, however, one other way of invalidating legislation that does not contain a suspect classification. This requires that one look to the objective purpose of the statute—the purpose that plainly appears from an examination of the face of the statute. Thus, at the same time that Justice Scalia has argued that "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task," he has written that "it is possible to discern the objective 'purpose' of a statute (*i.e.*, the public good at which its provisions appear to be directed)."⁹²

⁸⁹ I have offered a similar criticism of the Court's equal protection doctrine in KOPPELMAN, *supra* note 45, at 103-11.

⁹⁰

[T]he ultimate issue will be posed in terms of the goodness or the evil of the officials' hearts. Courts have long regarded such inquiries as unseemly, as the legislative investigation cases of the 1950's attest. The principal concern here is not that tender judicial sensibilities may be bruised, but that a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect. Because an individual's behavior results from the interaction of a multitude of motives, and because racial attitudes often operate at the margin of consciousness, in any given case there almost certainly will be an opportunity for a government official to argue that his action was prompted by racially neutral considerations. When that argument is made, should we not expect the judge to give the official the benefit of the moral doubt? When the governmental action is the product of a group decision, will not that tendency toward generosity be heightened?

Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164-65 (1978) (footnote omitted).

⁹¹ Strauss, *supra* note 75, at 957.

⁹² Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Justice

This method of sticking to the facial purpose of the statute is not necessarily inconsistent with the process-based approach to the Equal Protection Clause. If directly searching for the legislature's subjective purpose is really a forlorn and doomed enterprise, then one needs proxies that have evidentiary value. One such proxy is the objective purpose of the statute. It provides clear evidence of the subjective goals of the lawmakers.

The Court recently followed this objective approach in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁹³ in which it struck down four ordinances that a city had enacted with the avowed purpose of preventing a Santeria church from practicing animal sacrifice. The laws, the Court held, violated the Free Exercise Clause of the First Amendment because their object was to suppress a religious practice. Justice Kennedy, who wrote the majority opinion, was able to find lurid statements by Hialeah city officials indicating that they sought "not to permit this Church to exist" and thought that Santeria was "an abomination to the Lord" and the worship of "demons."⁹⁴ But Justice Kennedy lost his majority in the section of the opinion that cited these facts; only Justice Stevens joined it. The majority portion of the opinion held that "suppression of the central element of the Santeria worship service was the object of the ordinances,"⁹⁵ and cited the language and operation of the statutes, as well as the fact that almost all nonreligious killings of animals were expressly exempted.

The objective approach does not confine the Court's attention to the four corners of the statute. The context in which the law was enacted is another objective fact that the Court may properly take into account in discerning the law's purpose. This is always so when the suspect classification doctrine is used; it is only by reference to the tendencies in American culture to stigmatize and devalue certain groups that the Court has been able to discern the "discrete and insular minorities" that need judicial protection.⁹⁶ Even

Frankfurter once took a similar line:

You may have observed that I have not yet used the word "intention." All these years I have avoided speaking of the "legislative intent." . . . Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the minds of legislators or their draftsmen, or committee members.

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 1947 COLUM. L. REV. 527, 538-39.

⁹³ 508 U.S. 520 (1993).

⁹⁴ *Id.* at 541-42 (quoting various Hialeah city officials).

⁹⁵ *Id.* at 534.

⁹⁶ For a recent study of the suspectness inquiry that highlights its irreducible cultural

when a suspect classification does not appear on the face of the statute, however, context is relevant. Again, *Lukumi* is an illustration. The impermissible purpose of the laws was evident from the face of three of the ordinances, which prohibited "sacrifice" of animals as part of a "ritual."⁹⁷ The fourth ordinance, however, was facially neutral; Ordinance 87-72 merely prohibited "the killing of animals for food" outside of areas zoned for slaughterhouses.⁹⁸ It only exempted the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law."⁹⁹ The Court declared the ordinance "underinclusive on its face"¹⁰⁰ because the exempted activities implicated the city's professed concerns about public health and cruelty to animals as much as animal sacrifice did. This argument alone, however, could hardly have invalidated the law. The Court has often upheld arbitrarily underinclusive statutes.¹⁰¹

If any innocent-sounding explanation will save a statute that involves no suspect classification, then this law should have been upheld.¹⁰² The Court conceded that, "unlike the three other ordinances," this one "does appear to apply to substantial nonreligious conduct and not to be overbroad."¹⁰³ Nonetheless, the Court held that the invidious purpose of the other three ordinances contaminated this one as well:

For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87-72 was passed the same day as [one of the others] and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausi-

dimension, see Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996).

⁹⁷ City of Hialeah, Fl., Ordinance 87-52 (Sept. 8, 1987), quoted in *Church of the Lukumi Babalu Aye*, 508 U.S. at 527.

⁹⁸ *Id.* 87-72 (Sept. 22, 1987), quoted in *Church of the Lukumi Babalu Aye*, 508 U.S. at 528.

⁹⁹ *Id.*, quoted in *Church of the Lukumi Babalu Aye*, 508 U.S. at 528; see *Church of Lukumi Babalu Aye*, 508 U.S. at 555-57, for the full text.

¹⁰⁰ *Church of the Lukumi Babalu Aye*, 508 U.S. at 545.

¹⁰¹ See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding the exemption from a pushcart ban of any vendors of a certain longevity); *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (upholding the exemption from a ban on advertising on vehicles of any vehicles advertising the owner's products).

¹⁰² But cf. Petitioner's Brief at 27, *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993) (No. 91-948) ("If this Court permits even [the limited protection for free exercise that it now provides] to be evaded by clever drafting and a mere pretense of neutrality, then it has indeed repealed the Free Exercise Clause.")

¹⁰³ *Church of the Lukumi Babalu Aye*, 508 U.S. at 539-40.

ble to suggest that the three other ordinances, but not Ordinance 87-72, had as their object the suppression of religion. We need not decide whether Ordinance 87-72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.¹⁰⁴

The doctrine of impermissible intent that the Court has constructed tends to ignore the subjective intentions of the lawmakers, but encourages inquiry into the objective purpose of the law. Moreover, the inquiry into this purpose can be facilitated by knowledge of the context in which the law was enacted—once again, an objective inquiry. The pursuit of illicit motivation has produced a procedure that, for sound institutional reasons, drives evidence of actual motive to the margins of judicial inquiry.¹⁰⁵

The case for this approach becomes strongest when one considers laws enacted by referendum, such as Amendment 2. Such laws are subject to the same equal protection scrutiny as any other laws. "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."¹⁰⁶ The problems of discerning the subjective intent of lawmakers obviously become insuperable when one confronts a lawmaking body composed of hundreds of thousands, or even millions, of voters.¹⁰⁷

¹⁰⁴ *Id.* at 540; *cf. id.* at 557 (Scalia, J., concurring in part and concurring in the judgment) (stating that the Court should invalidate "those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment").

¹⁰⁵ Lino Graglia's critique of *Lukumi* misses this possibility and faults the Court for leaving uncertain "whether Ordinance 87-72 was found invalid because of its 'object,' i.e. improper legislative intent, or because of its 'function,' i.e., its effect on Santeria practice." Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 42 (1996). The answer is the former, but the intent that matters is not to be found in the legislative history. Thus, it is unsurprising that Graglia finds Justice Scalia's concurrence incomprehensible. *See id.* at 49-51.

¹⁰⁶ *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

¹⁰⁷ Amendment 2 is an illustration. 813,966 people voted for the Amendment, while 710,151 voted against it. *See Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993). Jane Schacter has observed that "courts simply could not cumulate what may be millions of voter intentions." Jane Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 125 (1995). Julian Eule, recognizing the "inevitable evidentiary obstacles to assessing electoral motivation," thinks that only "[t]wo approaches are possible. We may relax the burden of proving discriminatory purpose and be more imaginative about the sources we canvass—for example, ballot pamphlets, exit polls, campaign advertising—or we may abandon the purpose requirement altogether in certain plebiscitary settings." Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1562 (1990). This is the same false dichotomy

The Court has struck down, on the basis of invidious purpose, three laws enacted by popular vote. In *Reitman v. Mulkey*,¹⁰⁸ the Court invalidated an amendment to the California constitution that prohibited the state from interfering with "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."¹⁰⁹ The Court reasoned that the amendment, though facially neutral, "was intended to authorize, and does authorize, racial discrimination in the housing market."¹¹⁰ *Hunter v. Erickson*¹¹¹ involved an amendment to the Akron, Ohio city charter that required that any ordinance regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry must first be approved by a majority"¹¹² of the voters. The Court held the amendment unconstitutional because it made "an explicitly racial classification treating racial housing matters differently from other racial and housing matters."¹¹³ Finally, in *Washington v. Seattle School District No. 1*,¹¹⁴ the Court relied on *Hunter* to invalidate an amendment prohibiting mandatory school busing, holding that although

the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action . . . a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.¹¹⁵

None of these cases gathers evidence of motive in fact. The Sixth Circuit Court of Appeals has observed that "neither the Supreme Court nor this Court has ever inquired into the motivation of voters in an equal protection

we noted earlier in Lino Graglia's critique of *Lukumi*. See *supra* note 105. The pursuit of a law's objective purpose does not require reliance on such extrinsic aids as media sources, which in any case cannot yield any determinate popular intent. See Schacter, *supra*, at 144-47. When a plebiscite is challenged, only objective evidence of invidious intent is likely to be available to a court. See Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 567-72 (1994).

¹⁰⁸ 387 U.S. 369 (1967).

¹⁰⁹ *Id.* at 371 (quoting CAL. CONST. art. I, § 2b (repealed 1974)).

¹¹⁰ *Id.* at 381.

¹¹¹ 393 U.S. 385 (1969).

¹¹² *Id.* at 387 (quoting amended city charter).

¹¹³ *Id.* at 389.

¹¹⁴ 458 U.S. 457 (1982).

¹¹⁵ *Id.* at 470.

clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results.”¹¹⁶

In a discussion written before *Washington*, Ely argues that *Reitman* was wrongly decided because the statute in question was facially neutral but that the *Hunter* amendment was different: “[B]ecause it [was] directed in terms at legislation respecting racial and religious groups, it plainly was enacted with the motivation of rendering unusually difficult the efforts of such groups to secure protection via the political process.”¹¹⁷ *Hunter*, therefore, is an easy case; the others are harder. But one cannot easily dismiss, even if one can question, *Reitman* and *Washington*.¹¹⁸ In context, each decision is as obviously about discrimination against blacks and the remedies for such discrimination as if the statutes had said so. In neither case can the impact on blacks be said to be an accidental by-product of the law. There was enough evidence of racial motivation to warrant some degree of suspicion. Once suspicion is aroused, the presumptions that are put into play may appropriately—indeed, must—do the rest of the work. The Sixth Circuit has gone so far as to hold that “in the referendum context, it is *impermissible* for the reviewing court to inquire into the possible actual motivations of the electorate in adopting the proposal.”¹¹⁹

¹¹⁶ *Arthur v. City of Toledo*, 782 F.2d 565, 573 (6th Cir. 1986).

¹¹⁷ Ely, *supra* note 78, at 1301; cf. *Hunter*, 393 U.S. at 395 (Harlan, J., concurring) (“Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.”).

¹¹⁸ The weaknesses, as precedent or persuasive authority, of this line of cases are noted in Seidman, *supra* note 9, at 75.

