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Animus and Moral Disapproval: A Comment on Romer v. Evans

Barbara J. Flagg

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Romer v. Evans[1] was the first "gay rights" case to reach the U.S. Supreme Court in the decade since *Bowers v. Hardwick*,[2] and it already has generated nearly the same level of discussion as did its predecessor, though for quite different reasons. From the gay rights point of view, *Romer* reached a much more satisfactory result than *Hardwick*: by a 6-3 vote the Court held unconstitutional an amendment to the Colorado state constitution ("Amendment 2") that would have prohibited the enactment or enforcement of any statute, regulation, ordinance, or policy forbidding discrimination on the basis of homosexuality.[3] Moreover, *Romer* marks an apparent sea change in the Court's perspective on one problem of moral community: whether and how the state may express moral disapproval of "victimless" private conduct—that is, conduct that causes no harm to anyone, including the person who finds it morally objectionable, other than the moral disapproval itself.[4] *Hardwick* held that a moral purpose provided adequate justification for a state's

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

2. 478 U.S. 186 (1986) (finding constitutional against due process challenge a state law criminalizing same-sex sodomy).

3. *Romer* concluded that Amendment 2 violated the Equal Protection Clause. 116 S. Ct. at 1629. See *infra* note 16 for the language of Amendment 2.

4. Examples might include consensual adult sexual activity, such as sodomy, or unconventional marriage arrangements, such as polygamy, same-sex marriage, or miscegenation. This is to be distinguished from conduct that is thought to cause harm for reasons other than just its supposed immorality. For example, abortion restrictions may express moral disapproval of the act of terminating fetal life, but the latter aspect of the conduct means that such restrictions necessarily implicate a "preventing harm to others" rationale. Throughout this Essay I confine my use of the term "moral disapproval" to state interests that do *not* include any "preventing harm to others" component; thus abortion restrictions do not provide an example of the expression of moral disapproval so defined.

criminalization of one form of adult, private, consensual sexual activity.[5] However, the *Romer* Court discounted an analogous moral justification, identifying (impermissible) "animus," rather than (arguably permissible) moral disapproval, as the motivating force behind Amendment 2. Thus one might infer from the decision that there is now a "gay-friendly" majority on the Court, a majority that might be inclined to credit arguments that *every* anti-gay measure is motivated by constitutionally impermissible bias and hostility.

Indeed, some speculate that *Romer* may signal a preliminary move by the Court in the direction of suspect-class status for homosexuality,[6] which in turn could lead to the invalidation of other measures disadvantaging gays and lesbians, such as, most notably, bans on same-sex marriage. This line of speculation is fueled in large measure by the fact that the *Romer* majority opted not to rely on the "discriminatorily restructuring the political process" rationale that had provided the basis for a similar result in the Colorado Supreme Court.[7] Instead, the Court held that Amendment 2 failed equal protection rational basis review. This choice is remarkable in at least three respects. First, the majority selected an approach that seemingly requires more, rather than less, judicial involvement with controversial value choices. Second, the chosen rationale has much greater potential applicability to issues of lesbian and gay rights than the alternative approach, suggesting that the Court can anticipate having to resolve similarly value-laden questions in the future. Third, as noted above, the majority characterized the ultimate driving force behind Amendment 2 as constitutionally impermissible animus, rather than moral disapproval, and so held that it *failed* rational basis review.

A distinction between animosity and moral disapproval thus lies at the heart of the *Romer* opinion, though it makes a

5. 478 U.S. at 196. *Hardwick* was decided as an as-applied challenge; the Court did not address the question whether Georgia's sodomy law was constitutional as applied to cases in which the sexual partners were of the opposite sex. *Id.* at 188 n.2.

6. The conclusion that anti-gay measures generally are the product of prejudice and hostility might be a precursor to suspect-class status for homosexuality. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 162-64 & 255-56 n.92 (1980).

7. Evans v. Romer, 882 P.2d 1335, 1341 & n.4 (Colo. 1994). It might be said that the *Romer* opinion subsumes a variant of the "discriminatory restructuring" approach *under* the rational basis heading. These analyses are described more fully *infra* at text accompanying notes 33-41.

silent appearance, discernible only by inference from precedents upon which the Court does, and does not, rely. The proposition that animosity is not a legitimate state interest represents an unexceptionable reading of earlier equal protection decisions.[8] At the same time, there are two arguably relevant due process precedents not mentioned by the *Romer* majority: *Bowers v. Hardwick*,[9] which might be read to state the general proposition that legislation rationally may be justified by the state's pursuit of moral objectives, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[10] which contains hints that some members of the *Romer* majority might yet be receptive in some circumstances to a state's asserted moral justifications.[11] If one takes these precedents seriously, it becomes crucial to determine whether animus or moral disapproval was the actual motivating force behind Amendment 2 in particular, or, more generally, behind the proscription of any "victimless" private conduct.

The distinction between moral disapproval and animus may be less than obvious. Consider this illustration: My partner and I (a lesbian couple) are planning to host a party for a number of our friends and acquaintances. In Scenario A, we decide not to invite the Straights (a heterosexual couple) because we morally disapprove of their lifestyle (though not of them personally), and we want our party to reflect our moral community. In Scenario B, we decide not to invite the Straights because we don't like them (because they are heterosexuals) and, on account of this dislike, want to hurt their feelings. Scenario A illustrates moral disapproval; Scenario B illustrates animus.