¹¹⁹ *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 270 n.9 (6th Cir. 1995), *vacated and remanded on other grounds*, 116 S. Ct. 2519 (1996), *reaffirmed on remand*, 1997 WL 656228 (6th Cir. 1997); see *Clarke v. City of Cincinnati*, 40 F.3d 807, 815 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1960 (1995); *Arthur v. City of Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986). The Fifth Circuit has taken a different view, though its precise contours are unclear. After holding that an individual voter may not be subjected to judicial examination concerning how or why he voted, the court stated, in response to a petition for rehearing, that “our decision is not to be misunderstood as holding or suggesting that, in a proper case, the motivation of the electorate may not be examined by the introduction of either direct or circumstantial evidence. The latter inquiry may be a proper inquiry.” *Kirksey v. City of Jackson*, 663 F.2d 659, 661-62 (5th Cir. 1982). “The court, however, did not reexamine the evidence of discriminatory voter motivation under this new standard or specify what would be a ‘proper case.’” Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 741 n.129 (1983).

III. THE INTENT TEST IN *ROMER*

Let us at last return to the problem posed by *Romer*. Now that we understand why the Court is concerned about purpose, what shall we say about its inference that an impermissible purpose underlay Amendment 2?

A. *The Innocent Explanation*

The difficulty that Justice Scalia raises is that an innocent explanation for Amendment 2 seems to be available. Let us examine this innocent explanation in greater detail.

The application of antidiscrimination law to nongovernmental activities typically is predicated on the factual premise that the groups it seeks to protect are subject to *pervasive* discrimination.¹²⁰ Opponents of antidiscrimination protection for gays claim that whatever discrimination gays suffer is too rare to have much impact on their lives or opportunities.¹²¹ Some also think, without making any claim one way or the other about the pervasiveness of discrimination, that laws protecting gays from discrimination are so rarely invoked that they are not worth having.¹²²

Moreover, even if nearly every employer and landlord is predisposed to discriminate against gays, it remains possible to avoid such discrimination. The price of doing so is the closet. Absent a massively intrusive investigatory apparatus,¹²³ it is impossible for anyone to discriminate solely on the

¹²⁰ Thus, for example, the argument between Richard Epstein, who advocates the abolition of all employment discrimination laws, and his critics focuses on a factual dispute over whether discrimination against blacks is sufficiently pervasive to withstand the egalitarian tendencies of a well-functioning free market. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219 (1992) (reviewing *FORBIDDEN GROUNDS*); Symposium, *A Critique of Epstein's Forbidden Grounds*, 31 SAN DIEGO L. REV. 1 (1994) (critiquing *FORBIDDEN GROUNDS*). Even those of us who are unpersuaded by Epstein's claims about racism are indebted to his analysis because the task of responding to him has starkly revealed what kind of showing is necessary to make out a prima facie case for intervention in an allegedly discriminatory market.

¹²¹ See, e.g., Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 401-11 (1994).

¹²² See ANDREW SULLIVAN, *VIRTUALLY NORMAL* 157 (1995).

¹²³ Such an apparatus has been and continues to be deployed within the United States military, which routinely engages in illegal wiretaps and searches, days-long interrogations, denial of access to counsel, groundless threats of severe penalties for noncooperation, incessant demands for names of other gays, coerced or forged confessions, and intimidation of witnesses. See generally Samuel A. Marcossan, *A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intru-*

basis of orientation because it easily is concealed. The Catholic Church's Congregation on the Doctrine of the Faith puts this point well:

An individual's sexual orientation is generally not known to others unless he publicly identifies himself as having this orientation or unless some overt behavior manifests it. As a rule, the majority of homosexually oriented persons who seek to lead chaste lives do not publicize their sexual orientation. Hence the problem of discrimination in terms of employment, housing, etc., does not usually arise.¹²⁴

In short, even if pervasive discrimination against all gays would be unjustified, this does not mean that one cannot justify the lower levels and more targeted kinds of discrimination that, in fact, exist.

Moreover, if the Court really is confining itself to minimal scrutiny, then it should not matter if gays *are* pervasively discriminated against, whether by the state or by private entities. Such pervasive discrimination might merely reflect a moral perspective that, the Court held in *Hardwick*, is a permissible basis for criminal prohibition (which is a far heavier imposition than private discrimination): the "belief . . . that homosexual sodomy is immoral and unacceptable."¹²⁵ A state might reasonably conclude that, if gays by their conduct are revealing themselves to be moral monsters, they ought not to complain when other citizens shun them as such.

Justice Kennedy declared that "[i]t is not within our constitutional tradition to enact laws of this sort,"¹²⁶ but the truth is that, not too long ago, pervasive discrimination against gays was regarded as a sort of moral imperative. In 1953, President Eisenhower issued an executive order barring homosexuals from all federal jobs, and the FBI initiated a "widespread system of surveillance to keep homosexuals off the federal payroll."¹²⁷ Corporations under government contract applied the administration's security provisions to their own employees, and many states and municipalities followed the federal government's lead, while also enforcing similar standards in the licensing of many professions.¹²⁸ One study in the mid-1950s estimated

siveness, 64 UMKC L. REV. 59, 75-78 (1995). These practices, however, are so anomalous in American society that spokespersons for the military have found it necessary to deny that they exist. See Andrew Koppelman, *Gaze in the Military: A Response to Professor Woodruff*, 64 UMKC L. REV. 179, 186 n.41 (1995).

¹²⁴ Congregation for the Doctrine of the Faith, *Letter to Bishops on the Pastoral Care of Homosexual Persons* (Oct. 1, 1985), 32 POPE SPEAKS 62 (1987).

¹²⁵ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

¹²⁶ *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

¹²⁷ JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 293 (1988).

¹²⁸ See *id.*

that over 12.6 million workers, more than twenty percent of the labor force, faced loyalty-security investigations as a condition of employment.¹²⁹

The closest thing to a canonical rationale for this pervasive discrimination was set forth in 1950 by a Senate committee that investigated the employment of "homosexuals and other moral perverts" in government.¹³⁰ Homosexuals, the Committee concluded, lacked "emotional stability" because "indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility."¹³¹ Even one "sex pervert in a Government agency," the committee warned,

tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert One homosexual can pollute a Government office.¹³²

It is now clear that the committee was in the grip of a fantastic delusion. No one believes this sort of stuff any more.¹³³ Under minimal scrutiny, however, this ought not to matter. "[I]t has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it."¹³⁴ "This remarkable deference to state objectives," Tribe observes,

¹²⁹ See *id.*; JOHN D'EMILIO, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 57-73 (1992). For the most thorough study to date of the legal status of gays in the decade and a half after World War II, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (forthcoming 1998) (manuscript at ch.2, on file with author).

¹³⁰ COMMITTEE ON EXPENDITURES IN EXECUTIVE DEPARTMENTS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. NO. 81-241, at 4 (1950).

¹³¹ *Id.*

¹³² *Id.*

¹³³ The extent to which the cultural ground has shifted can be measured by present presidential policies and politics. After Bill Clinton became president, he issued an executive order *banning* discrimination against gay civilian federal workers. More surprisingly, in the waning days of the 1996 presidential campaign, the senior policy advisor to Republican candidate Robert Dole declared that a Dole administration would maintain that policy. See Lou Chibbaro, Jr., *Dole Aid Meets with Log Cabin Candidate to Keep Non-Bias Policy*, WASH. BLADE, Nov. 1, 1996, at 1. The advisor, Sheila Burke, had been Dole's chief of staff until he resigned from the Senate.

¹³⁴ *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959).

has operated in the sphere of economic regulation quite apart from whether the conceivable "state of facts" (1) actually exists, (2) would convincingly justify the classification if it did exist, or (3) was ever urged in the classification's defense either by those who promulgated it or by those who argued in its support.¹³⁵

If believed, the Senate Committee's claims obviously would justify discrimination against homosexuals by a broad range of private employers as well as by government.

Not only is it possible to doubt the need for antidiscrimination protection of gays, it is also possible reasonably to object to the expressive function of antidiscrimination ordinances such as Denver's. As Scalia observed, such ordinances are intended by at least some of their supporters to achieve "not merely a grudging social toleration, but full social acceptance, of homosexuality."¹³⁶ Some opponents of such laws also interpret them in just this way.

When a legislature acts to protect homosexual behavior under antidiscrimination laws, it elevates homosexual practices to the status of protected activities while at the same time branding many mainstream religious institutions and individuals as outlaws engaged in antisocial and immoral behavior. Symbolically, gay rights legislation declares homosexual behavior good (i.e., protected) and religiously motivated discrimination evil (i.e., prohibited).¹³⁷

The rationale for Amendment 2, then, might well be the following: Homosexual conduct is intrinsically evil and corrupting; so much so that it justifies discrimination in almost every context. In fact, however, such discrimination rarely occurs, and, when it does occur, it does little harm. Antidiscrimination law, then, does not protect gays in any tangible way. Its sole function is the expressive one of giving gays a legitimacy they do not deserve and giving moral scruples against homosexual conduct a stigma that *they* do not deserve.¹³⁸ For these reasons, one might argue, the Colorado

¹³⁵ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1443 (2d ed. 1988).

¹³⁶ *Romer v. Evans*, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting).

¹³⁷ Duncan, *supra* note 121, at 397-98.

¹³⁸ One can accept the description of the Amendment 2 controversy as an episode in the culture wars without claiming, as some have, that it was gays who started the fight by seeking antidiscrimination legislation. As the above description of the 1950s regime makes clear, the culture wars over homosexuality have been going on for a long time.

electorate was entirely justified in seizing from gays the expressive machinery of the state and deploying it on its own behalf.¹³⁹

There is no question that many of the supporters of Amendment 2 had motives of this kind. Such motives do not per se deny anyone equal concern and respect. Professor Dworkin argues that, in the context of Amendment 2, "there can be no difference" between moral disapproval and animus.¹⁴⁰ This is because Dworkin thinks that *Romer* implicitly denies (what he explicitly denies) that it is legitimate "for a state to impose a disadvantage on a particular group just to express the majority's moral contempt for that group's practices, even when no other proper purpose, such as protecting anyone's economic or security interests, is served."¹⁴¹ In so claiming, Professor Dworkin relies on an argument that he has often made—that government fails to treat citizens with equal concern and respect whenever it restricts individual liberty on the ground that one citizen's conception of the good life is better than another's.¹⁴² John Finnis adequately answered this claim long ago. Morals legislation

may manifest, not contempt, but a sense of the equal worth and human dignity of those people whose conduct is outlawed precisely on the ground that it expresses a serious misconception of, and actually degrades, human worth and dignity, and thus degrades their own personal worth and dignity, along with that of others who may be induced to share in or emulate their degradation.¹⁴³

The gay rights activists merely seized, and sought to turn around, cultural artillery that previously had been firing at them.

¹³⁹ For other accounts of the rationality of Amendment 2, see Tymkovich et al., *supra* note 4, *passim*, Seidman, *supra* note 9, at 101-02, and Duncan, *supra* note 16, at 354-55.

¹⁴⁰ Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. OF BOOKS, Aug. 8, 1996, at 44, 49.

¹⁴¹ *Id.*

For Colorado could certainly declare, in good faith, that the amendment's 'sheer breadth' was justified by the depth of its citizens' moral disapproval of homosexuality. Nothing less than a complete ban on any law that suggests that homosexuality is an acceptable form of sexual union, it might say, would be enough to express the profoundness of the majority's rejection of that moral position.

Id. at 49-50.

¹⁴² See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-77 (1977).

¹⁴³ J.M. Finnis, *Legal Enforcement of 'Duties to Oneself': Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 437 (1987); see also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 221-23 (1980).

It is clear that the condemnation of homosexuality by the Catholic Church, for example, takes precisely this form. Homosexuals themselves are not condemned. Their equal dignity and worth is emphatically insisted upon.¹⁴⁴ As Ely has pointed out, "a sincerely held moral objection to the act" of homosexual sex is not per se the same thing as "a simple desire to injure the parties involved."¹⁴⁵

Any attempt to justify *Romer* by invoking a general right to antidiscrimination protection must fail. At one point in his opinion in *Romer*, Justice Kennedy comes close to suggesting that gays have such a substantive right.

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.¹⁴⁶

This argument seems to draw on an amicus brief filed in the Supreme Court by Laurence Tribe and four other eminent constitutional law scholars (including Ely). The Tribe group argued that Amendment 2 was a per se violation of the Equal Protection Clause. According to the brief, it is unconstitutional "for a state's constitution absolutely to preclude, for a selected set of persons, even the possibility of protection under any state or local law from a whole category of harmful conduct, including some that is undeniably wrongful."¹⁴⁷ This is because "the Equal Protection Clause requires a regime that gives all persons equal access at least to the possibility of protection under the laws of the state from the wrongs that may befall them—whether such wrongs as robbery or such wrongs as discrimination, and whether privately or officially inflicted."¹⁴⁸ "Outlawry may be consis-

¹⁴⁴ See *infra* note 263.

¹⁴⁵ ELY, *supra* note 50, at 256 n.92. The two sides of this distinction are not mutually exclusive, as Ely seems to think; a moral objection can impose norms of caste, of the kind that the Fourteenth Amendment forbids. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 277-84 (1994). On the other hand, moral objections to homosexual conduct are not all reducible to rationalized sexism, even if some are. My critique of Ely in the article just cited was too cavalier in its treatment of this concern.

¹⁴⁶ *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

¹⁴⁷ Amicus Curiae Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland & Kathleen Sullivan at 2, *Romer* (No. 94-1039) [hereinafter Amicus Curiae Brief].

¹⁴⁸ *Id.* at 8.

tent with some regimes, but it is not consistent with the regime contemplated by the Fourteenth Amendment."¹⁴⁹

The trouble with these formulations is that they presuppose, not only that such exclusion is unjustified, but also that gays need legal protection in order to avoid it. Unless an action inflicts actual harm, its wrongfulness is no reason for the state to prohibit it. If you make a voodoo doll with my image and stick pins in it, you may be acting with wrongful (perhaps even homicidal) intent, but it would not be appropriate for the state to intervene to stop you. Moreover, even if a certain kind of private action does harm me, I may not be entitled to protection from it. The Norris-LaGuardia Act of 1932¹⁵⁰ prohibited the federal courts from issuing a restraining order or injunction in "a case involving or growing out of a labor dispute,"¹⁵¹ thereby deliberately depriving employers of a remedy that federal courts had previously provided. The employers were thus denied legal protection even in cases where the federal courts held the strikes against them to be wrongful, but the statute was upheld.¹⁵² Some read *Romer* as adopting this unpersuasive rationale, but this departs radically from the text of the opin-

¹⁴⁹ *Id.* at 10-11.

¹⁵⁰ 29 U.S.C. §§ 101-115 (1994).

¹⁵¹ *Id.* § 101.

¹⁵² See *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). For a similar critique of the Tribe brief's argument, see Jeffrey Rosen, *Disoriented*, NEW REPUBLIC, Oct. 23, 1995, at 24-26.

Before *Lauf*, many courts did invalidate anti-injunction acts on the basis of arguments such as this. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 151-52 (1991). The Supreme Court agreed, holding that the Equal Protection Clause "forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction." *Truax v. Corrigan*, 257 U.S. 312, 334 (1921). The dissenter in *Lauf* thought that if Norris-LaGuardia were not narrowly construed, then it must be unconstitutional under *Truax*. See *Lauf*, 303 U.S. at 340 (Butler, J., dissenting). The weakness of the *Truax* argument was noted at the time by Justice Brandeis:

[A]n injunction has been denied on grounds of expediency in many cases where the remedy at law is confessedly not adequate. This occurs whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused and the injured party left to such remedy as courts of law may afford. Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain actionable libels. In the interest of personal liberty they ordinarily refuse to enforce specifically, by mandatory injunction or otherwise, obligations involving personal service. In the desire to preserve the separation of governmental powers they have declined to protect by injunction mere political rights, and have refused to interfere with the operations of the police department.

Truax, 257 U.S. at 374-75 (Brandeis, J., dissenting) (citations omitted).

ion.¹⁵³ *Romer* speaks, not of substantive rights, but of impermissible animus.

Another way of making the innocent explanation irrelevant has been suggested by Akhil Amar, who argues that Amendment 2 should be understood as a sort of bill of attainder against a class of persons defined by status and not by conduct.¹⁵⁴ Amar argues that the "analytic lynchpin" of *Romer* is Justice Kennedy's claim that Amendment 2 burdens a "targeted class" and "imposes a special disability upon [homosexuals] alone."¹⁵⁵ Of course, all laws classify, but Amendment 2 is peculiar because it is based on

¹⁵³ The editors of the *Harvard Law Review* thus argue that the Court "founded its decision on a rule that legislation making it more burdensome for a single group of citizens to seek the government's protection is a per se denial of equal protection of the laws." *Leading Cases*, *supra* note 11, at 163 (1996). For a similar claim, see William M. Wilson III, *Romer v. Evans: "Terminal Silliness," or Enlightened Jurisprudence?*, 75 N.C. L. REV. 1891, 1936-37 (1997). Their interpretation rests on Justice Kennedy's statement that Amendment 2 constituted "a denial of equal protection of the laws in the most literal sense," *Leading Cases*, *supra* note 11, at 155 (quoting *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996)), and his statement, when he first mentions the rational relationship test, that the Amendment's difficulties under that test are "*in addition to the far-reaching deficiencies of Amendment 2 that we have noted.*" *Leading Cases*, *supra* note 11, at 160 (quoting *Romer*, 116 S. Ct. at 1629) (emphasis added by Harvard). The Harvard writers argue that

[b]ecause the final portion of the opinion invokes the rational basis test, it is tempting to conclude that the opinion rests solely upon it and to avoid recognizing that the per se rule forms the basis of an independent argument. The per se analysis alone would have been sufficient to invalidate the Amendment, however, and the rational basis argument in a sense operated as, at most, an alternative holding.

Id. at 160-61.

This argument is an overreading of Kennedy's opinion, which nowhere speaks of a per se denial of equal protection, and it generates law that is hard to defend. The Harvard writers claim that "a state violation of the Court's per se rule is unjustifiable under any circumstances," *id.* at 160, but Cass Sunstein observes that if a state said "that no governmental body may allow cigarette smokers to claim minority status, quota preferences, or protected status for any claim of discrimination, it would probably be acting constitutionally." Sunstein, *supra* note 6, at 58. Why would one want to argue the opposite? *But see* Duncan, *supra* note 121. The Harvard editors' reading also minimizes Kennedy's statement that the rational basis objection to the law is "related" to the singling out of the group. *See Leading Cases*, *supra* note 11, at 160. It does not explain what the relationship is. I would suggest that the two points are related inasmuch as they are two steps in a single equal protection analysis. *Cf.* Schacter, *supra* note 62, at 380 ("Whether independent or interdependent, it seems fair to conclude that the qualities that make Amendment 2 violate the literal terms of the Equal Protection Clause—the unalloyed attempt to deny gay people ordinary access to antidiscrimination remedies—undermined the law's rationality and thus supported the animus finding.").

¹⁵⁴ *See* Akhil Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996).

¹⁵⁵ *Id.* at 225 (quoting *Romer*, 116 S. Ct. at 1626-27).

a *trait*—sexual orientation—rather than on conduct. Like a bill of attainder, Amendment 2 penalizes gays simply for being who they are. “[M]ere orientation cannot be criminalized or used by law to disenfranchise or degrade,”¹⁵⁶ but this is what Amendment 2 did.¹⁵⁷ Amar thus concludes that the Amendment “is *formally* flawed in a way that should be clear even to the most finicky formalist. It is flawed on its face—in its words, not just in their spirit.”¹⁵⁸

Amar’s account leaves crucially ambiguous whether the formal singling out of gays for disfavored treatment was itself the constitutional violation, or whether the singling out was merely evidence of a violation.¹⁵⁹ To the extent that he suggests that the former is the case, Amar mistakes a step in Justice Kennedy’s argument for its conclusion. If it were unconstitutional to single out a named class for disadvantage, then, as Justice Scalia pointed out, it would also be impermissible to enact a “state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen.”¹⁶⁰

Amar responds that such a law would not target anyone in particular; it “could apply to many persons in the future if their relatives happen to win office.”¹⁶¹ It is equally true, however, that at the time such a law is enacted, some people will be affected immediately, and everyone is likely to know who at least some of them are. Even if the legislative history makes it plain that the statute was enacted solely in response to one city’s too-cozy dealings with the mayor’s brother, the law is valid because its purpose is legitimate. Amar’s account of *Romer* focuses on the fact that the Amendment named a disfavored class, but this naming mattered to the Court only because of what it revealed about the Amendment’s purpose.¹⁶² If singling

¹⁵⁶ *Id.* at 228.

¹⁵⁷ The Amar theory states an alternative reading of the Tribe amicus brief, described above. See *infra* text accompanying notes 158-61. One way of reading Tribe’s brief is that it is impermissible to “single out *particular* persons,” Amicus Curiae Brief, *supra* note 147, at 5, to withhold from a named, “selected and specified” class of citizens, *id.* at 13, a benefit that everyone else is entitled to. Here, the special defect of Amendment 2 is its language “[r]endering some persons facially ineligible for the protection of the state’s laws from a certain type of wrong.” *Id.* at 8.

¹⁵⁸ Amar, *supra* note 154, at 230.

¹⁵⁹ Amar’s article nowhere denies the importance of purpose, and in several places emphasizes its relevance. See *id.* at 214 & n.36, 226, 233-34. If purpose matters, however, then the trouble with Amendment 2 is not a purely formal one, as Amar suggests elsewhere. See *id.* at 230.

¹⁶⁰ *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting).

¹⁶¹ Amar, *supra* note 154, at 233.