At the level of state regulation of private conduct, same-sex marriage seems a particularly good arena in which to explore the distinction between moral disapproval and animosity. Last year Congress passed, and President Clinton signed, the Defense of Marriage Act (DOMA), which purports to permit states not to give full faith and credit to same-sex marriages recognized in another state.[12] The debate on this measure featured comments such as:

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8. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985); Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

9. 478 U.S. 186 (1986).

10. 505 U.S. 833 (1992).

11. *See infra* text accompanying notes 55-60.

12. *See* Pub. L. 104-199, 110 Stat. 2419 (1996). The constitutionality of

> What is at stake in this controversy? Nothing less than our collective moral understandings—as expressed in the law—of the essential nature of the family—the fundamental building block of society. This is far from a trivial political issue. Families are not merely constructs of outdated convention, and traditional marriage laws were not based on animosity toward homosexuals. Rather, I believe that the traditional family structure—centered on a lawful union between one man and one woman—comports with nature and with our Judeo-Christian moral tradition. It is one of the essential foundations on which our civilization is based.[13]

That is, opponents of same-sex marriage disavow Scenario B, contending that a ban would be motivated, and justified, by the kind of reasoning illustrated by Scenario A.

On the most progressive reading of *Romer*, one could argue that even under rational basis review a state proscription of same-sex marriage would be constitutionally impermissible because motivated by animosity towards homosexuals. However, same-sex marriage might well be the setting in which the Court, or at least some members of the *Romer* majority, would characterize the state's objective as moral disapproval rather than hostility. If so, the Court would then confront the questions left unresolved in *Romer*: whether moral disapproval *is* a "legitimate" (or "important" or "compelling")[14] state interest under equal protection analysis, and what to make of the due process precedents that address analogous questions.

DOMA is not obvious; it is not at all clear that Article IV, Section 1 of the federal Constitution grants Congress the power to create exceptions to the Full Faith and Credit Clause. That provision reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art IV, § 1. Authority for passage of DOMA, if it exists at all, is to be found in the phrase "the Effect thereof."

13. 142 CONG. REC. H7441 (daily ed. July 11, 1996) (statement of Rep. Canady).

14. Supreme Court precedents seemingly recognize three levels of judicial review: rational basis review, captured by the requirement that legislation bear "a rational relation to a legitimate state interest"; intermediate scrutiny, encapsulated in the formula "a substantial relation to an important state interest"; and strict scrutiny, which requires "a necessary relation to a compelling state interest." They are progressively less deferential and accordingly more difficult to satisfy. There may be a recent trend away from the distinction between intermediate and strict scrutiny. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.' "); United States v. Virginia, 116 S. Ct. 2264, 2271 (1996) (stating that sex classifications require "exceedingly persuasive justification").

This Essay explores the problem of moral disapproval as a constitutionally adequate state interest through the lenses of *Romer v. Evans* and same-sex marriage. I argue that expanding the *Romer* majority's emerging insight regarding the hostile nature of anti-gay legislation need not lead ineluctably to the proposition that government never may take action motivated by a moral vision, nor, more narrowly, to wholesale overruling of seemingly related precedent such as *Hardwick*. Moreover, I contend that the lodestar of the Equal Protection Clause lies in a direction quite distinct from that of the Due Process Clause, so that the status of government's asserted moral interests is quite different with respect to those two constitutional provisions. Indeed, the pluralist values underlying equal protection impel the doctrinal conclusion that a moral purpose alone cannot satisfy the requirements even of rational basis review. Accordingly, a ban on same-sex marriage ought not to survive an equal protection challenge even if it would satisfy the requirements imposed by the Due Process Clause.

In Part I of this Essay, I describe the principal rationale set forth by the litigants who challenged Amendment 2, explain why it is noteworthy that the Court opted not to settle on that proposed line of analysis, and analyze the *Romer* opinion as actually written. In Part II, I examine the problem of state interests in expressing moral disapproval, propose an approach to that problem that I think is mandated by underlying equal protection values, and apply that proposal to the question of same-sex marriage.

I. INTERPRETING *ROMER*

Colorado's Amendment 2 was passed in 1992 by statewide referendum, in reaction to the adoption of several local ordinances prohibiting discrimination on the basis of homosexuality.[15] Amendment 2 repealed all such existing antidiscrimination laws, and in addition precluded enactment or enforcement of similar laws in the future.[16] Had Amendment 2 taken effect,

15. *See* Romer v. Evans, 116 S. Ct. 1620, 1623 (1996).

16. Amendment 2 provided:

> 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 per-

lesbians and gay men seeking legal protection against discrimination on the basis of homosexuality could have accomplished their goals only via a state constitutional amendment.[17]

The plaintiffs challenging Amendment 2 rested primarily on the contention that it violated a fundamental right of equal participation in the political process.[18] They relied on a series of cases that had held it a denial of equal protection for government to restructure the political process in such a way that particular groups were required to pursue their interests though more arduous political routes than others had to negotiate.[19] For instance, in *Hunter v. Erickson*[20] the Court invalidated a scheme that effectively required proponents of "fair housing" legislation—prohibiting discrimination on the basis of race or religion—to submit their proposals both to the City Council and to the citizenry at large, while all other measures

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sons 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.

Id.

17. *See id.* at 1627. Because the state trial court granted a preliminary injunction staying enforcement of Amendment 2, which was later replaced by a permanent injunction, the amendment never went into effect. *See id.* at 1624.

18. The plaintiffs challenging Amendment 2 on several state and federal constitutional grounds sought and obtained a preliminary injunction against its enforcement. That ruling was affirmed by the Colorado Supreme Court, stating with respect to the merits that the right to participate equally in the political process is a "fundamental right" triggering strict scrutiny. *See* Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993). On remand, the parties litigated the question whether Amendment 2 was narrowly tailored to serve a compelling state interest, and whether lesbians and gay men should be considered a "suspect class" for equal protection purposes. The trial court ruled against the challengers on the latter point, and they did not appeal that ruling. However, the trial court did conclude that each of Colorado's proffered interests failed strict scrutiny, either because the interest itself was not compelling, or because the means was not necessary to serve the interest in question, and so permanently enjoined enforcement of Amendment 2. The Colorado Supreme Court affirmed the permanent injunction, reiterating its conclusion that the right to participate equally in the political process is a fundamental right, and agreeing that the state's asserted interests were insufficient. *See* Evans v. Romer, 882 P.2d 1335, 1341 & n.4 (Colo. 1994).

19. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385, 393 (1969); Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 470 (1982). *But cf.* James v. Valtierra, 402 U.S. 137 (1971) (upholding state constitutional requirement that public housing project be approved by electorate, partly on ground that referendums were required for several other types of decisions); Gordon v. Lance, 403 U.S. 1, 5, 7 (1971) (upholding referendum requirement for incurring bonded indebtedness, partly on ground that the challenged legislation did not disadvantage any identifiable group).

20. 393 U.S. 385 (1969).

passed by the City Council were subject to popular review only upon presentation of a petition signed by ten percent of the electorate.[21] Similarly, *Washington v. Seattle School District No. 1*[22] considered a statewide initiative ("Initiative 350") that had the effect of preventing local school districts from making school assignments for racial reasons, but simultaneously preserved maximum flexibility for those districts in making assignment decisions on any other basis. Initiative 350 restructured the political process in that it resolved the question of pupil assignment (and busing) for racial reasons at the state level, while all other pupil assignment decisions remained local ones.[23] The Court held the legislation unconstitutional, on the ground that it "subtly distort[ed] governmental processes in such as way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[24]

The political schemes invalidated in these cases exhibit three features. First, each of them involved reallocation of a single issue to a different level of government decisionmaking; usually, authority for resolution of a particular issue was moved from a relatively smaller to a relatively larger decisionmaking base, making it more difficult and more costly for a special interest minority to command the assent of a majority of decisionmakers.[25] Second, each invalidated scheme could be

21. *See id.* at 393. More precisely, most ordinances approved by the City Council took effect 30 days after passage unless 10% of the electorate signed a referendum petition, but ordinances regulating "the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry" became effective only if approved by a majority of voters. 393 U.S. at 387, 390.

22. 458 U.S. 457 (1982).

23. The Initiative provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student," but also set forth a series of exceptions such as special education needs, and health and safety hazards or obstacles, which effectively covered all reasons for assignment to a school other than the one nearest or next nearest a student's residence, *except* racial balancing. *See id.* at 462-63.

24. *Id.* at 467.

25. The exception is Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd mem.*, 402 U.S. 935 (1971), in which local elected (but not appointed) school boards were permitted to retain decisionmaking authority; all other race-related decisions were reserved for the state legislature. *Id.* at 712. Even in this case, however, the effect of making "beneficial legislation" more difficult for the minority to achieve is apparent.

said to adversely impact an identifiable group of citizens.[26] Finally, each of the cases in which the Court found a constitutional violation implicated issues of race.[27]

Amendment 2 clearly displayed the first two of these characteristics, but not the third. Thus it presented the question whether the "discriminatory restructuring" precedents depended for their outcomes on the Court's identification of underlying racial motivations. In essence, applying the "discriminatory restructuring" precedents to Amendment 2 required the Court to decide whether the former revolved around race discrimination or around the restructuring per se. The *Romer* majority easily could have taken the latter position. The "discriminatory restructuring" rationale appeals to a set of political process values widely shared on the Court. Indeed, one of the most significant modern justifications for judicial review concerns the role of the Court in policing the integrity of the political process.[28] From this perspective, heightened scrutiny would be appropriate with regard to any distortion of the political process, including claims of discriminatory restructuring. Had the *Romer* Court taken this route it would not have been necessary to reach the difficult question whether homosexuality is a suspect classification for equal protection purposes; the same rationale would apply whenever the political process was restructured in a manner designed to disadvantage *any* identifiable group.[29] Moreover, the process values at stake here seem to justify a sui

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26. In *Hunter* and *Seattle School District No. 1*, the Court identified racial minorities as the group adversely affected by the challenged legislation. *See* 393 U.S. at 390-91; 458 U.S. at 472-73. In *Gordon v. Lance*, the Court upheld the challenged legislation partly on the ground that it disadvantaged no identifiable group. *See* 403 U.S. 1, 5 (1971).