¹⁶² Look again at the conclusion of the Court’s chain of reasoning. The broad disability imposed on a targeted group

raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that

out a named class for disadvantage were sufficient to render a law unconstitutional, then there would have been no need to survey the state's proffered justifications to determine whether any of them was a persuasive justification for the law. The Court's focus on motive reflects Ely's insight that "unconstitutionality in the distribution of benefits that are not themselves constitutionally required can intelligibly inhere only in the way the distribution was arrived at."¹⁶³

B. *Does the Innocent Explanation Save Amendment 2?*

If it is possible to imagine an innocent explanation for a law, is the game over? Must we conclude that *Romer* is wrongly decided? The trouble with this kind of reasoning is that it proves far too much. There always have been innocent explanations for discriminatory laws, even those animated by the most sinister of motives. The Court, however, strikes down some laws, even those that can be given innocent explanations, when objective indicia of invidious intent dispose the Court toward suspicion.¹⁶⁴

The question, then, is whether Justice Scalia's benign interpretation is persuasive, given the context in which Amendment 2 was adopted. Chief Justice Warren raised the same problem of innocent explanations when he

a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

Romer, 116 S. Ct. at 1628 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). *Moreno* did not involve the naming of a class defined by status. It invalidated a 1971 amendment to the Food Stamp Act that excluded from participation in the food stamp program any member of a household whose members were not all related to each other. (Congress evidently was attempting to prevent "hippie communes" from receiving any stamps). See *Moreno*, 413 U.S. at 529. *Moreno* involved, not status, but Congressional targeting of households of a kind it disapproved of. Membership in a certain kind of household is not a trait or an orientation, and the food stamp amendment was not purely a "status-based enactment." The case for an inference of status-based animus is stronger in *Romer* than it was in *Moreno*, but it is not clear that it can be persuasive even in *Romer*. See Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L. REV. 236 (1996); Halley, *supra* note 14, at 443-44. I have criticized elsewhere the frequently repeated claim that homosexuality must be an immutable status in order to be entitled to constitutional protection. See ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 146-48 (1996); Andrew Koppelman, *Three Arguments for Gay Rights*, 95 MICH. L. REV. 1636, 1652-61 (1997).

¹⁶³ ELY, *supra* note 50, at 151. Once more, it can be argued that first-class citizenship and nonsubordination are benefits that are themselves constitutionally required, see *supra* note 66, but this is not the line that the Court has taken.

¹⁶⁴ This is why Professor Duncan's discussion of marriage, which attempts to provide a rational basis for state refusal to recognize the marriages of same-sex couples, cannot resolve the constitutional debate over that issue. See Duncan, *supra* note 121.

wrote in *Brown v. Board of Education* that “[s]eparate educational facilities are inherently unequal.”¹⁶⁵ The statement was correct insofar as it recognized the implausibility of the “separate but equal” claim in the context of Jim Crow, but it was incredible insofar as it was phrased in terms of what Charles Black called “the metaphysics of sociology: ‘Must Segregation Amount to Discrimination?’”¹⁶⁶ Charles Black’s comment remains instructive:

That is an interesting question; someday the methods of sociology may be adequate to answering it. But it is not our question. Our question is whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.¹⁶⁷

Just as Chief Justice Warren’s opinion in *Brown* seemed to invite an irrelevant debate about the metaphysics of sociology, Justice Kennedy’s opinion in *Romer* seems to invite an irrelevant debate about the metaphysics of legislative draftsmanship: a debate about how narrow a class may permissibly be disadvantaged by a statute, how broad the disadvantaging may be, and how the narrowness and broadness should be calibrated in order to avoid unconstitutionality. This would be a silly direction for constitutional law to go in. In both cases, the issue is what the purpose of the law is in the context in which it was enacted. This question “has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.”¹⁶⁸ To say it again, context matters.

Up to this point, we have uncovered a gap in the Court’s reasoning in *Romer*. The fact that a group, narrowly defined, is saddled with a broad range of disabilities does not, without more, warrant an inference of impermissible motive. If this gap cannot be filled, then *Romer* is decided wrongly.¹⁶⁹ Conversely, if *Romer* is rightly decided, and if the opinion accurately

¹⁶⁵ *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

¹⁶⁶ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Daniel Farber and Suzanna Sherry attempt to leap over the gap by arguing that *Romer* stands for a narrowly confined “pariah principle,” which “forbids the government from designating any social group as untouchable.” Farber & Sherry, *supra* note 7, at 258. They claim that *Romer* implies nothing about heightened scrutiny of laws that

represents at least a part of the sequence of reasoning that leads to that conclusion, then we must be able to point to facts that complete the logical circuit.

C. *Invidious Motives*

Given its context in American culture, is there any good reason to think that a law like Amendment 2, which on its face imposes unusual disadvantages on gays, is the product of impermissible motives? What does history and common knowledge tell us about the way in which gays are regarded in the contemporary United States?

1. *Hatred*

First of all, raw hatred of gays has been and continues to be quite common. In the most extreme cases, it takes the form of random attacks on strangers. "Violence against gay men and lesbians," Kendall Thomas observes, "on the streets, in the workplace, at home—is a structural feature of life in American society."¹⁷⁰ In a survey of anti-gay violence and harassment in eight major cities,

discriminate against gays because unlike conventional equal protection doctrine, which "looks to the target group's general status in society," the pariah principle "looks only to the particular legislation at issue to determine whether it creates or encourages pariah status." *Id.* at 274. This argument reproduces the same logical gap we saw in *Romer* while demonstrating its unpersuasiveness even more dramatically. Status is social; it cannot be discerned from the four corners of a statute. How can one possibly determine whether a particular legislation "creates or encourages pariah status" unless one reads it in light of its cultural context, most relevantly "the target group's general status in society"? In arguing that the pariah principle applies to Amendment 2, Farber and Sherry betray their promise not to look beyond the legislation itself; they are compelled repeatedly to advert to the meaning of the social stigmatization of homosexuality, and in particular to the fact that "[h]omosexuals are hated not just for what they do but for who they are." *Id.* at 279. The general cultural inquiry into the indicia of suspectness cannot thus neatly be cabined off. For a similar critique of Farber and Sherry, see J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2357-58 (1997).

¹⁷⁰ Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1464 (1992). It is also a venerable tradition.

Gay men and lesbians in America have been "condemned to death by choking, burning and drowning; . . . executed, [castrated], jailed, pilloried, fined, court-martialed, prostituted, fired, framed, blackmailed, disinherited, [lobotomized, shock-treated, psychoanalyzed and] declared insane, driven to insanity, to suicide, murder, and self-hate, witch-hunted, entrapped, stereotyped, mocked, insulted, isolated . . . castigated . . . despised [and degraded]."

Id. at 1462 (quoting JOHNATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 11, 22-23, 44, 127-28 (1976)).

86.2% of the gay men and women surveyed stated that they had been attacked verbally; 44.2% reported that they had been threatened with violence; 27.3% had had objects thrown at them; 34.9% had been chased or followed; 13.9% had been spit at; 19.2% had been punched, hit, kicked, or beaten; 9.3% had been assaulted with a weapon; 18.5% had been the victims of property vandalism or arson; 30.9% reported sexual harassment, many by members of their own families or by the police.¹⁷¹

A study commissioned by the National Institute of Justice, the research arm of the U.S. Department of Justice, found that gays "are probably the most frequent victims [of hate violence today]."¹⁷² As a consequence, "gay men and lesbians always and everywhere have to live their lives on guard, knowing that they are vulnerable to attack at any time."¹⁷³

Attacks on gays bespeak an astonishing rage, frequently involving torture and mutilation. Homophobic murders typically involve mutilation of the victim. The coordinator of one hospital's victim assistance program reported that "attacks against gay men were the most heinous and brutal I encountered."¹⁷⁴ A physician reported that injuries suffered by the victims of homophobic violence that he had treated were so "vicious" as to make clear that "the intent is to kill and maim"¹⁷⁵:

Weapons include knives, guns, brass knuckles, tire irons, baseball bats, broken bottles, metal chains, and metal pipes. Injuries include severe lacerations requiring extensive plastic surgery; head injuries, at times requiring surgery; puncture wounds of the chest, requiring insertion of chest tubes; removal of the spleen for traumatic rupture; multiple fractures of the extremities, jaws, ribs, and facial bones; severe eye injuries, in two cases resulting in permanent loss of vision; as well as severe psychological trauma the level of which would be difficult to measure.¹⁷⁶

¹⁷¹ *Id.* at 1463-64 n.125 (citing NATIONAL GAY TASK FORCE, ANTI-GAY/LESBIAN VICTIMIZATION 24 (June 1984)).

¹⁷² *Id.* at 1464 (quoting PETER FINN & TAYLOR MCNEIL, THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME: AN EXPLORATORY REVIEW 2 (1987)).

¹⁷³ *Id.* at 1465.

¹⁷⁴ *Id.* at 1463 (quoting the coordinator of a victim assistance program at a New York City hospital).

¹⁷⁵ *Id.* at 1466 (quoting a physician from a San Francisco hospital).

¹⁷⁶ *Id.* For other illustrations, see *id.* at 1462-70.

This extraordinary level of antipathy is the tip of a large iceberg. Those who attack gays are atypical, but they reveal much about the culture in which they have been socialized. Their behavior can hardly be characterized as aberrant or isolated when it is so common throughout the United States.

According to Gordon Allport's classic study of prejudice, patterns of behavior rejecting out-groups form a continuum, from verbal denunciation (what Allport calls "antilocution"), to avoidance, to discrimination, to physical attack, to organized extermination.¹⁷⁷ The milder forms of prejudice are the most common: "most people are content to express their hostility verbally to their own friends and never go further. Some, however, reach the stage of active discrimination. A few take part in vandalism, riots, lynchings."¹⁷⁸ When violence does occur, it "is always an outgrowth of milder states of mind. Although most barking (antilocution) does not lead to biting, yet there is never a bite without previous barking."¹⁷⁹ The perpetrators of hate violence are predominantly young males, who are distinguished from their elders primarily in that they "have a thinner layer of socialized habit between impulses and their release."¹⁸⁰ Others, however, are likely to manifest similar attitudes in other, more socially acceptable ways. "[A]ny negative attitude tends somehow, somewhere, to express itself in action. Few people keep their antipathies entirely to themselves. The more intense the attitude, the more likely it is to result in vigorously hostile action."¹⁸¹

While few Americans actually engage in violence against gays, many more dislike gays intensely. Gays are among the least liked groups in the United States, according to Kenneth Sherrill's analysis of the Feeling Thermometers of the American National Election Study.¹⁸² Respondents were asked to rate their feelings toward a variety of groups on a scale of 0 to 100. In four surveys spanning a ten-year period, more respondents consistently assigned the lowest score, zero, to gays and lesbians than any other group; next in order were illegal immigrants, people on welfare, and Christian fundamentalists. (In 1994, the most recent year, 28.2% assigned gays a zero ranking, as compared with 24.2% for the next most unpopular group, illegal immigrants, and 9.1% for the third most unpopular group, people on welfare. The figure for blacks was 2.0%.) Sherrill concludes that "such hostility does not face any other group in the electorate."¹⁸³ The hostility is not only intense, but widespread. Gays and lesbians also have consistently received one of the lowest mean FT scores, though in recent years they have

¹⁷⁷ See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

¹⁷⁸ *Id.* at 49.

¹⁷⁹ *Id.* at 57.

¹⁸⁰ *Id.* at 59.

¹⁸¹ *Id.* at 14.

¹⁸² See Kenneth Sherrill, *The Political Power of Lesbians, Gays & Bisexuals*, 29 PS 469, 470 (1996).