27. In addition to the impact on racial minorities noted above, *Hunter* and *Seattle School District No. 1* considered legislation that the Court identified as having a racial subject. That characterization was obvious in *Hunter*, because the challenged ordinance mentioned race on its face. *See supra* note 21. However, in *Seattle School District No. 1* the racial subject was apparent only by omission; pupil assignments were permitted under Initiative 350 for all usual reasons *except* racial ones. *See supra* note 23.

28. See the second paragraph of *Carolene Products* footnote four:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); *see also* ELY, *supra* note 6, at 73-104.

29. The issue of suspect class status for homosexuality was not presented to the U.S. Supreme Court in *Romer*. *See supra* note 18.

generis approach; it would have been equally unnecessary to label the interest in political participation a "fundamental right" as a predicate for heightened scrutiny.[30]

However, the *Romer* majority eschewed heightened scrutiny altogether, opting instead to test the state's purpose and means under the "rational basis" standard. One can only speculate why this course was selected; perhaps the Justices took to heart Colorado's contention that it would be formidably difficult, if not impossible, to formulate a definition of the "identifiable groups" whose participation in the political process would be protected under some form of heightened scrutiny.[31] However, it is difficult to conclude that this or similar doctrinal difficulties alone account for the decision of the *Romer* majority to turn to a more traditional, broadly based rational basis analysis, principally because the opinion brings into play value choices that are not present under the "discriminatory restructuring" approach. In the restructuring cases the Court seemed to say that the distortion itself constituted the violation; there is little analysis of the state's purposes even when a discriminatory motive seems apparent. In contrast, the rational basis approach leads the *Romer* Court to a more generalized examination of the state's motive in enacting Amendment 2, thus replacing the arguably difficult matter of "identifiable groups" with an equally difficult, and perhaps even more contentious, problem: the identification of the state's purpose as animus or moral disapproval.

Moreover, the Court's choice has the additional effect of broadening considerably the potential field of application of the *Romer* decision. The "discriminatory restructuring" analysis applies only where a particular issue or closely related set of issues is treated differently in the political process than are analogous issues; as the relatively short line of precedent illus-

30. That is, I think the Colorado Supreme Court was correct in reading the U.S. Supreme Court's earlier "discriminatory restructuring" decisions as providing a basis for a right of equal political participation that would, if burdened, trigger some form of heightened scrutiny, but I do not think it necessary to label such a right "fundamental."

31. *See* Reply Brief of Petitioners at *11-12, Romer v. Evans, 116 S. Ct. 1620 (1996), 1995 WL 466395 (No. 94-103). Other barriers to adopting the "discriminatory restructuring" approach include the possibility that the rationale and holding of *Hunter* might not command a majority on today's Court, and the conceivable perception of one or more Justices that it is problematic for the Court to expand the list of "fundamental rights" (the argument advanced *supra* at note 30 and accompanying text notwithstanding).

trates, such restructuring of the political process is relatively rare. On the other hand, *every* government action that makes some distinction among citizens is subject to the requirements of equal protection, at least under the standard of rational basis review.[32] Thus the Court's turning to the broadly based rationality test is, at least at first glance, surprising on two fronts: it opts for value-conscious review when a putatively value-free analysis was available, and it seems to open the door to additional value-sensitive constitutional challenges.

On closer examination, it appears in the *Romer* opinion that Amendment 2 "fails, indeed defies" the conventional rational basis inquiry for two reasons.[33] First, the Court says, "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group."[34] Second, "the amendment seems inexplicable by anything but animus toward the class that it affects."[35] The two points, the Court says, are "related."[36]

The Court's first point is doctrinally elusive. In some respects it appears similar to the "discriminatory restructuring" approach described above:

> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[37]

Nevertheless, this is not equivalent to the "discriminatory restructuring" argument. First, shortly after citing the "discriminatory restructuring" cases relied upon by the Colorado Supreme Court, the Court stated that it was adopting a different rationale,[38] and indeed the relevant portion of the *Romer* opinion does not cite the restructuring cases.[39] Second, the immediate context of the passage reproduced above is a

32. This point is recognized in *Romer*. 116 S. Ct. at 1627.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 1628.
37. *Id.*
38. *See id.* at 1624.
39. *See id.* at 1627-29. Moreover, as noted above, *Romer* eschews heightened scrutiny.

discussion of means-end "fit," or, more precisely, a discussion of the disparity between the narrowness of the adversely affected class and the breadth of the disabilities imposed.[40] Thus it is hard to determine whether it really is crucial to Justice Kennedy's analysis that the disability concerns the political process; he seems to be saying that *any* broad disability imposed on a narrow class of citizens offends the guarantee of equal protection.[41] Even if this line of analysis is intended to be a variant of the "discriminatory restructuring" approach, it is one that emphasizes the affected *group* over the reallocation itself, and so seems to carry somewhat broader implications than would an opinion written to follow more closely the lines set out in the "discriminatory restructuring" precedents.

Two recent commentaries on *Romer* provide a more satisfactory reading of the Court's first point: they contend that the disparity between the narrowness of the affected class and the breadth of disabilities imposed exposes Amendment 2 as an attempt to render lesbians and gay men an "outlaw" caste in society. Professor Amar locates the relevant constitutional value in the Bill of Attainder Clause, arguing that "the sociology and principles underlying the Attainder Clause powerfully illuminate the facts of *Romer*, the opinions in *Romer*, and the spirit of the Equal Protection Clause itself."[42] Along similar lines, Professors Farber and Sherry identify a constitutional "pariah principle" (founded on the equal protection guarantee) that prohibits government from "passing caste legislation: it cannot create or sanction outcast groups."[43] Under each of these

40. This passage begins with a reference to the equal protection requirement of means-end "fit": "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 1627. The opinion notes that the purpose of that inquiry is to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* The Court then characterizes Amendment 2 as "at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." *Id.* at 1628. This is not a problem of means-*end* fit, but a discussion of two aspects of the challenged means: the classification and the particular consequences attached to it. This portion of the opinion contains *no* discussion of the state's asserted purposes.

41. This line of argument was advanced in an amicus brief filed by Laurence Tribe and other law professors. *See* Brief of Laurence H. Tribe et al. *passim*, 116 S. Ct. 1620 (1996), 1995 WL 862021 (No. 94-1039).

42. Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203, 203-04 (1996).

43. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 266-67 (1996).

analyses, the key to this portion of the *Romer* majority's reasoning is to be found in Justice Kennedy's concluding statement that a state "cannot . . . deem a class of persons a stranger to its laws."[44] Amendment 2 fails because it renders homosexuals "outlaws."

This "untouchability"[45] interpretation of *Romer* goes a long way toward explaining the puzzles described earlier. First, the problem of characterizing the state's purpose recedes almost into irrelevance, because the prohibition against creating a class of "untouchables" seems indifferent to the doctrinal distinction between purpose and effects. Second, the "untouchability" interpretation reads *Romer* as an even narrower decision than it would have been had it been decided on the "discriminatory restructuring" rationale, because "untouchability" legislation is quite rare. Thus this portion of the *Romer* opinion, though doctrinally opaque, is revealed as fundamentally well-conceived.

However, the *Romer* Court does not rest its decision exclusively on the "untouchability" rationale, but goes on to make a second point. The Court concludes that it can identify no purpose behind the challenged law other than "animus," because of a different problem of "fit": there is no congruence at all between the state's asserted purposes—respect for others' freedom of association and the interest in conserving resources to combat other forms of discrimination—and the chosen means.[46] There are relatively few rational basis review cases on point, but this nevertheless is a well-established matter of equal protection doctrine. The bare desire to harm a particular class is not a legitimate state interest.[47] Though this point is described as "related" to the first—broadly construed, both incorporate notions of animus—the Court underscores the difference: "We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a

44. 116 S. Ct. at 1629.

45. *See* Amar, *supra* note 42, at 224; Farber & Sherry, *supra* note 43, at 266-67.

46. This portion of the *Romer* opinion follows an analysis set forth in the Respondents' Brief, *see* Brief for Respondents at *22, Romer v. Evans, 116 S. Ct. 1620 (1996), 1995 WL 370335 (No. 94-1039), and in an amicus brief filed by Laurence H. Tribe, *see* Brief of Laurence H. Tribe et al. *4-6 (No. 94-1039).

47. In support of this proposition the Court cites *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). *See* 116 S. Ct. at 1628. One could cite *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) as well.

law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not."[48]

If it is a "conventional and venerable" proposition that animosity is not a legitimate state interest, it is not at all equally clear precisely how the *Romer* majority came to identify that "purpose" as the impetus behind Amendment 2.[49] Moreover, the opinion fails to address the question whether there is any constitutionally significant difference between a state's asserted moral objectives and "a bare Congressional desire to harm,"[50] or, assuming that such a distinction *can* be made out, what might be the status of the former under equal protection analysis.[51]

The notion that moral disapproval is a constitutionally permissible state interest under rational basis analysis, even though animosity is not, has its roots in *Bowers v. Hardwick*.[52] The question presented there was the constitutionality of a state law criminalizing sodomy, as applied to conduct engaged in by two persons of the same sex.[53] The Court held first that the individual interest at stake was not one that triggered strict judicial scrutiny, and then concluded that the state's asserted moral purpose satisfied the requirements of rational basis review.[54] If rational basis analysis can be transposed from the due process to an equal protection context (with regard to moral purposes), *Hardwick* would seem to control.

Another recent due process decision provides a further hint concerning the question of moral justification. In *Planned*

48. 116 S. Ct. at 1629 (citation omitted).

49. The "untouchability" interpretation of the first point treats Amendment 2 as something distinct from less drastic measures that rest on simple animosity. *See* Farber & Sherry, *supra* note 43, at 283 ("[T]he [pariah] principle is somewhat different from *Cleburne*'s amorphous concern with malignant legislative intent."). Thus that portion of the opinion bears no immediate relevance to the present inquiry regarding the distinction between animosity and moral disapproval. However, to the extent we take the lesson of *Romer* to be one solely having to do with the creation of a class of "untouchables," we subtly normalize simpler forms of societal animus. A fortiori, this interpretation reinforces the message sent by due process precedents that expressing moral disapproval is a permissible state interest.

50. *Moreno*, 413 U.S. at 534.

51. Of course, the last point would not have been presented in *Romer* even had the Court explained how it reached the conclusion that animosity, rather than moral disapproval, lay behind Amendment 2.

52. 478 U.S. 186 (1986).

53. *See id.* at 188 & n.2.

54. *See id.* at 196. Only one member of the *Romer* majority, Justice O'Connor, had joined the opinion of the Court in *Hardwick*.