¹⁸³ *Id.* at 470.

escaped the lowest average rating by being two to four points above illegal immigrants. "Among American citizens included in these studies only lesbians and gay men were the objects of cold feelings from a majority of Americans."¹⁸⁴

The idea that gays are inferior human beings is not the only reason they are discriminated against, but it plainly is one of the reasons. Both homosexual activity and homosexual desire are stigmatized. The stigma cannot be explained simply in terms of the perceived immorality of the desired conduct. The trouble is not homosexual conduct, but homosexual identity.¹⁸⁵

This problem can be shown by focusing on the mildest form of prejudice in Allport's continuum—verbal denunciation. Richard Mohr notes that the English language does not treat gays merely as persons who engage in certain sexual activities. Dictionary definitions of "homosexual" refer to desire rather than conduct.¹⁸⁶ Anti-gay slurs also target status rather than behavior:

With the apparent exception of "cocksucker," no widespread anti-gay slur gives any indication that its censure is directed at sex acts rather than despised social status. Group-directed slurs (dyke, queer, fag) place gays in a significant social category along with blacks (nigger, shine, shitskin), other

¹⁸⁴ *Id.*

¹⁸⁵ John Boswell has put the point with characteristic force:

[M]ost modern hostility has little if anything to do with the specific "activities" performed by gay people. It is being a homosexual that disturbs most of the public, from school systems to the U.S. Army. What people do in private . . . is of much less concern than what they say in public. "Avowed homosexuals" are excluded from the ministry of nearly all church denominations, even if they choose to be celibate. What is at issue is the category, a category independent of any sexual activity. The allegedly antisocial behavior known as "flaunting"—a focus in such anti-gay campaigns as that of Anita Bryant—does not involve any genital activity at all: it refers to public honesty and openness about one's erotic feelings. "Pansy," "queer," and "faggot" allude not to explicit, dangerous acts, but to private, invisible preferences, or even such personal and—one might have thought—unthreatening aspects of an individual as his aesthetic taste or the way he walks or holds his hands in conversation. Violence against gay people on the streets of American cities arises not from the observation of prohibited acts, which almost all gay people perform out of view, but from the surmise that someone is a lesbian or a gay man. . . . [I]t is unrelated to any external activity: the aim is to punish, injure, or eliminate persons who *are* gay.

John Eastburn Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities*, 1 YALE J.L. & HUMAN. 205, 225-26 (1989).

¹⁸⁶ See RICHARD MOHR, A MORE PERFECT UNION: WHY STRAIGHT AMERICA MUST STAND UP FOR GAY RIGHTS 60 (1994).

racial groups (chink), women (cunt, gash), various ethnic groups (wop, dago, gook, jap, JAP, mick, kike) They do not place gays in the same category as liars, hypocrites, murderers, and thieves—those who commit immoral and criminal actions and yet for whom culture in no case has coined group-based invectives. This schema of slurs strongly suggests that gays are held to be immoral because they are hated, rather than hated because they are immoral.¹⁸⁷

Judge Richard Posner, no gay rights advocate,¹⁸⁸ has acknowledged that homosexuals “are despised more for what they are than for what they do.”¹⁸⁹ He notes that laws prohibiting homosexual sex are marked by “a gratuitousness, an egregiousness, a cruelty, and a meanness” that is unusual.¹⁹⁰ Even homosexuals who do not act on, or even who openly repudiate, their inclinations, still bear the stigma of their status, if it is known. In 1976, presidential candidate Jimmy Carter told an interviewer, “I’ve looked on a lot of women with lust. I’ve committed adultery in my heart many times. This is something that God recognizes I will do—and I have done it—and God forgives me for it.”¹⁹¹ The statement caused a minor flap at the time, but Carter went on to win the election. Imagine the reaction if he had said that he had looked on a lot of men with lust.

The actions thought typical of gays, Mohr concludes, are stigmatized as

signs or markers for a despised status. What the effeminate male and butch lesbian does does not matter. It is their mere existence, mere presence, that offends. Such acts as gays are thought to perform—whether sexual, gestural, or social—are viewed socially as the expected or even necessary efflorescence of gays’ lesser moral state, of their status as lesser beings, rather than as the distinguishing marks by which they are defined as a group. Such purported acts—the stuff of stereotypes—provide the materials for a retrospectively constructed ideology concocted to justify the group’s despised status, just as, for instance, the beliefs that Jews poison wells and kill babies and messiahs are concocted, as socially

¹⁸⁷ *Id.* at 61-62.

¹⁸⁸ For a critique of Judge Posner’s work from a gay rights perspective, see William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992).

¹⁸⁹ RICHARD POSNER, *SEX AND REASON* 346 (1992).

¹⁹⁰ *Id.*

¹⁹¹ JULES WITCOVER, *MARATHON: THE PURSUIT OF THE PRESIDENCY, 1972-1976*, at 566 (1977) (quoting Jimmy Carter).

"needed," to justify society's hatred of Jews. Hatred's targeting of status is primitive, and its condemnation of behavior an ideologically inspired afterthought.¹⁹²

2. Stereotyping

Stereotyping of gays is problematic even if it is not merely a manifestation of hatred. Consider the Senate Committee's fantasies described earlier,¹⁹³ or, more pertinently here, the mendacious stereotypes about gays that the supporters of Amendment 2 deployed. Colorado for Family Values was the organization that drafted and principally led the campaign for Amendment 2. Its principal pamphlet, delivered to 800,000 Colorado doorsteps before the election, claimed, *inter alia*, that "sexual molestation of children is a large part of many homosexuals' lifestyle," that such molestation "is actually an accepted part of the homosexual community!", that gays are "rich, 'horny', political power brokers," and that gay rights ordinances protect sexual intercourse in public places, would require employers to construct separate bathrooms for gays, would impose legal penalties upon churches and individuals who preach that homosexuality is wrong, and "could force churches to unite homosexuals in marriage."¹⁹⁴ Members of Colorado for Family Values evidently judged that at least some of their audience was predisposed to credit silly claims of this sort.

Ely explains why stereotyping of this kind violates the Fourteenth Amendment. "The cases where we ought to be suspicious are . . . those involving a generalization whose incidence of counterexample is significantly higher than the legislative authority appears to have thought it was."¹⁹⁵ This is because such a generalization denies those people who are counterexamples, and to whose existence the decisionmaker is oblivious, "*their* right to equal concern and respect, by valuing their welfare at zero."¹⁹⁶ The danger of such devaluation is particularly great when the group in question is one to which the decisionmakers do not belong. People are especially likely to subscribe to self-flattering generalizations and to negative myths about outsiders. "Just as we would want reconsidered any impor-

¹⁹² MOHR, *supra* note 186, at 65-66.

¹⁹³ See *supra* text accompanying notes 130-32.

¹⁹⁴ COLORADO FOR FAMILY VALUES, EQUAL RIGHTS—NOT SPECIAL RIGHTS! (1992). See generally Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133 (1991) (cataloguing common, demonstrably false stereotypes).

¹⁹⁵ ELY, *supra* note 50, at 157.

¹⁹⁶ *Id.*

tant decision that was made under the influence of an erroneous assumption about the relevant facts, so should we here."¹⁹⁷

It seems likely that the Court recognized the existence of both of these motives. Moreover, in assessing whether *Romer* was correctly decided, we also ought to take note of two other constitutionally impermissible purposes that are pervasive in American society and underlie the stigmatization of homosexuality, both of which appear to have escaped the Court's notice.

3. Sexism

One of these constitutionally impermissible motives is the desire to impose traditional sex roles on others. Any action that singles out homosexuals facially classifies on the basis of sex. If a business fires Ricky, or if the state prosecutes him, because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against on the basis of his sex. Here, as elsewhere, the facial classification reveals something important about purpose. The link between heterosexism and sexism is common knowledge. Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate to one's sex is the imputation of homosexuality. The two stigmas—sex-inappropriateness and homosexuality—are virtually interchangeable, and each is readily used as a metaphor for the other. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over women. Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as *too* aggressive and dominant; they appear to be guilty of some kind of insubordination. As was true in *Brown*,¹⁹⁸ the findings of scholarship reinforce what common sense already tells us. Numerous studies by social psychologists have found that support for traditional sex roles is strongly correlated with (and in some studies is the best single predictor of) disapproval of homosexuality. Historians chronicling the rise of the modern despised category of "the homosexual" have found similar connections with sexism.¹⁹⁹

¹⁹⁷ *Id.*

¹⁹⁸ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹⁹⁹ I have developed the claims made in this paragraph at much greater length in Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). This argument has been subject to some misunderstanding. My claim is not that gender role deviance is "the total explanation for homophobia." See Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 82 (1996); see also Roderick M. Hills, *You Say You Want a Revolution? The Case Against Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1608-12 (1997). I specifically disavow that argument. See Koppelman, *supra*, at

Doubtless it never occurred to the Court that discrimination against gays is a kind of sex discrimination. If it had, then *Romer* would have been an easy case, squarely controlled by *Hunter v. Erickson*.²⁰⁰ If *Hunter* involved an explicitly racial classification, then Amendment 2 equally involved an explicit gender classification; under the Amendment, men, but not women, who sleep with men may be freely discriminated against.²⁰¹ Viewing Amendment 2 as sex discrimination would have been a simpler and more automatic path to heightened scrutiny, but it is not the path that the Court took.

4. *Imposition of Religious Belief*

Finally, much of the reason homosexuality is stigmatized is that many Americans are Christians or Jews who interpret the Bible as forbidding homosexual conduct. Motivation of this kind does not violate the Fourteenth Amendment because it does not deny anyone equal concern and respect. The equal dignity of all human beings is a foundational belief in both Judaism and Christianity; as an historical matter, contemporary secular liberals got the idea of equal dignity from these faiths.²⁰² Religious motives, however, may run afoul of other considerations. The Supreme Court has held that, to be constitutional, a law must "have a secular legislative purpose."²⁰³ This does not mean that religious motivation invalidates a statute, but it does mean that a law must be defensible in secular terms. Kent Greenawalt has explained why religious arguments are not a proper basis for state action:

255-57 n. 222. My causal claim is a good deal more modest: that the homosexuality taboo

is crucially dependent on sexism, without which it might well not exist. And when the state enforces that taboo, it is giving its imprimatur to sexism. As with the miscegenation taboo, the effect that the taboo against homosexuality has in modern American society is, in large part, the maintenance of illegitimate hierarchy; the taboo accomplishes this by reinforcing the identity of the superior caste in the hierarchy, and this effect is at least in large part the reason why the taboo persists.

Id. at 255-57 (footnotes omitted).

²⁰⁰ 393 U.S. 385 (1969) (invalidating an amendment to a city charter requiring a majority of electors to approve proposed ordinances regulating realty transactions on the basis of race).

²⁰¹ Sunstein has already noted the availability of this kind of argument. See Sunstein, *supra* note 6, at 64. J.M. Balkin also appears to think that *Romer* ought to have been disposed of on the basis of a sex discrimination argument. See Balkin, *supra* note 169, at 2361-73.

²⁰² See Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 846 (1993).

²⁰³ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

A liberal society . . . has no business dictating matters of religious belief and worship to its citizens. It cannot forbid or require forms of belief, it cannot preclude acts of worship that cause no secular harm, it cannot restrict expression about what constitutes religious truth. One needs only a modest extension of these uncontroversial principles to conclude that a liberal society should not rely on religious grounds to prohibit activities that either cause no secular harm or do not cause enough secular harm to warrant their prohibition.²⁰⁴

This does not mean that a law is invalid if it was enacted with religious motives; that would mean, as Michael McConnell has argued, "that those whose understandings of justice are derived from religious sources are second-class citizens, forbidden to work for their principles in the public sphere."²⁰⁵ It does, however, mean that those with moral objections to homosexual conduct have an obligation to translate those objections into secular terms.²⁰⁶ "The absence of a strong secular justification for the categorization is the best evidence that the program favors religion over nonreligion, or one religion over another."²⁰⁷ Efforts to translate religious objections to homosexual conduct into secular terms have been, at least as of this writing, a conspicuous failure.²⁰⁸ Thus, there is some reason to suspect that even if some of the purposes of laws discriminating against gays do not violate the Equal Protection Clause, those purposes nonetheless violate the Establishment Clause.

D. *Invidious Motive and Amendment 2*

Laws, such as Amendment 2, that target gays for disadvantage are the product of a political process contaminated by constitutionally impermissible mo-

²⁰⁴ KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 90-91 (1988).

²⁰⁵ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 144 (1992).

²⁰⁶ See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) ("No suggestion has been made that Arkansas' law [prohibiting the teaching of evolution in public schools] may be justified by considerations of state policy other than the religious views of some of its citizens.").

²⁰⁷ McConnell, *supra* note 205, at 144.

²⁰⁸ The most sophisticated effort at such translation is that of the new natural law theorists, most prominently John Finnis. I describe and critique their arguments in Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. (forthcoming 1997).

tives. It is only when this cultural background is kept in view that it becomes clear why Amendment 2's singling out of gays for broad disadvantage is constitutionally fatal. Judicial suspicion that such motives were at work is confirmed by the language of the Amendment, which had "the peculiar property of imposing a broad and undifferentiated disability on a single named group."²⁰⁹ Justice Kennedy was right to focus on this unusual property, which appears to have tipped the scales against the law (though the opinion would have made a good deal less sense if some other group had been named). Thus, a law that does not single out a "named group," such as a slightly redrafted Amendment 2 that merely substitutes "sexual orientation" for "homosexual, lesbian or bisexual orientation," would present a harder case.²¹⁰ But unless there were reliable background knowledge of hatred and stereotyping of gays, even the inference of animus in *Romer* would have been unwarranted.

The core constitutional objection to Amendment 2 is that, absent invidious motives, it probably would not have passed. The key, though not necessarily fatal, weakness of that objection is that its judgment of probability reasonably can be disputed. Invidious prejudices certainly contribute to the passage of laws of this kind, but they are mixed with permissible motives. Justice Scalia's claim that "the only sort of 'animus' at issue here" was "moral disapproval of homosexual conduct"²¹¹ was surely a correct description of many, perhaps most, of those who voted for Amendment 2. On the other hand, these voters had some allies who had pretty unsavory motives. Sorting them out, and determining whether the impermissible motives were the determinative ones, seems an impossible task.

The existence of such mixed motives is not a new difficulty, however. It is the innocent explanation problem again. Almost any law can be given *some* innocent explanation. What is more, any such innocent explanation usually will correctly characterize the motives of some of its supporters. For example, probably the most severe attribution of invidious legislative purpose in any Supreme Court opinion was its declaration, in *Loving v. Virginia*,²¹² that laws prohibiting interracial marriage were "measures designed to maintain White Supremacy."²¹³ The Court stated this in the teeth of a perfectly innocent alternate ex-

²⁰⁹ *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

²¹⁰ The amendment, (with new words emphasized) would read:

No Protected Status Based on Sexual Orientation.

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby *sexual* 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.

²¹¹ *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting).

²¹² 388 U.S. 1 (1967).

²¹³ *Id.* at 11.

planation that the Commonwealth of Virginia had offered. In its brief, Virginia argued that if the Court were to undertake an inquiry into the wisdom of the challenged legislation, "it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view."²¹⁴ It argued that the decision not to allow such marriages rested on the acceptance of scientific arguments put forth by respectable authorities. If an innocent explanation was all that was needed, here it was. Moreover, it is nearly certain that at least some of Virginia's leaders had managed to persuade themselves that these scientific claims were true. The appellants responded that "there is not a single anthropologist teaching at a major university in the United States who subscribes to the theory that Negro-white matings cause biologically deleterious results,"²¹⁵ but the Court certainly was not competent to adjudicate this dispute. Moreover, under motive-based analysis, even if the law rested on bogus science, this would not necessarily have impugned the legislators' motives. Innocent mistakes are not invidious.

Instead, the Court emphasized that "Virginia's miscegenation statutes rest solely upon distinctions drawn according to race."²¹⁶ Such distinctions are "odious to a free people whose institutions are founded upon the doctrine of equality."²¹⁷ The Court supported its attribution of invidious purpose by noting that "Virginia prohibits only interracial marriages involving white persons,"²¹⁸ but it also indicated that Virginia would not be able to cure the difficulty by enacting a more broadly worded statute.²¹⁹

In both *Loving* and *Romer*, the kind of classification that was used triggered a presumption of unconstitutionality, which the state was unable to overcome. In both cases, the triggering of that presumption was appropriate because the classifications in question were ones that were widely understood to separate those citizens who were fully human from the *untermenschen*. The use of such classifications sufficed to raise a serious doubt about the legitimacy of the laws' motivations.

Once such a doubt has been raised, legislation can no longer be presumed to be constitutional.

[The Equal Protection Clause] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legisla-

²¹⁴ Brief of Appellee at 41, *Loving* (No. 395).

²¹⁵ Brief for Appellants at 37, *Loving* (No. 395).

²¹⁶ *Loving*, 388 U.S. at 11.

²¹⁷ *Id.* at 11 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

²¹⁸ *Id.*

²¹⁹ See *id.* at 12 n.11 ("[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races.").

ture or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.²²⁰

The doctrine of suspect classification rests on the judgment that, whenever a classification of a certain sort is used, a court is justified in presuming that "a motivating factor in the decision" was the illicit motive ordinarily associated with that classification in the minds of at least some of the citizenry. A classification should be suspect, then, if many citizens think that the classification in question distinguishes persons who are entitled to a full measure of concern and respect from persons who are inherently degraded and inferior. Sexual orientation is a classification of this sort.

Richard Duncan has argued that *Romer* was wrongly decided because the draconian or unconstitutional applications that worried the Court were unlikely ever to occur and, in any event, were not the law's primary effect.²²¹ At oral argument, the justices had wondered whether the Amend-

²²⁰ *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (footnotes omitted). The Court here cited Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, who argues at pages 117-18:

If the decisionmaker gave weight to an illicit objective, the court should presume that his consideration of the objective determined the outcome of the decision and should invalidate the decision in the absence of clear proof to the contrary. . . . In this case, proof that the decisionmaker took account of an illicit objective rebuts whatever presumption of regularity otherwise attaches. For this reason, and because of the constitutional interests at stake, the court should place on the decisionmaker a heavy burden of proving that his illicit objective was not determinative of the outcome.

See also *id.* at 119 (footnotes omitted):

A complainant who can prove that, but for the decisionmaker's desire to promote an illicit objective, the decision would not have been made, should clearly have won his case. But such rigorous proof is not essential. It should suffice to demonstrate that illicit motivation played a non-trivial part in the decisionmaking process, so that it might have affected the outcome. Whichever of these ways one poses the inquiry, it is inappropriate to ask which of several possible objectives was "sole" or "dominant" in the decisionmaker's mind: an illicit motive may have been "subordinate" and yet have determined the outcome of the decision.

²²¹ Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling*,

ment would authorize libraries to refuse to lend books to gays, hospitals to deny gays access to kidney dialysis, or the police, the health department, and the insurance commissioner to engage in similar discriminatory denials of services.²²² The Amendment's literal language might have authorized such discrimination, but these scenarios were unlikely and might have been cured by a narrow interpretation of the Amendment. Duncan tellingly cites Justice Kennedy's observation, in another context, that courts should not invalidate laws "on a facial challenge based upon a worst-case analysis that may never occur."²²³

Duncan's question, "But why should we think these scenarios will ever occur or were intended by the voters of Colorado when they approved the initiative?"²²⁴ deserves an answer. The evidence of actual discriminatory animus is sparse. The offending, overbroad language of the Amendment did not even appear on the ballot, which contained only a summary of the law. Survey data does not turn up convincing evidence of impermissible animus in the Colorado electorate.²²⁵ Michael Dorf observes that if the reason objective impermissible purpose voids a statute "is because the objective features of the statute provide clear evidence of the subjective goals of the legislature," then "one would expect that on occasion a statute with an objective impermissible purpose could be defended on the ground that, al-

the Culture War, and Romer v. Evans, 72 NOTRE DAME L. REV. 345 *passim* (1997).

²²² See U.S. Supreme Court Official Transcript at *25, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039), 1995 WL 605822 (U.S. Oral Argument Oct. 10, 1995).

²²³ *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990), *quoted in* Duncan, *supra* note 221, at 354.

²²⁴ Duncan, *supra* note 221, at 354.

²²⁵ A poll conducted a month after the vote by an independent survey firm on behalf of the Denver Post and KCNC-TV showed that 81% of voters surveyed agreed with the statement that "[e]xcept for their choice of sexual partners, homosexuals are not really different from anyone else." Only 6% agreed that "[a] homosexual is more likely to sexually molest children than a person who is heterosexual." Only 13% agreed that "[h]omosexual behavior should be against the law, even if it occurs between consenting adults." Talmey-Drake Research & Strategy, Inc., December, 1992 Issues Poll. (The state's lawyers cite this data to argue that Scalia's analysis of voter motivation is the correct one. See Tymkovich et al., *supra* note 4, at 331.) Indeed, it appears that most Colorado voters supported the idea that people should not be denied a job or housing based on sexual orientation. Amendment 2's proponents evidently succeeded in inducing voters to believe that Amendment 2 was principally about affirmative action, which many opposed. See Schacter, *supra* note 62, at 393, *citing* Evan Gerstmann, *At the Constitutional Crossroads: Gays, Lesbians, and the Failure of Class Based Equal Protection* (1996) (unpublished Ph.D. dissertation, University of Wisconsin-Madison); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 300-07 (1994). It is not unusual for voters to be confused about the referenda they are voting upon. Nor is it unusual for proponents and opponents of ballot measures to deliberately compound voters' confusion. See Eule, *supra* note 107, at 1515-18 (1990).

though the statute appears to serve only an impermissible purpose, in fact it was enacted for different, permissible purposes."²²⁶ This is just what Duncan is saying. Duncan concedes that Amendment 2 may look as though it was animated by a bare desire to harm gays, but he thinks that the totality of the evidence of the lawmakers' subjective purposes should lead us to a different conclusion.

The judicial limitations already noted forbid this move, however.²²⁷ We decided in the first place to look to objective, rather than subjective, purpose because (a) it is very hard confidently to attribute any particular motive to a collective group; (b) courts are rightly reluctant to challenge other officials' motives; and (c) this reluctance means that a motive-based test will bias the judiciary in favor of validating statutes, even those that are in fact contaminated by impermissible motives. All of these considerations militate against permitting a motive-based defense to a finding of impermissible objective purpose. It will be as difficult confidently to attribute a good subjective motive to the decisionmakers as it was to attribute a bad one to them. The courts' reluctance to impugn the lawmakers' motives will again bias adjudication to the detriment of Fourteenth Amendment protections; in assessing the prima facie case against a statute, if it was hard to say that a lawmaker had a bad motive, it will be equally hard at the rebuttal stage to *deny* that the lawmaker had a good motive. The only way to avoid this difficulty is to forbid the parties to the litigation from putting in issue the subjective motives of the lawmaker.

Thus, we come to the following paradox. Following the Court's interpretation of the Equal Protection Clause, the sine qua non of a violation of that Clause, is unconstitutional subjective motive. A well-crafted set of implementing rules, however, will push subjective motive so far outside the scope of inquiry (at least in cases where the person challenging the law does not directly put motive in issue) that evidence of motive, in fact, will become entirely irrelevant to the adjudication of the law's constitutionality, perhaps to the point of being inadmissible in court.