Parenthood of Southeastern Pennsylvania v. Casey,[55] a plurality, composed of three members of the *Romer* majority,[56] applied an unspecified level of review to pre-viability restrictions on abortion, and indicated that a state interest in persuading a woman to choose childbirth rather than abortion could satisfy that standard of review.[57] While this state interest is intimately tied to the interest in protecting fetal life, and so falls within the "preventing harm to others" category of state interests,[58] the plurality's recognition of this interest provides a clue regarding their receptivity to states' asserted moral purposes. The joint opinion states:

> Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. . . . Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.[59]

Because the objective of protecting fetal life would be more effectively vindicated by measures that do impose substantial obstacles (not to mention outright prohibitions), one has to conclude that the emphasis here is more on the woman's state of mind, or perhaps the symbolic message sent by the state, than on fetal life per se. To this extent, the plurality appears to recognize an interest that is partially independent of a "preventing harm to others" rationale; in the context of an issue as heavily laden with moral connotations as abortion,[60] this approach suggests that the members of the *Casey* plurality may be more receptive to a state's asserted moral interests than their position in *Romer* otherwise might indicate.

Thus, the juxtaposition of *Bowers* and *Casey*, on the one hand, with *Romer* (along with *Moreno* and *Cleburne*) on the other, strongly suggests that moral disapproval enjoys quite a different constitutional status than does governmental animosity. However, the Court has yet to address this distinction, or to

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55. 505 U.S. 833 (1992).

56. These are Justices O'Connor, Kennedy, and Souter.

57. *See* 505 U.S. at 878.

58. *See supra* note 4.

59. *Casey*, 505 U.S. at 877-78 (plurality opinion).

60. Indeed, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), Justice Stevens argued that the state's interest in fetal life has not only a moral, but a religious foundation. *See id.* at 563-70 (Stevens, J., concurring in part and dissenting in part).

engage the problem of the status of governmental moral purposes under the doctrinal heading of equal protection review.[61] Potential state prohibitions against same-sex marriage would provide one circumstance—the one looming most immediately on the horizon—in which to test and apply the distinction between moral disapproval and animosity.

II. SAME-SEX MARRIAGE

The question whether there is a constitutionally significant difference between animosity and moral disapproval comes into sharp focus when one considers the question of same-sex marriage. A state might respond to an equal protection challenge to a prohibition against same-sex marriages by directly asserting an interest in moral disapproval of homosexuality, or by doing the same indirectly, say by claiming an interest in preserving the "traditional family." Doctrinally, three issues present themselves: the applicable level of scrutiny, the question whether due process precedents apply, and, if not, how to fashion a distinct equal protection analysis. The last question subdivides into two: whether there is a meaningful distinction to be drawn between animosity and moral disapproval for equal protection purposes, and if so, whether moral disapproval is a legitimate state interest.

Under equal protection analysis, heightened scrutiny would be in order if a prohibition against same-sex marriage were characterized by the Court as sex discrimination.[62] However, this is something the state courts generally have been unwilling to do;[63] if the Supreme Court follows suit, the ban would be subject to rational basis review.[64] I proceed on that assumption.

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61. In *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Court addressed equal protection challenges to abortion funding restrictions, and concluded that the state's interest in protecting fetal life was sufficient under rational basis review. *See* 432 U.S. at 478; 448 U.S. at 324. However, abortion restrictions do not express pure moral disapproval as defined for purposes of this Essay. *See supra* note 4.

62. The argument is that a prohibition on same sex-marriage is sex discrimination because it permits a man but not a woman to marry a woman, and permits a woman but not a man to marry a man. An exactly analogous argument led to the conclusion that a miscegenation statute constituted race discrimination in *Loving v. Virginia*, 388 U.S. 1 (1967).

63. *See* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App.), *review denied*, 84 Wash. 2d 1008 (1974). However, a sex discrimination claim also may be premised on state law; in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court concluded that a ban on same-sex marriage consti-

Cass Sunstein has addressed, and in my view, laid to rest, the argument that due process precedents should control equal protection analysis across the board.[65] Sunstein points out that the Due Process Clause often has been interpreted to protect society's traditional values; accordingly its point of reference is taken to be the common law, Anglo-American practice, or the status quo.[66] For example, in *Griswold v. Connecticut*,[67] the first of the modern "substantive" due process cases, Justice Goldberg looked to the "traditions and (collective) conscience of our people" to determine whether the right at stake was to be deemed "fundamental."[68] In *Moore v. East Cleveland*,[69] Justice Powell characterized fundamental liberties as those that are "deeply rooted in this Nation's history and tradition."[70]

In contrast, Sunstein notes, the values driving equal protection interpretation are quite different. The Equal Protection Clause was "self-consciously designed to eliminate practices that existed at the time of ratification and that were expected

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tutes sex discrimination and is subject to strict scrutiny under the state constitution's equal protection clause. *See id.* at 68.

64. It seems likely that a ban on same-sex marriage would not survive heightened scrutiny, which would be the applicable standard if the ban were viewed as sex discrimination. At present, it is not clear precisely which sort of heightened review applies to legislation that discriminates on the basis of sex. *See supra* note 14.