I recognize the contingent and contestable nature of my judgment. Reasonable people disagree about whether hatred and stereotyping of gays is sufficiently pervasive in our society to warrant judicial suspicion of laws that discriminate on the basis of sexual orientation. *Romer*, therefore, is a hard case. An objective test of suspectness must rely on objective social

²²⁶ Letter from Michael Dorf, Associate Professor, Columbia University School of Law, to Andrew Koppelman (Nov. 6, 1996) (on file with author). Our correspondence was prompted by Professor Dorf's fine article, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

²²⁷ These limitations have long been emphasized by Justice Scalia, who thinks that it is almost never appropriate for courts to rely on extrinsic evidence of legislators' meaning. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990).

meanings, and these are always going to be contested. But this does not, without more, impugn the result. If the Court is not altogether going to abdicate its Fourteenth Amendment role, then it has to make its own best judgment.²²⁸

IV. WHAT ABOUT *HARDWICK*?

If this reading of *Romer* is correct, then the case has far-reaching implications. Charles Black wrote of *Brown* that "the venial fault of the opinion consists in its not spelling out that segregation . . . is perceptibly a means of ghettoizing the imputedly inferior race."²²⁹ The *Romer* opinion has a similar fault. In neither case, however, does this fault necessarily impugn the result. The cultural information that is omitted from both opinions is easily supplied by the reader. If, however, the key element in this equation is the recognition of the invidiously stigmatized status of gays, that recognition cannot be confined to the facts of *Romer*. It is precisely this kind of background knowledge that the Court relies on when concluding that a given type of classification warrants heightened scrutiny as a general matter. Even though *Romer* does not so much as intimate that sexual orientation is a suspect classification, it nonetheless is a step in that direction. *Romer* found that there exists a non-empty set of laws targeting gays that are unconstitutional because they reflect an impermissible animus against the group.²³⁰

²²⁸ For a defense of the legitimacy of adjudication of hard cases, even those in which the arguments are equally strong on both sides, see Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 587-92 (1993).

²²⁹ Black, *supra* note 166, at 430.

²³⁰ There appears to be at least one member of this set of laws in addition to Amendment 2. Shortly after *Romer*, the Court vacated and remanded a decision upholding an amendment to the Cincinnati Charter, the wording of which was nearly identical to that of the Colorado amendment. See *Equality Found. v. City of Cincinnati*, 116 S. Ct. 2519 (1996). On remand, the Sixth Circuit reaffirmed its earlier decision, see *Equality Found. v. City of Cincinnati*, 1997 WL 656228 (6th Cir. 1997), but in order to do so, it was compelled to distinguish *Romer* on the basis of factors, such as Amendment 2's "interfer[ence] with the expression of local community preferences," *id.* at *7, that had been given no weight at all in the Supreme Court's opinion. Arthur Leonard observes that the Sixth Circuit's opinion "adopts and embellishes (without citation)" the arguments made by Justice Scalia in his dissent from the remand. Arthur S. Leonard, *6th Circuit Sustains Cincinnati Ballot Measure*, LESBIAN/GAY L. NOTES, Nov. 1997, at 157. The decision thus rests on a basis that has already been rejected by a majority of the Court. Leonard reports that the plaintiffs intend to seek either en banc review or certiorari before the Supreme Court. See *id.* at 158.

Another likely member of the set is the recent Defense of Marriage Act, which is as indiscriminate as Amendment 2 in the injury it inflicts on gays, and as difficult to defend in the details of its applications. See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. (forthcoming

Once that finding is made, it becomes reasonable to ask, of *any* law that facially discriminates against gays, whether it is a member of that set.

Given the widespread prejudice against gays, minimal scrutiny of laws that target them is at least sometimes inappropriate, and *Romer* shows that the Court is disposed, at least implicitly, to recognize this. Has the way then been paved for heightened scrutiny of such laws as a general matter? Will sexual orientation become at least a quasi-suspect classification? *Romer* can easily be read as a precursor of that development. Thus Lino Graglia: "The Court was obviously unwilling, for public relations reasons, to openly declare homosexuality a 'suspect criterion.'"²³¹ But there is an alternative explanation of why the Court did not drop the other shoe.

Return to the problem with which we began. Can *Romer* be reconciled with *Bowers v. Hardwick*,²³² in which the Court held that a law criminalizing homosexual sodomy does not violate the Due Process Clause? Justice Kennedy did not mention the earlier case in his opinion, and when asked the question in an interview, he would not answer it.²³³ In this final section of this Essay, I will suggest that *Hardwick* is an obstacle, though not necessarily an insuperable one, to heightened scrutiny for sexual orientation classifications. It is this obstacle—not merely the precedent, but the defensible principle for which it stands—that is the reason for the Court's hesitation.

Citing with approval several lower court opinions, Justice Scalia reasoned that, after *Hardwick*, it would be anomalous to deem gays a protected class under the Equal Protection Clause.²³⁴ Without more, this argument is a non sequitur. It implicitly assumes that if a law does not violate one provision of the Constitution, then it cannot violate any other constitutional com-

1997).

²³¹ Lino A. Graglia, *Romer v. Evans: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409, 424 (1997).

²³² 478 U.S. 186 (1986).

²³³ Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82, 90. "I'm not going to comment," Justice Kennedy told his interviewer. "It will be interesting to see how *Romer* is understood." *Id.*

²³⁴ See *Romer v. Evans*, 116 S. Ct. 1620 at 1631-32 (Scalia, J., dissenting) (citing *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987)); see also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571-74 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-66 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). This reasoning was rejected in *Watkins v. U.S. Army*, 847 F.2d 1329, 1345-49 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); *Jantz v. Muci*, 759 F. Supp. 1543, 1546-47 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992); cf. *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (rejecting a privacy challenge to a statute disallowing same-sex marriages while sustaining an equal protection challenge to that same statute).

mand either.²³⁵ Due process and equal protection are two distinct constitutional provisions, and there is no reason to presume that a law permitted by one provision is also permitted by every other.²³⁶

There is, however, an argument that can be made for linking due process and equal protection in the way that Scalia attempts to. The Court has sometimes suggested that in order to be a fundamentally unfair basis of classification, which is the gravamen of an equal protection claim, a trait must be irrelevant to any (or almost any) legitimate state purpose.²³⁷ This means that, in order to adjudicate an equal protection claim, a court must canvass the range of possible legitimate state purposes and decide whether the purposes proffered on behalf of the challenged law are legitimate. That same extratextual inquiry undergirds a due process claim, in which the issue is whether the state has a sufficient basis for infringing on the liberty of the person challenging the law.

This means that when courts decide whether homosexuality should be deemed a suspect classification, it is relevant that the legitimacy of the state's purposes in suppressing homosexual conduct was already put into question in *Hardwick*. In *Hardwick*, the Court decided that the promotion of morality was a sufficient basis for criminalizing sodomy.²³⁸ According to *Hardwick*, then, there is a legitimate state interest in discouraging homosexual conduct.²³⁹ If that is true for due process purposes, then it must also be

²³⁵ See Koppelman, *supra* note 123, at 187-88. The Court in *Hardwick* expressly declared that it was not deciding the equal protection question. See *Hardwick*, 478 U.S. at 196 n.8.

²³⁶ See Sunstein, *supra* note 6, at 67-69.

²³⁷ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (declining to declare mental retardation a suspect classification).

²³⁸ See *Hardwick*, 478 U.S. at 196.

²³⁹ Even if one thinks that *Hardwick* wrongly decided the privacy issue, one can still endorse its holding that the promotion of morality is a legitimate state interest. For example, John Finnis thinks that homosexual conduct is morally wrong, see *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1063-70 (1994), and that the state "should deliberately and publicly identify, discourage and hinder the harmful and evil," *id.* at 1076, but he denies "that that rationale requires or authorizes the state to direct people to virtue and deter them from vice by making even secret and truly consensual adult acts of vice a punishable offence against the state's laws." *Id.*; cf. *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting) (stating that the repeal of sodomy laws "does not necessarily abandon the view that homosexuality is morally wrong and socially harmful," and often "simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens"); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 58-62. I disagree with Finnis about the morality of homosexual conduct, see generally Koppelman, *supra* note 208, but I agree that the state can legitimately promote morality. I have argued at length that the encouragement of an anti-racist and anti-sexist ethic is a legitimate undertaking for a liberal state. See generally Koppelman,

true for equal protection purposes.²⁴⁰

The existence of a legitimate purpose is not, however, dispositive for equal protection analysis. Cass Sunstein has observed that a crucial distinction between due process and equal protection claims is that the former are backward-looking, protecting traditionally valued liberties, while the latter are forward-looking and self-consciously directed *against* tradition in the name of equality.²⁴¹ The distinction that is more relevant to process-based equal protection analysis is that between result and motive. The Due Process Clause protects citizens from being injured in important ways, and is indifferent to the state's motives. In equal protection analysis, however, motive is central.

The analysis in *Hardwick* turned on the importance, or lack thereof, of the asserted liberty. The Court rejected *Hardwick's* claim because the right to engage in homosexual sodomy is neither "implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and tradition."²⁴² *Hardwick's* interest in engaging in sodomy was deemed (at least constitutionally) trivial, so that the state did not need much justification in order to infringe on that interest. When the Court suspects invidious motive, on the other hand, it does not matter if the discrimination is about something trivial. A city could not permissibly distribute one lollipop to each white child who resides within its limits. If the Court suspects that an illicit motive is involved, then the state has a serious burden of proving the relevance of laws that discriminate against a group.²⁴³

Still, a realistic analysis properly concludes that after *Hardwick*, the granting of protected status to gays under the Equal Protection Clause would be surprising. As Laurence Tribe observed,

The fact that the Court in [*Hardwick*] went out of its way to create a line between heterosexuals and homosexuals, where there was none in the challenged sodomy statute, merely to preserve prosecution of homosexuals under the law from

supra note 162.

²⁴⁰ For a similar analysis of the relationship between gays' due process and equal protection claims, see Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 380-81 (1997).

²⁴¹ See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); Sunstein, *supra* note 6, at 67-69.

²⁴² *Hardwick*, 478 U.S. at 191-92.

²⁴³ Thus, Ely, for example, can dismiss the substantive due process claim raised in *Hardwick*, see ELY, *supra* note 55, at 22, while acknowledging that the equal protection claims of gays are more complicated and colorable. See ELY, *supra* note 50, at 161-70.

constitutional infirmity, indicates how unlikely it is that homosexuality will be deemed quasi-suspect in the near future.²⁴⁴

Romer upsets a sound realist prediction. It is not clear, however, that this gives anyone a right to complain. Realist predictions are not the law.

There is no doctrinal inconsistency between the Court's decisions in *Hardwick* and *Romer*,²⁴⁵ but this is not to say that the result in *Hardwick* is secure. Numerous statutes in American history have specifically prohibited interracial fornication.²⁴⁶ Since fornication is not a fundamental right, any privacy-based challenge to such laws would have failed. If there had been precedents rejecting such privacy claims, the Court would not have needed to overrule them in order to hold the very same statutes unconstitutional under the Equal Protection Clause.²⁴⁷ Similarly, a sodomy law that facially discriminates against gays, such as remains on the books in five states, is valid under *Hardwick* but might still be invalidated on equal protection grounds.²⁴⁸

The real stumbling block in this analysis is that there is an ambiguity in the Court's equal protection doctrine. Suspect classifications are sometimes described as those that are "seldom relevant to the achievement of any legit-

²⁴⁴ TRIBE, *supra* note 135, at 1616 n.47; see also POSNER, *supra* note 189, at 348-49: having upheld state sodomy laws against a 'sexual privacy' challenge (nominally under the due process clause) in *Bowers v. Hardwick*, the Supreme Court would hardly turn around and strike them down in the name of equal protection The Court is not so enamored of doctrinal niceties. . . . It has made its lack of sympathy for the claims of homosexuals plain enough.

²⁴⁵ I thus disagree with those commentators who are confident that *Romer* has implicitly overruled *Hardwick*. See Grey, *supra* note 240; Seidman, *supra* note 9, at 82. Whether anything remains of *Hardwick* as a practical matter is a harder question, for the reasons set forth below.

²⁴⁶ See, e.g., *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding such a statute).

²⁴⁷ In fact, the Court did hold such statutes unconstitutional. See *McLaughlin v. Florida*, 379 U.S. 184 (1964) (rejecting a Florida statute which prohibited cohabitation of a "white person" and a "negro"). It would have been unfortunate if such a privacy case had arisen. It would have been still more unfortunate if the Court, faced with a prosecution of an interracial couple under a statute prohibiting fornication simpliciter, had behaved in the way it did in *Hardwick* by announcing that the question before it was whether there was a right to "interracial fornication," and expressly reserving the issue of whether "monoracial fornication" was protected. Nonetheless, such ill-advised dicta could not have posed any obstacle to the later invalidation of the statute on equal protection grounds. Cf. Sunstein, *supra* note 6, at 67 n.307 (explaining that *Loving v. Virginia* could have been challenged on equal protection grounds if the due process attack had been unsuccessful).

²⁴⁸ See Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 149-53 (1988).

imate state interest,"²⁴⁹ but this makes little sense; why make it hard for government to rely on such classifications on the rare occasions when they *are* relevant? The real problem is that suspect classifications signal invidious intent. If, however, government can often point to a colorable reason for relying on such a classification, then it is not clear whether a presumption of unconstitutionality is justified.

Hardwick establishes that sexual orientation is a "distinguishing characteristic[]" relevant to interests the State has the authority to implement."²⁵⁰ Once it is stipulated that homosexual acts are harmful in some way that the state can permissibly cognize, then discrimination against gays is indisputably rational. "[B]ecause adults having sex with children is rationally thought harmful," Thomas Grey writes, "a school district surely could rationally disqualify as a teacher someone who had asserted (1) sexual desire (whether homosexual or heterosexual) for young adolescents and (2) a belief that relations of this sort could be genuinely consensual and, indeed, legitimate and beneficial."²⁵¹ Cass Sunstein thus overreads the decision when he writes that "[t]he underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior."²⁵² Sunstein offers a better formulation a bit later in the same article: "if the government is going to discriminate against homosexuals, it must do so on some ground other than its dislike of homosexuals and homosexuality."²⁵³ There always, however, will be room for dispute as to what is the government's real reason for enacting laws. Perhaps that is why the Court, in both *Hardwick* and *Romer*, avoided formulating any presumption about laws that discriminate against gays.

The reasoning of *City of Cleburne v. Cleburne Living Center, Inc.*,²⁵⁴ in which the Court enjoined the application of a law discriminating against the mentally retarded because it reflected "irrational prejudice,"²⁵⁵ but re-

²⁴⁹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). This phrase appears in a sentence that reasons that race, alienage, and national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy and deserving as others." *Id.* The infrequent relevance of those classifications does not, without more, justify the inference; this is the *Romer* puzzle all over again.

²⁵⁰ *Cleburne*, 473 U.S. at 441.

²⁵¹ Grey, *supra* note 240, at 377.

²⁵² Sunstein, *supra* note 6, at 62.

²⁵³ *Id.* at 63-64.

²⁵⁴ 473 U.S. 432 (1985).

²⁵⁵ *Id.* at 450.

fused to declare the retarded a quasi-suspect class, may have influenced the Court's decision in *Romer* to remain silent on the question of suspectness:

Doubtless, there have been and there will continue to be instances of discrimination against [gays] that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because [sexual orientation] is a characteristic that the government may legitimately take into account in a wide range of decisions . . . we will not presume that any given legislative action, even one that disadvantages [gays], is rooted in considerations that the Constitution will not tolerate.²⁵⁶

Romer, therefore, can be viewed as a case in which, as in *Cleburne*, the Court intervened against a particularly abusive law, while prudently avoiding a sweeping declaration of suspectness. This cannot, however, conclude the inquiry. In *Cleburne*, the retarded had been the beneficiaries of protective legislation that "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."²⁵⁷ Such beneficial legislation, the court worried, might well be chilled by heightened scrutiny.²⁵⁸ It appears that the same arguments weighed against judicial protection of other groups who "can claim some degree of prejudice from at least part of the public at large,"²⁵⁹ such as "the aging, the disabled, the mentally ill, and the infirm."²⁶⁰ None of those groups, however, has been subject to the degree of antipathy that gays have experienced and continue to experience. In each of those cases, there was less warrant for a presumption of impermissible motive. Tobias Barrington Wolff has observed that, unlike *Cleburne*, *Romer* employs "a rational basis review that would be entirely consistent with a future determination that gay people require heightened judicial protection."²⁶¹

²⁵⁶ *Id.* at 446.

²⁵⁷ *Id.* at 443.

²⁵⁸ *See id.* at 444.

²⁵⁹ *Id.* at 445.

²⁶⁰ *Id.* at 446.

²⁶¹ Tobias Barrington Wolff, Case Note, *Principled Silence*, 106 YALE L.J. 247, 252 (1996). *Romer* certainly does not hold, as Professor Duncan claims, that "laws that

Our answer to the suspectness question will depend on whether we think it likely that, in most cases, laws that discriminate against gays primarily reflect impermissible prejudice or a permissible moral judgment. An honest answer will not cheat by collapsing one of these into the other; both are invariably present.²⁶² Reasonable people can and do disagree about which of them, in the general run of cases, has a greater effect on gays' legal status. Those who think that condemnation of homosexuality rests on a sound moral judgment will find such a judgment reflected even in the most vicious antigay violence.²⁶³ Those who think that the condemnation of ho-

make distinctions on the basis of sexual orientation are presumptively constitutional." Duncan, *supra* note 12, at 156. Duncan attempts to support this assertion with a quotation from the opinion that describes the rational basis test, *see id.*, but he distorts the context in which that quotation appears. The Court distinguishes a number of earlier cases, noting that in each of those cases, the challenged law was "narrow enough in scope and grounded in a sufficient factual context for us to ascertain that there existed some relation between the classification and the purpose it served." *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). None of those cases involved a classification by sexual orientation, and the Court does not assert that this test applies to "most laws taking sexual orientation into account" Duncan, *supra* note 12, at 156.

²⁶² It is unfair to the Court to accuse it of this kind of cheating, as Louis Michael Seidman does when he writes that the Court has now "recharacterized [moral disapproval] as irrational animosity." Seidman, *supra* note 9, at 85; *see also* Balkin, *supra* note 169, at 2317-20; Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1443 (1997). The Court did not do that; rather, it held that Amendment 2 itself appeared to be the product of animosity and not mere moral disapproval. It may sometimes be hard to distinguish animus from moral disapproval, but the difference, both in principle and in practice, is often clear enough. Try to apply intelligibly to burglars Richard Posner's claim that homosexuals "are despised more for what they are than for what they do." POSNER, *supra* note 189, at 346.

No inconsistency exists in holding both that homosexual conduct can be the object of legitimate moral objection and that much of the stigmatization of gays in American society rests, not on this basis, but on illegitimate animus. Thus, for example, Catholic theologian Bruce Williams's defense of the Church's teachings about the immorality of homosexual conduct concedes that gays are often the objects of "violent and insane hatred," and praises some non-Catholic ministers for being "far ahead of official Catholic leadership in condemning Christian connivance in the cultivation of that irrational fear and hatred of gay people which is nowadays frequently called homophobia." Bruce Williams, *Homosexuality: The New Vatican Statement*, 48 THEOLOGICAL STUD. 259, 271, 275 (1987). Ralph Reed, the former executive director of the Christian Coalition, similarly holds that "the Bible makes it clear that homosexuality is a deviation from normative sexual conduct and God's laws," RALPH REED, *ACTIVE FAITH: HOW CHRISTIANS ARE CHANGING THE SOUL OF AMERICAN POLITICS* 265 (1996), but also finds "disturbing" declarations by religious conservatives "that AIDS is 'God's judgment' on the gay community," *id.* at 264, and declares that "the deeply-held moral beliefs of Christians regarding this practice do not justify hateful or spite-filled intolerance of homosexuality." *Id.* at 265.

²⁶³ *See, e.g.,* Congregation for the Doctrine of the Faith, *Letters to Bishops on the*

homosexuality mainly reflects irrational prejudice will find such prejudice reflected even in overtly religious objections.²⁶⁴ Whether it is appropriate for gays to be deemed a "suspect class," and for laws that discriminate against them to be presumed unconstitutional, depends on which of these sides is right.²⁶⁵ No wonder the Court hesitates. I think it likely that, absent motives of raw hatred of gays, sexism, stereotyping, and religious triumphalism, the legal status of gays would be very different than it is now.

Pastoral Care of Homosexual Persons (Oct. 1, 1985), 32 POPE SPEAKS 62 (1987):

It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors wherever it occurs. It reveals a kind of disregard for others which endangers the most fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law.

But the proper reaction to crimes committed against homosexual persons should not be to claim that the homosexual condition is not disordered. When such a claim is made and when homosexual activity is consequently condoned, or when civil legislation is introduced to protect behavior to which no one has any conceivable right, neither the Church nor society at large should be surprised when other distorted notions and practices gain ground, and irrational and violent reactions increase.

One should also take note of Ely, who argues that the moral objection to homosexuality differs significantly from the moral objection to interracial sex: "I agree that such laws are stupid and cruel, but the claim that they respond to genuine revulsion with the act rather than constituting part of a general attempt to isolate a minority is vastly more credible in the homosexual case." ELY, *supra* note 55, at 468 n.157. This is a hard sentence to square with Ely's general theory; the fact that the law is "cruel" seems to indicate bad motive, but its colorably moralistic character seems, in his eyes, to absolve it.

²⁶⁴ See, e.g., JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 7 (1980):

If religious strictures are used to justify oppression by people who regularly disregard precepts of equal gravity from the same moral code, or if prohibitions which restrain a disliked minority are upheld in their most literal sense as absolutely inviolable while comparable precepts affecting the majority are relaxed or reinterpreted, one must suspect something other than religious belief as the motivating cause of the oppression.

²⁶⁵ *Romer* itself, of course, does not indicate which side is right. Thus, I agree with Professor Seidman that

[d]eciding whether *Romer* protects gay marriages or invalidates "don't ask/don't tell" is . . . a little like speculating about Hamlet's childhood. The opinion provides new grounds for challenging old ways of thinking, but it cannot determine whether those challenges will ultimately succeed. For now, the only thing that is certain is that the opinion is open to a broad construction if future courts are disposed to so construe it. Whether they will be so disposed depends upon future political and social developments that we cannot reliably predict.

Seidman, *supra* note 9, at 98.

Because other reasonable people have different views, I am not serenely confident of this judgment. I *am* certain, however, that deferential judicial review, resting on the easy assumption that all laws addressing or affecting homosexuality are innocently motivated, *can't* be the right answer.