A ban on same-sex marriage also would be open to a due process challenge. If same-sex marriage were found to be a fundamental interest, the applicable standard would be strict scrutiny. (Of course, this approach likely would fail if the Court accepted the definition of marriage as a union between one man and one woman, rendering irrelevant precedents recognizing marriage as a fundamental interest.) However, that line of argument is not under examination here.

65. *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).

66. This is a generalization; of course, there are problems to be considered in the application of tradition, and there are occasional exceptions to the general approach. *See id.* at 1170-74.

67. 381 U.S. 479 (1965).

68. *Id.* at 493 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

69. 431 U.S. 494 (1977).

70. *Id.* at 503 (plurality opinion). The passages quoted from *Moore* and *Griswold* have to do with the characterization of the individual interest at issue in those cases. *See* 431 U.S. at 503; 381 U.S. at 492-93 (Goldberg, J., concurring). It is consistent with those analyses to conclude that state interests too should be tested in due process cases by reference to society's traditional values.

to endure."[71] The purpose of this clause is to protect socially subordinated groups against discrimination by the majority. Thus it is not only *not* driven by traditional values, it often functions directly in opposition to tradition. This understanding of equal protection explains sex discrimination doctrine, which holds that a state may not justify treating women differently than men by resting on a traditional vision of their respective roles, capacities, or characteristics.[72]

In a sense, then, the Due Process Clause is assimilationist, while the Equal Protection Clause is pluralist.[73] That is, due process analysis will ratify practices that have the effect of requiring conformity to society's traditional norms, and will invalidate only measures that constitute departures from those norms.[74] On the other hand, equal protection analysis will do the opposite—it will invalidate measures that require conformity to norms of the dominant culture.[75] It follows that the role of moral justification is quite different under these two constitutional provisions, especially when a proffered moral purpose is one that looks to society's traditional values. When an enactment is challenged as violating due process, a moral objective may, at least in principle, pass constitutional muster.[76]

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71. Sunstein, *supra* note 65, at 1174.

72. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (striking statutory preference for male estate administrators); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding unconstitutional statute presuming that a female spouse was dependent upon male service member, but requiring female service member to prove dependency of male spouse); Schlesinger v. Ballard, 419 U.S. 498, 507-08 (1975) (explaining that statutes invalidated in *Reed* and *Frontiero* reflected "archaic and overbroad generalizations" about women and men).

73. The substantive component of due process is assimilationist to the extent that it ratifies conformity to traditional values; assimilationism sometimes may have a broader meaning. *See, e.g.*, Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 299-300 (1988) (defining "assimilationist law" as law that enforces conformity to the norms of a dominant group). By pluralism, I mean cultural, rather than interest-group pluralism. *See generally* Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993 (1991); Kevin M. Fong, Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133 (1978).

74. For example, *Hardwick* ratified legislation that criminalized nonconformity to traditional sexual mores, *see* 478 U.S. 186, 196 (1986), while *Griswold* invalidated legislation that was perceived to deviate from traditional norms, *see* 381 U.S. at 485-86.

75. Typically such legislation does so by disadvantaging those who are different in some specified respect.

76. This is not to say that I think all of the due process cases are correctly

But equal protection is diametrically different; at a minimum, due process precedents regarding moral purposes carry no weight in equal protection cases.[77]

I arrive, then, at the issues that lie silently at the core of *Romer*: whether there is a constitutionally significant difference between animus and moral disapproval, and if so, whether moral disapproval ought to be deemed a legitimate state interest for equal protection purposes. I conclude that the equal protection guarantee forecloses recognition of any such distinction, and thus there is no need to reach the latter question. The analysis undertaken above, concerning the different orientations of the Due Process and Equal Protection Clauses, provides guidance: pluralism is the lodestar of equal protection.

Consider again the hypothetical situation described at the beginning of this Essay. The difference between Scenario A—in which I decline to invite the Straights because I morally disapprove of their heterosexual lifestyle—and Scenario B—in which I omit them because I don't like them (as heterosexuals) and I want to hurt their feelings—revolves entirely around my intent. The effect is the same in either case: the Straights are not invited to my party. Moreover, their feelings of exclusion might well be the same in either case, whether they are or are not aware of my reasons. So far, this is just to say that the distinction between moral disapproval and animus goes solely to intent, and not to effects.

Thus one way to frame the equal protection inquiry is to ask whether this is a circumstance in which intent ought to be dispositive. I cannot define my "moral community" (of lesbians and gays) without excluding the Straights, and thus in life ought not to be surprised if they feel badly about my decision, whether or not they fully understand it. Can one conclude that the harm to the Straights is the same regardless of my reason for not inviting them? In one important sense it is: they are excluded in either scenario, because they are not homosexual. Variations in my state of mind seem relatively ephemeral compared to the stark fact of exclusion. Indeed, the point becomes

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decided; they present complicated issues of the level of generality at which the relevant tradition is identified. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

77. The converse is equally true: equal protection precedents should not control due process cases.

even stronger when one considers the exclusion of social "outsiders."[78]

Even so, this does not fully make the case that the harm inflicted by excluding a socially subordinate group because of the dominant group's desire to constitute a moral community is identical to the harm inflicted by exclusion because of animus, nor that the respective harms ought to be so regarded as a matter of constitutional law. Current equal protection doctrine clearly endorses the proposition that government's intent matters greatly.[79] There is some appeal in the underlying reasoning: injuries suffered as the byproducts of the state's pursuit of otherwise legitimate interests are categorically different from being the object of government's "bare desire to inflict harm," because the latter sets one out as undeserving of even minimal human respect. That argument returns us to the question whether moral disapproval of "outsiders" is the sort of legitimate state interest whose exclusionary byproducts ought to be tolerated as a matter of equal protection.

It is here that the notion of equality as pluralism provides a final answer. State action undertaken for moral reasons alone is the antithesis of pluralism; it evinces no respect for the moral understanding or norms of those whom it situates as outsiders. Thus, if the Equal Protection Clause is fundamentally pluralist, moral disapproval cannot be distinguished from animus because both reflect an absence of moral respect. It follows that government rationales ostensibly based exclusively on moral disapproval, like rationales that reflect hostility, ought never to withstand equal protection scrutiny, even under the rational basis standard.

In a sense, then, that which is "moral disapproval" in the due process context becomes "animus" in the equal protection context, because of the different directions in which the two provisions point. Pluralist values protect moral diversity just as they protect diversity in its other dimensions.[80] This under-

78. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319-20 (1987); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977).

79. *See* Washington v. Davis, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a discriminatory purpose.").

80. For example, equality principles protect cultural diversity. *See* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW (1998).

standing of equality may explain the remaining mystery of *Romer*: why the majority found it unnecessary to explain how they came to the conclusion that animus, rather than moral disapproval, motivated Amendment 2.

This is not to say that the state may not act to protect itself, or that it always must acquiesce to conduct a majority of its members find morally reprehensible. Most such conduct can be regulated because of other objectives, such as preventing harm to others.[81] For example, adults' sexual activity with minors might be proscribed on the ground that the inherent power imbalance renders such contact harmful per se to the child.[82] That such regulation might have a disparate impact on "outsider" groups[83] is, of course, not a constitutional infirmity. The point here is only that a moral position *alone* ought not to constitute a "legitimate" state interest for the purpose of equal protection review.

The question of a state's prohibition of same-sex marriage is subject to the same analysis. Assuming that a state can advance no credible "harm to others" justification for such a ban, but rests solely on a moral claim, the ban ought not to survive equal protection review even under the rational basis standard. Allowing the state to impose the majority's moral vision on a small percentage of the population who wish to select a person of the same sex as life partner is inconsistent with the pluralist character of the equal protection guarantee.

Just as the due process precedents do not control this question, the suggested perspective on equal protection—that moral purposes, standing alone, cannot constitute "legitimate" state interests—would not control due process analysis. Doctrinally, it is appropriate to conclude that moral objectives may satisfy the rational basis standard under due process review. It is not unusual to find that a state enactment that violates one constitutional provision is nevertheless consistent with another.[84] More generally, the state *may* pursue moral objectives, at least if they conform to society's traditional values. It just may not pursue those objectives by treating some citizens dif-

81. As noted earlier, this analysis can explain the equal protection abortion funding precedents. *See supra* note 61.

82. One can advance a similar argument with respect to incest.

83. The group in question is pedophiles, who are sometimes and quite incorrectly categorized together with gay men.

84. *See* Sunstein, *supra* note 65, at 1165-70.

ferently from others; the Equal Protection Clause is primarily concerned with classifications, rather than individual interests.[85]

Thus a ban on same-sex marriage ought to fail equal protection review even if the Court concludes that such a ban does not constitute sex discrimination. The prohibition would single out persons who wish to marry someone of the same sex, disadvantaging that group relative to those who wish to marry someone of the opposite sex. The state's asserted moral purpose, whether couched in terms of traditional family values or moral disapproval of homosexuality, ought not to provide a constitutionally adequate justification for the chosen means—denying one group the benefits of a legal status that the majority enjoys.

CONCLUSION

I have argued that the Court in *Romer v. Evans* made several remarkable doctrinal moves on the path to invalidating Colorado's Amendment 2, moves that might lead gay rights advocates to anticipate continuing victories in constitutional litigation, for instance with regard to the question of same-sex marriage. While that assessment ultimately may prove correct, one should not read *Romer* too broadly. The *Romer* opinion leaves untouched a matter most crucial to gay rights issues: the status in constitutional analysis of states' asserted interests in expressing moral disapproval. Moreover, there is in place at least one constitutional precedent that seemingly limits the reach of the insights that *Romer* does represent.

However, I contend that because the Due Process Clause and the Equal Protection Clause face in fundamentally different directions—the former is assimilationist, the latter pluralist—due process precedents regarding government's moral objectives are of no significance to equal protection analysis. Moreover, the pluralist values that ground the equal protection guarantee mandate a doctrine that moral purposes alone never satisfy equal protection review, even under the most deferential standard, the rational basis test.

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85. Even the fundamental interests branch of equal protection turns ultimately on the presence of a classificatory mechanism; it protects interests that are *not* afforded independent constitutional protection. *But cf.* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973) (contending that equal protection fundamental rights cases recognized only rights "explicitly or implicitly guaranteed by the Constitution").

This proposition, that moral disapproval alone ought not to be deemed a legitimate state interest for equal protection purposes, would explain the *Romer* majority's failure to explore the distinction between animosity and moral disapproval: *each* motive violates the principle of pluralism that is the heart and soul of the guarantee of equal protection. In the final analysis, perhaps *Romer* does signal the beginning of a new era of equality for lesbians and gay men.